SATELLITE TELECOMMUNICATION LAW:

THE CANADIAN PERSPECTIVE

by

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ABSTRACT

This thesis examines the Canadian law that pertains to the field of satellite telecommunications. An overview of Canadian telecommunication policies is presented with particular attention paid to those that deal directly with satellite telecommunication. The Canadian law that implements these policies is then discussed focusing on the constitutional, international, and administrative law aspects of Canadian law that are applicable to satellite telecommunication. Finally, a number of areas of legal controversy in the field are examined including the right to receive broadcasting and copyright protection of satellite telecommunication signals.

RESUME

Dans cette thèse, on examine la loi canadienne relative au domaine des télécommunications par satellite. On y présente une vue d'ensemble des politiques canadiennes en matière de télécommunications, et surtout celles qui traitent de façon spécifique des télécommunications par satellite. On y discute ensuite la loi canadienne les rendant effectives et, plus particulièrement, les aspects constitutionnel, international et administratif de cette loi s'appliquant aux télécommunications par satellite. On étudie, en dernier lieu, un certain nombre de points litigieux, dont, entre autres, le droit de capter directement les signaux transmis par les satellites de télécommunications, et la protection des droits d'auteur.

PREFACE

This dissertation deals with the regulatory regime in Canada that is applicable to satellite telecommunication. It is an overview of the law and policy that regulates activities in this field. Earlier and current scholarship has not dealt with this topic in an overall manner, concentrating instead on particular issues. There is a need for general examination of the legal framework in which satellite telecommunications rests in Canada. This thesis endeavors to provide such an examination.

While I alone am responsible for any shortcomings that remain, I have benefited from the assistance of certain individuals. I am particularly indebted to Dr. Ram S. Jakhu of the Institute of Air and Space Law at McGill University for his advice and counsel. I also express my thanks to Dr. Nicolas M. Matte, director of the Institute of Air and Space Law. A special thanks is given to Nicholas P. Goursky for his help in the editing of the text and to Lynn Riendeau and Maria D'Amico for their patience in typing the manuscript.

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INTRODUCTION

Satellite telecommunication has become the pre-eminant use of outer space. It creates the potential for immediate communication between all points on earth and the ramifications of this have spread to many fields. Canada has been active in the use of satellite telecommunication from its beginnings, seeing its potential in enhancing the land based telecommunication system Canada has developed to serve its particular economic, cultural and geographic needs. This has made Canada a leader in the development of communication satellite technology.

The effective development of a satellite telecommunications system does not only depend upon technology, however. The most efficient and effective systems depend on how the technology is used as much as how advanced it is. Thus, direction must be given in order to ensure maximum exploitation of the potential of the technology. This calls for the development of policies pertaining to satellite telecommunication and the law to enable the implementation of those policies. The question thus arises as to what Canada has done in creating these policies and implementing them with law. This thesis examines this question.

The structure of this thesis is organized to provide an overview of the policies and law that regulate

satellite telecommunication in Canada. The first chapter deals with policy, outlining Canadian telecommunications policy, showing the underlying factors affecting its development and its division into two major categories - broadcasting and point-to-point telecommunications. Satellite telecommunication policy is then discussed in light of general policy and Canadian space policies. The policy discussed is that formulated by the federal government because, as will be shown in Chapter II, it has exclusive jurisdiction over satellites and satellite telecommunication.

Chapter II looks at the fundamental legal issue of who has jurisdiction and thus the right to make law and regulation concerning satellite telecommunication for Canada. The constitutional issue of the division of powers is examined. The constitutional positions of the federal government and the provinces with respect to the two major divisions of telecommunication broadcasting and point-to-point are reviewed. Satellite telecommunication is then examined in light of this to determine where jurisdiction lies.

International law is then discussed with respect to the influence it has on the development of satellite telecommunication law in Canada.

The fourth chapter outlines the regulatory framework that has been established in Canada for both point-to-point telecommunication and broadcasting. Its implications for satellite telecommunication are discussed.

Finally several areas where legal problems in the field of satellite telecommunication have arisen are examined. The first section discusses the uncertainty surrounding the legal definition of "broadcasting" as it applies to satellite telecommunications. The latter sections address issues concerning the balancing of rights pertaining to the reception of radio signals with rights vested in the signals or the information transmitted thereby.

The emphasis is placed on the legal aspects of satellite telecommunication, stressing the areas of public law that must be considered when dealing with satellite telecommunication regulation and the implementation of policies thereon.

It should be noted that the time period of this thesis runs to mid-1984. The potential policy changes and attendant legislative changes that may develop from the change in federal government that year have not been looked at.

CHAPTER I

CANADIAN SATELLITE TELECOMMUNICATIONS POLICY: AN OVERVIEW

Canada has long recognized the importance of communication to its political, economic and cultural well being.[1] It has also been aware of the interaction between the various telecommunication and information resources. This has resulted in the emergence of a comprehensive Canadian telecommunication policy that has helped make it a leader in the development and use of telecommunications technology. Satellite telecommunication is an area where Canada has been particularly active and a conspicuous leader.[2] Canadian policy considers satellite telecommunication as part of Canada's entire telecommunications network. An overview of Canadian telecommunication policy is therefore necessary to the understanding of satellite telecommunication law.

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1. For example, one of the pre-conditions for the entry of British Columbia into Confederation in 1873 was the completion of the Canadian Pacific Railway as a means of transportation and communication with the east.

2. Canada was first to place a domestic commercial communications satellite in the geostationary orbit: ANIK A-1 in 1973. Also the Hermes satellite was the first to experiment with Direct Broadcasting in 1978.

1.1 Underlying Factors

Geographic and demographic factors have influenced the formation of Canadian telecommunication policy. Canada is a vast nation, stretching 5500 kilometers from east to west and covering millions of square kilometers. Most of it is wilderness where there is no permanent population. Almost 80 percent of Canadians live within 400 kilometers of the border shared with the United States; the bulk of Canada's relatively small population is spread out in this narrow band.

Canada is divided by major geographical features, such as the Rocky Mountains and Great Plains, that run in a north/south direction. These create natural barriers to east/west communication within Canada. In fact, many of these features facilitate north/south communication all along the U.S./Canada border. Canada's geography has thus divided the country into regions where it is more natural to communicate with the United States to the south than inter-regionally within Canada. Throughout Canadian history this has put a strain on national unity and made it essential to develop long-distance communications in Canada.[3] The

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3. The first development was the transcontinental rail-

regions have been held together only because considerable effort has been expended to improve east/west communication. Canadian telecommunication policies reflect this.

The formation of Canadian telecommunication policies is greatly influenced by political factors. The most important of these are national unity, cultural autonomy and economic independence. As will be seen, these form some of the underlying principles used in the development of current policy.

Concern over national unity arises from Canada's regionalism and its diversity of cultures. They both are sources of pride to the Canadian makeup, yet each puts a strain on national cohesion. Cultural diversity has been traditionally encouraged in Canada, largely because of the presence of two founding and official cultures. Canada is a land of immigrants, much like its neighbour to the south; but unlike the United States, Canada is no "melting pot" of cultures. In recognition of this fact Canadian telecommunication policy has had to develop in a manner that uses telecommunications to pull together the diverse cultures and regions, while at the same time, allowing them to flourish.

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line in Canada, followed closely by the telegraph. Canada is also the birthplace of the telephone and the first long distance telephone lines emanated out of Brampton, Ontario.

Canada also has fears concerning its own cultural autonomy. The proximity of the United States, a dominant cultural force that effectively projects its culture through the various media, makes these fears a reality. The immense volume of cultural output emanating from the United States, alone, may put extreme inhibitory pressure on Canadian cultural development. The autonomy of a culture depends on the existence of a means to express it. Telecommunication is such a means and to meet Canadian fears over cultural autonomy telecommunication policy in this area is directed to establishing a telecommunications network that meets specific Canadian cultural needs.

Economic independence is another issue that greatly influences Canadian telecommunications policies. The tremendous economic power of the United States greatly effects the economy of Canada and much concern has arisen here over this American influence. Canadian policies in many areas reflect this concern; ownership of key industries and controls over foreign investment in others are policies developed in reaction to Canadian fears.[4]

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4. See for example, the Foreign Investment Review Act, S.C., 1973-74, c.46 which is "an Act to provide for the review and assessment of acquisitions of control of Canadian business enterprises by certain persons and of the establishment of new businesses in Canada by certain persons." (Long Title)

Canadian control of its economy requires "a sophisticated telecommunications sector developed and owned in Canada to meet specific Canadian requirements".[5] The telecommunication industry itself is one where Canada could lose control if policies do not enhance its development. Adequate measures are needed to ensure control over the content of information services available in Canada such as data storage banks and the transborder flow of data. This control must not constrict the industry, however. In order to utilize telecommunications to deal properly with these and other political issues, systems must remain technologically advanced, efficient and economically viable. Canadian policy also needs to stimulate Canadian development of telecommunications technology. Consequently, there must be adequate control over telecommunications services and their technological development. At the same time this control must not make the system so inefficient and costly that it cannot survive.

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5. The Clyne Committee Report, infra, note 26, at 2.

1.2 The Policy Developed

1.2.1 General Telecommunication Policy

Canadian telecommunications policies, as will be seen, are divided into several major categories. The fundamental division includes general policies that pertain to all forms of telecommunication and those specific policies pertaining to broadcasting,[6] and point-to-point telecommunication.[7]

It is the responsibility of government to establish telecommunication policies.[8] At the base of these policies are fundamental principles that are constant throughout the spectrum of telecommunication, from telephone to television to computers to satellites. The principles considered fundamental by the federal government were set out by then Minister of Communications, Francis Fox.[9]

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6. Herein referred to as "broadcasting".

7. Includes all types of telecommunication that is not broadcasting.

8. The Federal Government has the primary responsibility, though other levels of government do play a part. See chapter II.

9. Fox, F., The Government Role in Communication, April 29, 1980, an address at the annual meeting of the Canadian Association of Broadcasters.

The four stated principles are:

1) The principle of freedom of expression

2) The principle of freedom of access

3) The principle of the protection of the privacy of the individual

4) The concept of Canadian autonomy

From these principles, current Canadian policy in telecommunication is derived.

a) Freedom of Expression

Freedom of expression comprises all forms of communication, whether it be the written word, the spoken word, visual images or any other sort of creative output. These freedoms are recognized as fundamental to our society and are taken for granted by most Canadians. These freedoms are more than theoretical principles; they have a practical side because such freedoms would be hollow indeed if there were no effective means by which to communicate the products of the freedom of expression to others. Ideas left uncommunicated may be brilliant, but are of little use until told to others.

Telecommunications play a major role in bringing about the communication of such ideas. Canadian telecommu-

nication policies, recognizing this, seek to ensure that the products of a person's freedom of expression "have a reasonable chance to reach an interested audience".[10] Canadian content quotas for broadcasting are an example of policies that are intended to enhance Canadian freedom of expression.

b) Freedom of Access

Freedom of access includes access by individuals to communication services, including broadcast media services. "Acknowledging freedom of access to broadcasting services simultaneously concedes the public's right to choose between competing services, and more specifically, between Canadian and foreign services."[11] Such a full interpretation would only be valid if it does not impair Canadian services. Telecommunications in Canada must be cost effective and policy should not endanger its economic viability. Access must not be increased at a cost that would cause the system to fail because this would deny all access.

To implement freedom of access in some parts of the telecommunications industry the government has moved

10. Ibid., 5.

11. Ibid., 5.

cautiously. For example, it only recently allowed customers to connect second supplier terminals to the phone system. Another example of improving access (and in this case access was deemed more important than the potentially disproportionate cost) is the setting up of the Northern Service in order to ensure access to telephone and broadcasting in northern Canada.

c) Protection of the Privacy of the Individual and Lessening of Society's Vulnerability

A need exists for society and individuals to be protected from harm by the abuse or misuse of telecommunications. This is pertinent in several areas. The ease with which information on an individual may be accumulated, stored in a computer data bank and then disseminated to other data banks means that controls are needed to ensure no harm comes to the individual and his rights are protected.

The ideas generated through freedom of expression, especially those propagated through telecommunication media, need protection by copyright to ensure that individual rights in those ideas remain with the originator. Furthermore, while freedom of expression must be enhanced, it should not be allowed to impinge upon the rights of others.

Canadian telecommunication policies in this area

are not, as yet, clearly defined. The needs are recognized but the policies needed to implement solutions to the problems have not been fully developed.[12]

d) Concepts of Canadian Autonomy

Francis Fox, then Minister of Communications, stated that concepts of Canadian autonomy

> are best expressed in French, by the phrase "l'affirmation canadienne". The latter image transcends the traditional definitions in English - control over Canada's political and cultural future, assertion of economic and technological independence - to convey more effectively intangible notions like integrity, identity and self-fulfillment.[13]

One of the elements of Canadian autonomy is political sovereignty. The policy-makers hold this element to be the protection of Canadian interests in relation to foreign interests and the preservation of the Canadian federation, i.e. harmonious federal/provincial relations. Canadian policy on protection from foreign interests includes

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12. To this end the government has stated: "...most producers of cultural products have trouble raising financing from banks or government agencies. The reason for this derives in part from the intangibility of the assets in question. To rectify the problem, it is essential that cultural property be given the same protection in law as any other asset. And this will require a major overhaul of the Copyright Act.", Supra, note 9, at 16.

13. Supra, note 9, at 6.

criteria for Canadian ownership of the telecommunication industry and Canadian content rules for telecommunications, to ensure that control stays Canadian. Canadian telecommunication policies towards other nations are not exclusively protectionist. As a member of several international telecommunication organizations, Canada supports international cooperation in telecommunication.[14]

Policy on federal/provincial control is less clear. As will be seen, this is a constitutional issue where the actual division of control may not exactly conform to that allowed by the Constitution. Both levels of government prefer to maintain the status quo and neither side has, as yet, opted for a final settlement of the control issue by the courts.

Technological sovereignty is another element of Canadian autonomy. It is closely related to the preservation of economic independence. Technological sovereignty in telecommunications implies support of research and development and the creation of a strong manufacturing industry in the area of communications; particularly in computer and

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14. Canada has long been a member of the International Telecommunication Union (ITU) viewing it as a positive means to regulate the radio spectrum and the geostationary orbit. Canada has also made commitments to INTELSAT and INMARSAT; both cooperative international efforts in telecommunications. See, infra, chapter III.

satellite communications. To this end, policies are pursued which stimulate and support such technological development in Canada.[15]

A strong telecommunications industry is actively promoted in Canada because it is critically important since it provides a central nervous system for the country's future business infrastructure. It is also one of the few non-resource-based industries where Canada can be a world leader in export; it represents 30% of all manufacturing research and development in Canada. Of these new information technologies the then Minister of Communications has stated that "it is clear that Canada has no option but to vigourously embrace the development and dissemination of these technologies".[16]

The third element of Canadian autonomy is cultural autonomy. "The preservation of a nation's culture, however it might be defined, is critical to its survival".[17] The recognition of this has resulted in Canadian policies aimed

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15. The Canadian company AES is doing well in word processing equipment and firms like Norpak are world leaders in Telidon technology.

16. Fox, F., Culture and Communications: Key Elements of Canada's Economic Future, Nov. 3, 1983, brief submitted to the Royal Commission on the Economic Union and Development Prospects for Canada.

17. Supra, note 9, at 8.

at the preservation of cultural independence. Evidence of this policy can be seen in the adoption of regulations on Canadian ownership and content for broadcasting as well as subsidies to essentially non-commercial cultural industries. There is a desire not to resort to artificial barriers[18] for they can be "counter-productive or shallow". The advent of satellites and information technologies in telecommunications, however, increases the threat to Canadian culture and policy dictates that measures will be taken.

Consequently, basic Canadian policy is that the telecommunications industry is government-regulated. The major facets of telecommunications, from telephone rate-setting and terminal attachment to broadcast content, are regulated. Telecommunications are seen as being too important to the national well being to leave unregulated. The regulation of the telecommunication industry in Canada has been divided into two major categories, each handled separately with its own policies and regulations.

> Telecommunications in Canada encompass
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> any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system.[19]

In Canadian telecommunications policy and law, two distinct

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18. See Supra, note 16, at 15.

19. Interpretation Act, R.S.C., 1970, c.I-23, s.28.

areas emerge from this broad general definition: broadcasting telecommunication and point-to-point telecommunication. Broadcasting is defined as "any radiocommunication in which the transmissions are intended for direct reception by the general public".[20] Point-to-point telecommunications has no legal definition, but for the purposes of this thesis will be deemed to include all non-broadcasting telecommunications.

1.2.2 Broadcasting Policy

As will be shown in Chapter II, broadcasting lies mainly within the jurisdiction of the federal government. Both private and public radio and television transmission/reception systems, including cable systems,[21] are regulated by federal policy. A broadcasting policy for

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20. Broadcasting Act, R.S.C., 1970, c.B-11, s.2 where also:
    "radiocommunication" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide;".

21. Federal legislative jurisdiction over cable systems was affirmed by the Supreme Court of Canada in Capital Cities Communications Inc. et al. v. Canadian Radio-Television Telecommunication Commission et al., [1978] 2 S.C.R. 141; (1977), 18 N.R. 181; 81 D.L.R. (3d) 609.

Canada has been set down in section 3 of the Broadcasting Act.[22] The principal elements of this policy are as follows:

> In Canada radio frequencies are public property and broadcast undertakings using them shall be regulated as component parts of a single broadcasting system.
>
> In order to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada the broadcasting system should be effectively owned and controlled by Canadians.
>
> Subject only to generally applicable statutes and regulations, the right to freedom of expression and the right of persons to receive programs is unquestioned. Individual broadcasting licensees are responsible for the programs they broadcast.
>
> The programming provided by the system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern.
>
> The programming provided by each individual broadcaster should be of high standard, using predominantly Canadian creative and other resources.
>
> Broadcasting in both official languages should be made available to all Canadians as funds become available.
>
> A Canadian Broadcasting Company (CBC) is to be set up whose objectives are to fulfill Canadian broadcasting needs in light of these policies and whose objectives when they conflict with the private elements of the system will take precedence.
>
> Facilities should be provided within

22. R.S.C., 1970, c.B-11.

the system for educational broadcasting.

> The regulation and supervision of the broadcasting system should be flexible and readily adaptable to scientific and technical advances.

These statutory objectives are to be achieved through two principal instruments; the CBC and the Canadian Radio-television and Telecommunications Commission (CRTC). A national broadcasting service is provided by the CBC with the goal of achieving policy objectives on program content, variety and quality. The CRTC administers the regulatory and licensing processes. It also plays a major role in setting policy.

The Broadcasting Act states that the CRTC must "regulate and supervise all aspects of the Canadian broadcasting system"[23] with a view to implementing the policy outlined in section 3 of the Act. To achieve this it has been given powers to issue, renew, amend, suspend or revoke broadcasting licences and to set conditions of licence. In exercising these powers the CRTC sets out policy statements[24] in order to keep prospective licensees informed. Such statements are within the Commission's authority as is the ability to use that policy to make determinations. The legality of the use of these

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23. Ibid., s.15.

24. As for example those found in 4 C.R.T. Part 2.

policy statements in this manner by the CRTC was affirmed in Capital Cities Communications Inc. et al. v. CRTC et al.[25]

Thus, while the federal government has set general broadcasting policy, it has delegated the implementation of that policy to an independent public authority - subject to final review to the Governor General in Council.

The broadcasting policy as laid down in the Broadcasting Act originated in 1968. Since that time several studies have examined this policy. Prominent among them was the 1978 Clyne Committee study.[26] The Committee

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25. Laskin, C.J.C. stated:

> In my opinion, having regard to the embracive objects committed to the Commission under s.15 of the Act, objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

[1978] 2 S.C.R. 141, 171; (1977), 81 D.L.R. (3d) 609, 629.

26. Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, Telecommunications and Canada, (Ottawa: Minister of Supply and Services Canada, 1979.). The Clyne Report.

concluded that the broad policy objectives outlined in the Broadcasting Act were not being achieved by the Canadian Broadcasting system. The failure of television broadcasters to implement Canadian content objectives, especially during prime-time viewing hours, was cited as an example of this.[27]

The Clyne Committee report expressed concerns over Canadian broadcasting policy and its implementation. These concerns were addressed by the federal government in a Broadcasting Strategy for Canada,[28] made public in March of 1983. It contains three fundamental goals:

> (1) To maintain the Canadian broadcasting system as an effective vehicle of social and cultural policy in light of a renewed commitment to the spirit of the broadcasting objectives set out in the 1968 Broadcasting Act.
>
> (2) To make available to all Canadians a solid core of attractive Canadian programming in all program categories, through the development of strong Canadian broadcast and program production industries.
>
> (3) To provide a significantly increased choice of programming of all kinds in both official languages in all parts of Canada.[29]

In order to implement this strategy several new

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27. Ibid., 37.

28. Department of Communications, Government of Canada, Towards a New Broadcasting Policy, (Ottawa, 1983).

29. Ibid., 5.

broadcasting policies were adopted and a number of additional policy proposals were put forward for public debate.

The new policies were adopted to enable Canadian consumers, broadcasters and entrepreneurs to take advantage of technological advances. Program choice is to be expanded through increased use of cable systems. This confirms an already extensive commitment by Canada to cable systems for information relay.[30] Canadian programming is to be strengthened by the shaping of the new technological environment and establishment of special support funds.[31] The Governor General in Council will be given the power to issue directives to the CRTC on broad policy matters.[32] The Government of Canada also abolished satellite dish antenna licensing requirements for individuals and certain

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30. Canada has the most pervasive and most technically advanced cable distribution system in the world. The considerable investment committed to this development, both public and private, is rigorously protected by Canadian policies in telecommunications.

31. Supra, note 27, at 7.

32. Ibid., 10, Bill C-20, 32-33 Elizabeth II, 1983-84, given first reading in Parliament Feb. 8, 1984, provides for such directives in s.15. It died when parliament disolved in June 1984.

commercial enterprises.[33]

Further policy proposals have been advanced to strengthen Canada's cultural, social and economic position within the new broadcasting environment. Included in these proposals are frameworks for creating a more flexible regulatory and legislative environment, for the enhancement and extension, where needed, of both French-language broadcasting across Canada and native culture, as well as encouragement for the private sector to fulfill an expanded role in increasing both the quality and quantity of Canadian programming.[34] The government has stated, however, that, because of the importance of these policies, public input will be sought before such policy proposals are implemented.

Canadian broadcasting policies, formulated for the most part by the federal government, are designed to create a regulatory regime that addresses fundamental concerns about the freedoms of individuals and the maintenance of Canadian autonomy. The principles outlined earlier in this

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33. The Regulation exempting individuals from the requirement of licensing dish antenna was published May 12, 1983; S.O.R./83-422.

34. A more detailed description of these policy proposals may be found in Towards a New National Broadcasting Policy, supra, note 28.

thesis emerge from these concerns and form the basis of broadcasting policies. These principles are often in conflict when it comes to their practical application and the broad policies stated in the Broadcasting Act attempt to meet the needs of broadcasting while minimizing this conflict. This attempt, however, has failed to create a broadcasting system that fully achieves the goals of the broad policies. Several studies have shown this and recommended ways to rectify the situation.

In answer to these studies the federal government has moved to improve the broadcasting system through the formulation of new policies. The process of formulation has not, as yet, been completed. Canadian broadcasting policy is thus currently in a state of flux. To meet the rapid technological changes occurring in the field of broadcasting, a new flexibility is emerging which also aims to reduce the conflict among the policy's basic principles.

1.2.3 Point-to-Point Telecommunication Policy

Telephone, telex and computer data transmission systems are all, inter alia, point-to-point telecommunication. Together they are part of an information network for Canada, vital to its economic development and well being. Additionally, the industry that has grown up around them is

a critically important one to Canada. It provides a central nervous system for the country, the equipment industry it fosters is the major non-resource-based industry in Canada, and it is the most innovative industry in Canada. It is a key to Canada's overall performance in information technology, accounting for 30% of all manufacturing related research and development in Canada.[35]

Point-to-point telecommunication is not within the exclusive jurisdiction of either the federal or provincial governments. Each may set policy and make regulations in this area.[36] This divides both policy and regulation, as can be illustrated in the regulation of the telephone system in Canada.

The regulation of telephones is divided. Two of the nine major companies[37] are regulated by the CRTC, a federal body, while the other seven companies are individually regulated at the provincial level by the public utility board of the province where the company operates. Furthermore, two companies providing long distance links - Telesat and CN/CP Telecommunications - fall under the

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35. Supra, note 16, at 7.

36. See, infra, Chapter II.

37. The two federally regulated entities are Bell Canada and British Columbia Telephone.

regulatory authority of the CRTC. This divided structure prevails in many areas of point-to-point telecommunication policy development and regulation within Canada.

The result of split jurisdiction is that no broad policies are laid out in law as has been done for broadcasting in the Broadcasting Act. The fundamental principles, as outlined in the general telecommunication policy, still form the basis of policy for point-to-point telecommunication; but the principles focused upon are different from those in broadcasting. The principle of freedom of access is essential to a point-to-point system.

Freedom of access, and the means of attaining that access, determine the manner in which a point-to-point system will develop. The characteristics of the access are determined by policy. Certain conditions within point-to-point telecommunications are set by those who regulate them. These are:

1) The setting of rates;
2) the planning and development of systems;
3) the issue of monopolistic versus competitive services;
4) the attachment of customer owned equipment; and
5) the entry of new companies into the telecommunication sector.

Rate setting is a prime policy area. Each point-to-point telecommunications entity has its rates set

individually by the regulatory body having jurisdiction over it. The appropriate body for entities within federal jurisdiction is the CRTC. The CRTC's regulatory mandate with respect to rate setting derives from several statutes, including the Railway Act[38] and the National Transportation Act.[39] In the area of point-to-point telecommunications the mandate of the CRTC is more limited than it is for broadcasting. Its main concerns are the regulation of rates and the interconnection of competing or intraprovincial systems to create networks. Policy statements are made by the CRTC in the area of point-to-point telecommunication, as with broadcasting, to set out the ground rules for prospective applicants appearing before the Commission.

The individual regulation of point-to-point telecommunication has led to an anomalous situation in the telephone system. The major telephone companies have formed a group called Telecom.[40] Each member of Telecom is regulated by some entity; Telecom, however, being only a composite of its members, is not regulated at all. It is the members who determine rate increases, including those of

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38. Railway Act, R.S.C., 1970, c.R-2, s.320.

39. National Transportation Act, R.S.C., 1970, c.N-17.

40. Formerly known as the Trans-Canada Telephone System (TCTS).

interprovincial long-distance. Each company files these increases with its respective regulatory entity, but there is a general reticence on the part of these entities to tamper with the interprovincial rates agreed upon within Telecom. The result is that no single entity takes responsibility for these rate changes.

System planning and development is another area that policies tend to leave to the point-to-point telecommunication companies themselves. The systems evolved are only scrutinized if they are interconnected and then the CRTC steps in.

Another major policy issue related to rate setting is that of competition versus monopolies. The then Minister of Communication has stated that "[t]here is little doubt that competition policy will be one of the major topics facing government in this area over the next few years".[41] Until recently Canadian policy has supported monopolies in telecommunications because of an early realization that a multiplicity of competing companies made little economic or practical sense. Freedom of access was best served in this manner. The rapid pace of technological development has blurred the distinctions between types of telecommunication. Many types of point-to-point and

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41. Supra, note 16, at 10.

broadcasting telecommunication no longer have definite boundaries. In recent years, therefore, policy has shifted so that competition has been tentatively introduced into the system. It is now possible to use customer-owned equipment on some existing systems in Canada.[42] Where previously protection of the economic viability of the system to ensure its survival was the main issue in creating access, it is now seen as a question of wider utilization and choice within the system. There are still questions about the effect of competitive services on subsidized services such as residential phones. The policies on this have yet to be formulated. It may not be easy, either, for "[g]iven the size and complexity of the issues, the potential for federal-provincial tension and the raw politics involved, the resolution of this question will probably be as difficult in its own way as the debate over the Crow."[43]

While the principle of freedom of access is an important basis for policy in this area in Canada, the other fundamental principles have not been disregarded. The principle of Canadian autonomy is a strong factor in policy making. Canadian unity depends heavily on this

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42. It is not allowed in Saskatchewan, for example, to connect such equipment.

43. Supra, note 16, at 10. "Crow" refers to the special freight rates applicable to shipments of grain established by the Crow's Nest Pass Act, S.C. 1897, c.5. The debate referred to was over amendment of this Act.

communications network and this is reflected in Canadian policy. Policies on Canadian ownership of the industry and subsidies designed to help maintain Canadian world leadership in the technological aspects of the industry illustrate this.

Canadian point-to-point telecommunications policies are in many ways similar to those for broadcasting, addressing concerns over access, individual rights and Canadian autonomy, albeit with different emphases. A major difference, however, is that both the federal and provincial governments make policy. This lack of a single authority for dealing with the national dimension of point-to-point telecommunications has the potential of diverting Canada from effective policies that enable it to keep up with the rapid changes in the field. Consequently, a definite predilection on the part of all governments not to alter the status quo has emerged.[44] Thus, the delicate federal-provincial relationship is maintained.

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44. As evidence of this there has been a reluctance by either the federal government or any of the provincial ones to take the jurisdiction issue to the courts.

1.3 Canadian Telecommunications Policy for Satellite Telecommunication

1.3.1 Canadian Space Policy

A communications satellite derives part of its particular usefulness from the fact that it resides in outer space. Because of the potential and real value of outer space, it is the subject of specific policies in Canada, quite apart from telecommunication. Canadian policies on satellite telecommunication are intertwined with those on outer space.

In Canada there was an early recognition of the high economic and social dividends that could result from the effective use of outer space.[45] Several approaches were available to Canada as means of establishing the space systems necessary to get these dividends. They ranged from complete foreign dependence to complete self-sufficiency. Canada chose to create a largely home-grown industry, considering the establishment of a technological base in Canada to be the best method to adopt. Out of this policy

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45. As early as 1963 the Canadian government opted for a policy that transferred the embryo space technology from government laboratories to Canadian industry with the goal of increasing Canada's ability to compete in world markets for this technology.

came the development of the first Canadian satellites - the Alouette series.[46] These early satellites relied on foreign as well as Canadian expertise, but by 1975 Canada made the decision to establish a prime-contractorship in Canada for Canadian spacecraft.[47]

One major area of space activity Canada has decided it would be uneconomical to develop is that of a launch capability. Here Canada relies upon foreign launching services; to date those of the U.S. National Aeronautics and Space Administration. In order to not be totally dependant, however, Canada actively seeks participation in the programs of the launch service supplier. A result of this participation has been the development of Canada's Remote Manipulator System for the American Shuttle program. There is also a trend towards more co-operation with the European Space Agency (ESA) in order to reduce total reliance on the U.S.

Canada's presence in space over the years reflects

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46. Launched September 29, 1962, Alouette I was a scientific satellite; the first such satellite designed and built by a nation other than the United States or the Soviet Union. It was followed on November 29, 1965 by Alouette II.

47. The Canadian Space Program; Five Year Plan (80/81 - 84/85), Serial No. DOC-6-79DP, discussion paper, January 1980, Government of Canada, Department of Communications, p. 16. This policy was reiterated in 1979.

an evolving space policy which is currently very active. This policy emerged in 1974 when "A Canadian Policy for Space" was adopted stating:

1) the government endorses the principle that a Canadian industrial capability for the design and construction of space systems must be maintained and improved through a deliberate policy of moving government space research and development out into industry;
2) government purchasing policies should encourage the establishment of a viable research, development and manufacturing capability in Canadian industry;
3) Canada will continue to rely on other nations for launch vehicles and services and we should enhance access to such services by participating in the supplying nation's space program;
4) departments involved should submit plans to ensure that, to the fullest extent possible, Canada's satellite systems are designed, developed and constructed in Canada, by Canadians, using Canadian components;
5) Canada's primary interest in space should be to use it for applications that contribute directly to the achievement of national goals;
6) utilization of space systems for the achievement of specific goals should be through activities proposed and budgeted by departments and agencies within their established mandates;
7) at the international level, Canada's ability to use space should be furthered by participating in international activities for the use and regulation of activities in space, negotiating agreements for the continuing access to science, technology and required facilities, and maintaining knowledge of foreign space activities in order to respond quickly to potential opportunities and threats to national sovereignty, and at the national level, Canada's ability to use space should be furthered by the

> support of research appropriate to the need to understand the properties of space, the potentialities of space systems, and the search for potential applications, and technology programs to develop the industrial capability essential to meeting future requirements for operational space systems.[48]

This space-policy has been implemented by several major programs. These currently include the Anik series telecommunication satellites, the SARSAT experimental project,[49] programs for remote sensing by satellite[50] and meteorological programs.

In 1980 Canada developed a Five Year Plan for its space programs. Its purpose is to coordinate and fund existing programs and implement new ones. Funding from the Canadian Government was laid out on a five year basis, alloting specific sums for current and future programs.[51] This policy has been successful; so much so, that it has been recently renewed as a new "Space Expenditure Plan" to

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48. Ibid., 17.

49. A joint Canada/France experimental project to determine the use of spaceborne technology in the detection and location of emergency beacons emitting signals from ships and aircraft in distress.

50. This includes LANDSAT, a U.S. remote sensing project.

51. For details see supra, note 47, at 45.

cover the years 1984/85 through 1986/ 87.[52]

Canada's space policy thus stresses the use of outer space as a means of furthering Canadian economic goals and national unity. At present the paramount use of outer space for this purpose is in telecommunications applications.

1.3.2 Satellite Telecommunications Policy

Satellite technology is still young but it has already had a tremendous impact on all areas of telecommunication. They are now used extensively in both point-to-point and broadcasting systems. One has only to watch television broadcast live coverage of the Olympics or to pick up the telephone and call long-distance to see evidence of this use.

The development of satellite telecommunication policies in Canada has gone hand in hand with the recent development of Canada's general telecommunications policies. Canada has recognized that there is a full range of connections amongst the various telecommunications and information resources and that they must be considered as a

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52. Minister of State, Economic and Regional Development, Science and Technology, News Release, March 19, 1984.

whole. The principles which form the basis of general telecommunications policy, and many of the policies derived therefrom, are applicable to satellite telecommunications. The unique attributes of satellite systems have, however, necessitated Canadian policies particular to satellite telecommunications.

One of the main conclusions of a 1968 Canadian government White Paper entitled A Domestic Satellite Communication System for Canada[53] was that a Canadian domestic satellite system was of "vital importance to the growth, prosperity and unity of Canada and should be established as a matter of priority".[54]

While the need for such a system was acknowledged, the question still existed as to the make-up of such a system. The main issue was whether the government should have full ownership, shared ownership with private industry[55] or no ownership, leaving the system to be

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53. Hon. C.M. Drury, Minister of Industry, White Paper on A Domestic Satellite Communications System for Canada, (Ottawa: The Queen's Printer, 1968).

54. Ibid., 8.

55. The White paper, ibid., dealt with the creation of a corporation to own and operate the system in conjunction with interested private parties.

controlled by private interests.[56] From this emerged a policy of mixed private-government ownership implemented through the creation of Telesat.

Telesat Canada came into being on September 1, 1969 on proclamation of the Telesat Canada Act.[57] The objects of the company were the establishment of commercial satellite telecommunication systems to provide telecommunication services between locations in Canada.[58] To achieve these objects the company was directed to utilize Canadian design, technology and research to the extent practicable.[59] Shares were issued in the company and made available to Her Majesty in right of Canada, approved telecommunications common carriers and persons who fulfill the statutory conditions determined by the Board of Directors of Telesat and approved by the Governor-in-Council.[60] The Government of Canada retains control in the company through shared ownership. Telesat is not, however, a Crown corporation.[61]

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56. As espoused by the telecommunications carriers.

57. R.S.C., 1970, c.T-4.

58. Ibid., s.5(1).

59. Ibid., s.5(2).

60. Ibid., s.10(2).

61. Ibid., s.34.

Canada, through the creation of Telesat, has chosen the mechanism by which it is to set up and operate Canadian satellite systems. While Telesat has not been given exclusive rights to put up and operate telecommunications satellites, any private venture attempting to do so would likely meet with difficulties.

The Federal Government holds exclusive jurisdiction over satellites used in all areas of telecommunications.[62] Through the CRTC it strongly regulates satellite telecommunications and in view of the Telesat policies it is unlikely that authorization would be forth coming. The framework is there, however, so that a change in government policy towards greater privatization would be all that is needed to allow privately owned satellites.

Satellites do not operate independently; they are only part of a communication system that has a major terrestrial component. In Canada, as a matter of policy, much of the terrestrial network is a cable system. This is especially true in broadcasting; cable television is available to 80% of Canadian homes.[63] There is considerable investment in this cable system and its protection is a

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62. But see, infra, Chapter II.

63. DBS Plans Deadlocked in Geneva, [July 11, 1983] Broadcasting 27.

natural policy development.

> Canada has the strongest and most technically advanced cable distribution system in the world. We are now building on this system to expand its domestic audience and revenue base, and to guarantee that we will have an ongoing vehicle for Canadian programming.[64]

Thus, cable has been given a preferred status in policy.

In keeping with this and the policy of telecommunications integration, satellites are seen as a part of the entire cable system, thus influencing policy-making in this area, perhaps even to the detriment of satellite communications.

Another property of satellites is that they allow transmission of communication over long distances with greater ease than ever before. Canada employs this property to facilitate its domestic telecommunications, as well as international telecommunications. Canadian policy for satellite telecommunications must, therefore, be directed not only inward but outward. There must be international policies.

Canadian international telecommunications policy over the years has been one of espousing international co-operation in the efficacious use of telecommunications. An early member in the International Telecommunication Union (ITU), Canada supports this organization's role in allo-

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64. Supra, note 28.

cating radio frequencies for telecommunication and satellite slots in the geostationary orbit.[65] Canada is also a member of INTELSAT and INMARSAT,[66] organizations which operate international satellite telecommunications systems. Canada's membership in INTELSAT, through the representative body Teleglobe[67], commits Canada to using INTELSAT's satellite system for Canada's international telecommunications traffic. Where satellite telecommunication is concerned this use should be exclusive. Canada also guarantees that its domestic systems will not interfere with INTELSAT's.[68] The commitment to INMARSAT on interference

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65. When a satellite is put into orbit at an altitude of approximately 35,800 km and in the plane of the equator it has an orbital period that is synchronous with the earth's rotation. If the movement of the satellite is in a west to east direction it will appear to an observer on the ground to be stationary in the sky. The orbit of this satellite is said to be geostationary.

66. Supra, note 14.

67. Further details on Teleglobe and its role in INTELSAT may be found, infra, in Chapter III.

68. Art. 14 of the Agreement Relating to the International Telecommunication Satellite Organization "INTELSAT"; 23:4 U.S.T. 3813 (1972); open for signature 20 Aug. 1971; entered into force 12 Feb. 1973 (the INTELSAT Agreement).

is similar.[69] Because of the importance of international co-operation to telecommunications, Canada is willing, in certain circumstances, to let Canadian needs in telecommunications take second place to international needs.

1.3.3 Fixed-Satellite Service and Broadcasting-Satellite Service

Telecommunication satellite services have developed into two major types - "fixed-satellite service" and "broadcasting-satellite service". The ITU Radio Regulations[70] define "Fixed-Satellite Service" as:

> A radiocommunication service between earth stations at specified fixed points when one or more satellites are used; in some cases this service includes satellite-to-satellite links, which may also be effected in the inter-satellite service; the fixed-satellite service may also include feeder links for other space radiocommunication services.[71]

and "Broadcasting-Satellite Service" as:

> A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct

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69. Art. 8 of the Convention on the International Maritime Satellite Organization "INMARSAT"; 31:1 U.S.T. 1 (1979); open for signature 3 Sept. 1976; entered into force 16 July 1979 (the INMARSAT Convention).

70. Radio Regulations, ITU, Geneva, 1982.

71. Ibid., Art. I, s.3.3.

reception by the general public.[72]

The distinction between the two lies in the manner of reception of the propagated signals; fixed services are directed at specific receivers while broadcasting services are for general reception. This distinction has ramifications as to the type of control that can be exerted upon the respective service, both internationally[73] and nationally. It has necessitated separate policies in Canada for these services.

Canadian policies directed at fixed-satellite service are basically those mentioned earlier with respect to satellite telecommunication. This is because this type of service is the one now operative in Canada and is seen as part of the overall telecommunications network.

Under the ITU Radio Regulations signals propagated through such a service are to be protected from unauthorized interception and divulgence of their contents unless they

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72. Ibid., Art. I, s.3.18.

73. International controls over broadcasting-satellite services, for example, have been debated without consensus for nearly 20 years in the U.N. Committee on Peaceful Uses of Outer Space (COPUOS), between those who support the "free flow of information" and those who support sovereign rights to control the flow of information into a nation as regards DBS. For a detailed history of the COPUOS debates on this issue see Christol, C., The Modern International Law of Outer Space, (New York, 1982), Chapter 12, p. 605 et seq.

are intended for the use of the general public.[74] Canadian policy adopts this position and considers all signals propagated by fixed-satellite services to be "private". Thus, in a news release announcing liberalization of licensing requirements for individuals operating private satellite dish antennae, the government felt it necessary to state that "[a]ll TVRO owners are reminded that the radio and television signals currently carried on Canadian and U.S. satellites are considered to be private signals"[75]

Broadcasting-satellite services utilize Direct Broadcast Satellites (DBS) which, because they are capable of propagating signals directly to the general public, create a service that has unique virtues and vices. Canada recognizes these, having already performed extensive experiments with the Hermes DBS[76] satellite.

DBS can assist Canada in achieving its national broadcasting objectives, expanding choice in all parts of

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74. Supra, note 70, Art. 23.

75. Government of Canada, Department of Communications, Communications, May 17, 1983, p. 4.

76. Hermes or Communications Technology Satellite (CTS) was developed jointly by the U.S. and Canada. Launched in January 1976 its principal purpose was to demonstrate the feasibility of DBS using the 14/12 GHz band.

Canada, especially in remote areas beyond even the extensive cable systems.[77] Canada, however, sees DBS as complementing the cable system and this affects formulation of policy in the field. For example, at the 1983 Regional Administrative Radio Conference (RARC '83),[78] Canada supported lower broadcasting power for DBS satellites envisaging that DBS broadcasting would, in the main, be picked up and distributed through cable systems.[79]

At the same Conference, Canada illustrated the importance that it gives to DBS by the number of geostationary orbit slots it sought for DBS satellites. Six were asked for and received, though not in the exact spots requested. This was only two less than the number obtained by the United States.

Canada's policy commitment to maintaining cultural

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77. Government of Canada, Department of Communications, Direct-to-Home Satellite Broadcasting for Canada, (Ottawa, 1983), at 10.

78. RARC '83 was convened in the summer of 1983 in order to work out an a priori scheme for allotment of geostationary orbit positions and related radio frequencies for future DBS services in ITU Region 2. From it Canada obtained 6 orbit slots so it can provide coast to coast service.

79. For an account of what transpired at RARC '83 regarding the power flux of DBS satellites. See U.S. Outvoted at RARC on DBS Power Standard, [July 18, 1983] Broadcasting 25.

autonomy is once again renewed. DBS services from the U.S. will create a potential influence even greater than that of the regular broadcasting that emanates from there. DBS covers a much wider area and even signals destined for the U.S. will have considerable spillover into Canada. Canada policy will be to adopt measures to counteract this influx of programming. One approach could be to provide a Canadian DBS service as an alternative to U.S. DBS services.[80]

Much of the policy for DBS is hypothetical, however, because such a service has yet to be implemented, not only in Canada but anywhere in the world. When it is, Canada's policies will no doubt firm up with experience. In general, however, they will reflect the broad objectives of Canadian broadcasting policy.

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80. Supra, note 77, at 11.

CHAPTER II

LEGISLATIVE JURISDICTION

In order to establish the law applicable to satellite telecommunications it is first necessary to determine where legislative jurisdiction over the subject matter lies. In Canada, legislative competence exists only if there is also legislative jurisdiction, though a cardinal principle of Canadian constitutional law is that all powers must be distributed.[1] Laws and regulations that are promulgated without legislative jurisdiction can be declared ultra vires and struck down by the courts.[2] This chapter will examine legislative jurisdiction over satellite telecommunications in Canada.

The Constitutional Act, 1867[3] is the primary source of jurisdiction; it divides the legislative powers between the provinces and the federal government. In addition, the international nature of satellites brings out

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1. Attourney-General for Ontario v. Attourney-General for Canada, [1912] A.C. 571, 583-4 (P.C.).

2. See for example Ontario Mining Co. v. Seybold, [1903] A.C. 73, 82 (P.C.).

3. British North America Act of 1867, 30-31 Vict. C.3, as am. (U.K.) now Constitution Act, 1867.

an international law aspect of legislative jurisdiction that must be considered.

2.1 Satellites

Satellites are currently used for meteorology, remote sensing, communications and for various forms of scientific experimentation. Despite the many types of satellites in existence, there is one common element amongst all of them - they depend upon radio communication to control and conduct their operations.

Radio communication is accomplished through the modulation of radio frequencies. It is the basis of all wireless communication and satellite control is but one of its many functions. The use of radio frequencies for communication must be regulated because they are susceptible to interference which can render them useless. Radio frequencies, however, generally go beyond national boundaries. Thus, effective regulation cannot be accomplished by a single nation, even within its boundaries. International co-operation is essential.

In recognition of this the International Telecommunication Union (ITU)[4] has come into being and through the

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4. The ITU was originally founded in 1865 to regulate

mechanism of an international convention,[5] arrived at through negotiations, allocates frequency bands to specific services. Among these are satellite services including fixed-satellite, broadcasting-satellite, and earth exploration-satellite services.[6] The ITU is also the regulatory body responsible for allocating satellite slots in the geostationary orbit,[7] a limited natural resource especially important for communication satellites. The resulting international regulatory framework depends upon international cooperation.

Extraterritoriality is an international aspect of satellites.[8] Since they are extraterritorial the

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international telegraphy. It is now composed of member states who meet periodically at Conferences to negotiate and formulate regulations for all international telecommunication.

5. International Telecommunication Convention, Nairobi, 1982, ITU, Secretariat, Geneva.

6. Radio Regulations, ITU, Geneva, 1982, Art. 8.

7. Supra, note 5, Arts 10(4), 33.

8. It can be argued that because the Convention on International Civil Aviation of 1944, (Chicago Convention), 15 U.N.T.S. 295 (1947) extends sovereignty into the airspace above a state and there is, as yet, no definition delimitation of the airspace/outer space boundary, satellites are territorial. However, the fact that most satellites and all communication satellites orbit at greater than 100 kilometers attitude, a delimitation limit frequently quoted,

question then arises as to who has authority over and, more importantly, responsibility for satellites in orbit. To answer this, international space law must be looked to.

The 1967 Space Treaty[9] states in Article VI that:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space...whether such activities are carried on by governmental agencies or by non-governmental entities;

and in Article VII that:

> [e]ach State Party to the Treaty that launches or procures the launching of an object into outer space... is internationally liable for damage to another State Party to the Treaty.

Furthermore, Article II of the Space Liability Convention[10] states that "[a] launching state shall be

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almost assuredly means they are not territorial. For further see Cheng, B., The Legal Regime of Airspace and Outer Space: The Boundary Problem. Functionalism versus Spatialism: The Major Premises (1980), V Annals of Air and Space Law 323.

9. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies; adopted in U.N.G.A. Res. 2222(XXI), 19 Dec. 1966; 610 U.N.T.S. 206 (1967); 18:3 U.S.T. 2410 (1967), T.I.A.S. 6347; [1967] Can.T.S. No. 19; entered into force 10 Oct. 1967, (the 1967 Space Treaty).

10. Convention on International Liability for Damage Caused by Space Objects; adopted in U.N.G.A. Res. 2777(XXVI), 29 Nov. 1971; 24:2 U.S.T. (1973); T.I.A.S. 7762; entered into force 9 Oct. 1973, (the Space Liability Convention).

absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight". In international law the state controls and is responsible for the satellites it places in orbit.

In the Canadian context legislative authority over satellites per se is a constitutional issue. Since, in international law, it is the state that exercises rights over satellites and must take responsibility for them, the federal government is responsible. Only Canada is a subject of international law, the provinces are not.[11] Thus, in order to properly exercise its rights and responsibilities it is essential for the federal government to have legislative authority over satellites.

The Constitution Act, 1867[12] is silent on the subject of satellites but because of the international nature of satellites it is clear that the federal government

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11. In the Reparations for Injuries Case (1949), I.C.J. Reports 179, the Court states that: "A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims." Canada as a "state" is such an entity. The provinces are not "states", lacking the constitutional ability to enter into relations with other states. Constitutionally the prerogative powers originally vested in the Crown in s.9 of the Constitutional Act, 1867 are now exercized by the Governor-General and thus the foreign affairs prerogative is now exercized by the Governor-General.

12. Supra, note 3.

has legislative jurisdiction by virtue of the peace, order and good government power.[13] This clause was used by the Privy Council in the Aeronautics[14] case and again in the Radio Reference[15] case to give legislative jurisdiction to the federal government where matters of international obligation were concerned.[16] More recently the clause was invoked by the Supreme Court of Canada in the

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13. Ibid., s.91 where it says that the government of the dominion has 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."

14. In re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54 (P.C.).

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

16. Subsequent to these decisions the Privy Council in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326; [1937] 1 D.L.R. 673 (P.C.) (the Labour Conventions Case) repudiated their reasoning that the peace, order and good government clause could be used to authorize the implementation of treaties by the Canadian government. The Labour Conventions reasoning has been open to criticism and there has been an indication by the Supreme Court of Canada in MacDonald et al. v. Vapour Canada Ltd. et al. (1976), 66 D.L.R. (3d) 1, that a reconsideration of the Labour Conventions case may someday be undertaken, but it remains the law.

Newfoundland Offshore Reference[17] case to give control of an extraterritorial matter to the federal government. By analogy satellites per se fall under the legislative jurisdiction of the federal government.

2.2 Communication Satellites

While legislative jurisdiction over satellites per se rests with the federal government it does not automatically follow that it has legislative jurisdiction over all aspects of satellite use. This is especially true of communications satellites because they are utilized as a part of telecommunication networks, not alone. Telecommunication in Canada is a separate constitutional subject, divided into two distinct categories; broadcasting and point-to-point telecommunications. A different legislative jurisdiction has evolved over each category. The federal government has exclusive jurisdiction in the domain of broadcasting, while in point-to-point telecommunications there is de facto divided jurisdiction although the issue is by no means settled de jure. The question of where legislative jurisdiction over communication satellites lies is thus

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17. Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (1984), 51 N.R. 362; 5 D.L.R. 385 (S.C.C.).

inexorably tied to the category in which they are used.

2.3 Broadcasting Jurisdiction in Canada

In Canada legislative jurisdiction for broadcasting has settled with the federal government. The leading case in this area is the Radio Reference, a decision of the Privy Council. The case held that the federal government had the jurisdiction to regulate and control radio communication. The court found a basis for this jurisdiction both in the power over peace, order, and good government of Canada in the opening words of section 91, as well as the section 92(10)(a)[18] power over interprovincial undertakings.

The peace, order and good government power was held to authorize laws implementing treaties entered into by Canada in her own right. Such treaties were no longer "British Empire" treaties (section 132 of the Constitution Act, 1867). Thus in order to fulfill her treaty obligations "it is necessary that the Dominion should pass legislation which would apply to all the dwellers in Canada";[19] authority to do this is in section 91. As regards radio communication, Canada had signed the International Radio-

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18. Constitutional Act 1867, supra, note 3.

19. Supra, note 15, at 313.

telegraph Convention of 1927 and jurisdiction to make laws would be needed to implement it. Subsequently, the Privy Council in the Labour Conventions case (1937),[20] repudiated this line of reasoning though it has been reinstated to some extent by later courts.[21]

The peace, order and good government power would still apply under the "national dimensions" test set out in the Canada Temperance[22] case. This test holds that the peace, order and good government power applies where the subject matter in question "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole".[23] The test was applied to aeronautics in Canada to uphold the peace, order and good government power when the "treaty reasoning" could

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20. Supra, note 16.

21. See supra, note 16, and further the Supreme Court of Canada has re-affirmed the Radio Reference case stating: "Although this Court is not bound by judgments of the Privy Council any more than by its own judgments, I hold the view that the Radio case was correctly decided under the terms of ss. 91 and 92(1)(a)." Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al., [1978] 2 S.C.R. 141, 161; (1977), 18 N.R. 181, 199.

22. Attorney-General of Ontario v. Canadian Temperance Federation, [1946] A.C. 193 (P.C.).

23. Ibid., 205.

no longer be relied upon.[24] It was found that aeronautics fit the test. Broadcasting is analogous to aeronautics as having a national dimension and this reasoning has been found compelling by the Ontario Court of Appeal in Re C.F.R.B.[25]

The second line of reasoning taken in the Radio Reference case was that radio broadcasting fell under the exemptions from provincial jurisdiction found in section 92 (10)(a). The Court stated:

> Now, does broadcasting fall within the excepted matters? Their Lordships are of the opinion that it does, falling in (a) within both the word "telegraphs" and the general words "undertaking connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province."[26]

The Court threw out the argument put forth by the Provinces that there should be a distinction between transmitters and receivers. They stated:

> Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without the transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independant of the other... (emphasis

24. Johannson v. West St. Paul, [1952] 1 S.C.R. 292.

25. Re CFRB and Attorney General of Canada, [1973] 3 O.R. 819 (Ont. C.A.).

26. Supra, note 15, at 314.

added)[27]

They also held that the word "undertaking" found in s. 92(10)(a) was defined broadly as "not a physical thing but an arrangement under which, of course, physical things are used".[28] Thus from the interprovincial nature of this undertaking legislative jurisdiction falls to the federal government.[29]

The Radio Reference case held that all radio communication was within the jurisdiction of Parliament. This includes not only radio broadcasting but television.[30] Other broadcasting areas were left unclear as to jurisdiction; specifically cable broadcast systems and broadcast content.

Cable systems were, of course, non-existant at the time of the Radio Reference. They are now an important part of the Canadian broadcasting system. The issue over who had jurisdiction was brought to a head in the late 1970's by two

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27. Ibid., 315.

28. Ibid., 315.

29. The Radio Reference case has been affirmed by the Supreme Court of Canada in Capital Cities, supra, note 21, at 199.

30. The original questions put to the Supreme Court of Canada asked if the Parliament of Canada had jurisdiction to regulate and control radio communication, including "pictures", transmitted by Hertzian waves, supra, note 16, at 310.

cases heard before the Supreme Court of Canada.

The first of these was Capital Cities et al. v. C.R.T.C. et al.[31] The Court concluded on the facts established in this case that exclusive legislative authority in relation to the regulation of cable systems and their programming, where such programming involved the interception of television signals which were retransmitted to cable users, rested in the Parliament of Canada. The reasoning of the Court relied heavily upon:

> The common sense of which the Privy Council spoke in the Radio case [which] seems to me even more applicable here to prevent a situation of a divided jurisdiction in respect of the same signals or programmes according to whether they reach home television sets and the ultimate viewers through Hertzian waves or through coaxial cable.[32]

The court thus affirmed the broad interpretation of the broadcast undertaking.

The second case, Dionne et al. v. Public Service Board (Quebec) et al.,[33] was decided at the same time as Capital Cities. It relied heavily upon the reasoning in Capital Cities but tightened a few gaps in the constitutional arguments, stating that cable systems:

> ...rely on broadcasting stations, and their operations are merely a link in a

31. Supra, note 21.

32. Ibid., 198.

33. [1978] 2 S.C.R. 191; (1977), 18 N.R. 271.

> chain which extends to subscribers who receive programmes through their private receiving sets. I do not think that any argument based on relative percentages of original programming, and of programmes received from broadcasting stations can be of more avail here than it was in Re Tank Truck Transport Ltd.[34]

A further constitutional issue in broadcasting arose over legislative jurisdiction over broadcasting content. An early case on this is Re C.F.R.B. and A.G. Canada et al.[35] At issue was the constitutionality of a federal law prohibiting the broadcasting of partisan advertisement on an election day or the preceeding day. The Court decided that the scope of the Privy Council decision in the Radio Reference was not limited to the physical means of communication; it also encompassed programme content. The federal government had exclusive jurisdiction over broadcasting content. This case was appealed to the Supreme Court of Canada and leave was refused.

Reference was made to Re C.F.R.B. by the Federal Court of Appeal in its decision in Re Capital Cities Communications Inc. et al. and C.R.T.C.[36] It was concluded

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34. Capital Cities, supra, note 21, p. 198-99 (Re Truck Transport Ltd., [1960] O.R. 497).

35. Supra, note 25.

36. [1975] F.C. 18; (1975), 52 D.L.R. (3d) 415; 7 N.R. 18 (F.C.A.).

that "The legislative authority of Parliament extends over the content of broadcasts as well as over the physical undertaking of the television reception unit."[37] Subsequent appeal of Capital Cities to the Supreme Court of Canada was dismissed and, as was stated by Laskin, C.J.C. (dissenting) in A.G. of Quebec v. Kellogg's Co. of Canada:

> This Court established in two recent decisions that federal competence in relation to television, and in relation even to cablevision which relies on and retransmitts television signals, embraces exclusive authority to deal with the content of television programmes: Capital Cities Communications Inc. et al. v. Canadian Radio-Television Com'n et al., ...[38]

The federal government is thus held to have exclusive legislative jurisdiction over broadcasting content. The exclusivity of this jurisdiction was tempered somewhat by the majority decision in the Kellogg's case. The issue here was the constitutionality of provincial legislation restricting the use by advertisers of cartoons in broadcast advertising directed at children. It was held that the legislation was valid because exclusive federal jurisdiction over broadcasting does not prevent valid provincial consumer protection legislation, i.e. if the

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37. Ibid., 421 (D.L.R.), 25 (F.C.).

38. (1978), 83 D.L.R. (3d) 314, 315 (S.C.C.).

legislation is directed at the advertiser and not the broadcaster, it is valid. This is true only if the advertising originates from within the province.

This case sets a precedent inconsistant with exclusive federal jurisdiction over broadcast content, despite its seemingly limited ratio dicendendi. The provinces can now do indirectly what they could not do directly and as Laskin, C.J.C. stated in his dissenting opinion "It is this indirect approach which is evident here and I would reject it".[39]

The federal government has legislative jurisdiction in the field of broadcasting and from this it follows that communication satellites used in broadcasting would fall within that jurisdiction. A number of arguments support this contention.

A communication satellite used in broadcasting is only a part of a broadcast undertaking. Like cable systems they depend upon telecasts for their operation, being no more than conduits for signals from the telecast. They even provide a link between the telecast and the cable system. They do not constitute a separate undertaking.

Communication satellites are extraterritorial to Canada. Even assuming that Canadian sovereignty extended to

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39. Ibid., 317.

the infinitely above Canada these satellites are found in the geostationary orbit located above the equator. This is clearly outside Canada. Communications satellites for broadcasting are therefore external to the provinces and cannot be considered local works or undertakings as per s. 92 (10).[40]

Finally, broadcasting communication satellites use radio communication through Hertzian waves. They would thus fall within the exclusive federal jurisdiction determined by the Privy Council in the Radio Reference case.

It is thus clear that communication satellites used in broadcasting fall within the legislative jurisdiction of the federal government.[41]

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40. Supra, note 18.

41. Municipalities seem to want to test this federal legislative jurisdiction in the area of broadcasting by means of by-laws that regulate reception antennae for radio signals. It was clearly established in Toronto v. Bell Telephone, [1932] A.C. 304 (P.C.) that the exclusive federal jurisdiction over the subject precluded municipalities from prohibiting the use of communication equipment. Municipalities try to get around this, however, by using powers to regulate construction, safety and zoning. It has led to a conflict as yet unresolved as to how much municipalities may regulate antennae and the like.

2.4 Point to Point Telecommunication Jurisdiction in Canada

While Canadian courts have resolved, to a large extent, the question of where legislative jurisdiction over broadcasting lies, this is not the case for point-to-point telecommunication. As noted in Chapter I this has created a situation of de facto divided authority between the provinces and the federal government. In addition there exists a policy of maintaining the status quo. The federal government out of deference to the political problems it might create and a sense that it would not be in the public interest, seems reluctant to seek exclusive jurisdiction over all interconnected facilities. Provincial governments, on the other hand, are unwilling to risk what they have, should they lose a challenge for greater powers.

It is beyond the scope of this thesis to analyse the constitutional arguments for the competing positions on this question. However, the important points will be set out in order to establish the current constitutional position. The status of satellites used for point-to-point telecommunication will be discussed afterwards.

Legislative jurisdiction over point-to-point telecommunication in Canada depends upon the Constitution Act, 1867. Proponents for federal government jurisdiction

rely upon the following sections.

(a) Section 91 where the federal general power to make laws for peace, order, and good government of Canada in all matters not given exclusively to the provinces is found.

(b) Section 92(10)(a) which exempts from provincial jurisdiction "... 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) Section 92(10)(c) which excludes from local works and undertakings subject to provincial authority those works situated in a province that are before their execution declared by Parliament to be for the general advantage of Canada or two or more Provinces.

Proponents for a significant role for the provinces in regulating point-to-point telecommunication rely upon:

a) Section 92(16) which gives the provinces power, generally, over all matters of a merely local or private nature in the province.

b) Section 92(10) which authorizes the provinces to legislate over local works and undertakings.

c) Section 93(13) which authorizes the provinces to legislate on matters of Property and civil rights in the provinces.

These summarize the competing federal and provincial constitutional powers within which can be found jurisdiction over point-to-point telecommunication.

The arguments for federal authority over point-to-point telecommunication focus, for the most part, on the

expansiveness and interdependance of such systems. The peace, order and good government clause of section 91 can be used as a basis for exclusive federal jurisdiction over this subject. Telecommunications lends itself well to the "national dimensions" test first expounded in the Canada Temperence case:

> ...the true test must be in the real subject matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion ...then it will fall within the competence of the Dominion of Parliament as a matter affecting the peace order and good government of Canada although it may in another respect touch upon matters especially reserved to the provincial legislature.[42]

This test may have been narrowed in scope by the Supreme Court of Canada in the Anti-Inflation Reference[43] case. However, this test has been used to extend federal jurisdiction to broadcasting and aeronautics. Strong analogies can be drawn between those and point-to-point telecommunication with respect to national dimension.

Point-to-point telecommunication is composed of various modes of communication that depend upon interconnection. This provides an argument that they are the "works

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42. Supra, note 22, at 205-206.

43. Reference Re Anti-Inflation Act, [1976] 2 S.C.R. 373; 68 D.L.R. (3d) 452.

and undertakings connecting the Province with any or others of the Provinces..." which are exempted from provincial control in section 92(10)(a).

The exact legal nature of interconnection as it pertains to section 92(10)(a) has yet to be resolved in the courts. In Luscar Collieries Ltd. v. McDonald[44] it was held by the Privy Council that a privately-owned railway line entirely within Alberta, but connected to the CNR's interprovincial line and under CNR operation, was a section 92(10)(a) undertaking. More recently in the GO Transit[45] case a similar determination was made giving federal jurisdiction over a local Ontario government-owned commuter train service operating on track owned by CNR and part of its national system. In this case the Supreme Court of Canada reasoned that:

> ...the constitutional jurisdiction depends on the character of the railway line not on the character of a particular service provided on that railway line (emphasis added).[46]

The other side of the argument is supported by City of Montreal v. Montreal Street Railway Company.[47] Here

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44. [1927] A.C. 925 (P.C.).

45. The Queen v. Board of Transport Commissioners, [1968] S.C.R. 118; (1968), 65 D.L.R. (2d) 425.

46. Ibid., 432.

47. [1912] A.C. 333 (P.C.).

jurisdiction was denied the federal government over a Montreal tramway connecting with a federally-regulated railway. Mere connection is thus not enough to bring the exception in 92(10)(a) into effect when a local undertaking is involved. What seems to be needed is some interaction between the enterprises that goes beyond the separate operations of the connected carriers.

In the communications field the courts have specifically found the Bell Telephone Co., which serves Ontario, Quebec, the Northwest Territories and Newfoundland, to be an interprovincial undertaking not within provincial jurisdiction.[48] Bell was not to be considered as two enterprises one local, and one long-distance, but rather as one operation. It has been argued that "[t]he implication of the Bell Telephone case is, of course, that an intraprovincial telephone system would be within provincial legislative authority as a 'local undertaking' under s. 92 (10)(a)."[49] Another implication, however, is that such systems must be considered as a whole once connected. If the whole is interprovincial in nature then it is a section 92(10)(a) undertaking. Intraprovincial communication

48. Toronto v. Bell Telephone, [1932] A.C. 304 (P.C.).

49. Hogg, P., Constitutional Law of Canada, (Toronto, 1977) at p. 343.

systems might thus be considered to form part of an inter-provincial Canadian telecommunication system once connected to systems outside their province. The fact that Bell Canada, the subject of the decision, is one entity complicates the argument but is not fatal to it.

Further argument for federal jurisdiction comes from the Radio Reference case. It holds that the federal government has exclusive jurisdiction over all radio communication.[50] While this is widely held to give exclusive authority over broadcasting, radio communication also includes microwave transmissions and other Hertzian waves that are used to propagate communications.

Point-to-point telecommunication relies heavily upon radio communication for connections between main exchanges and trunks as well as between separate systems. Therefore, federal jurisdiction does come into the field.

The foundation for a federal jurisdiction is interconnection. The foundation for provincial jurisdiction is local works and undertakings as stated in section 92(10) at its start. As mentioned earlier communication systems that are intraprovincial provide a case for provincial regulation. Even the court decisions giving exclusive jurisdiction of broadcasting to the federal government

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50. See supra, p. 56.

provide support for this. In Dionne the court specifically excludes cable distribution systems which limit operations to locally-produced programmes transmitted to this local subscribers.[51] In the Kellogg case where there is de facto limitation of federal jurisdiction over broadcast content, the Court similarly limits its decision to local enterprises.[52]

For the provinces to maintain this current de facto regulatory power in the face of a constitutional challenge, it will be necessary to establish the local nature of the communication system and its independance from interconnection for service. As the Supreme Court of Canada stated on the cable issue:

> The fundamental question is not whether the service involved in cable distribution is limited to intraprovincial subscribers or that it is operated by a local concern but rather what the service consists of.[53]

Overall, then, a strong case can be built for continued and even extended federal jurisdiction in point-to-point telecommunication tempered by the willingness of the courts to determine that some systems are of a strictly

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51. Supra, note 33, at 276.

52. Attorney-General of Quebec v. Kellogg's of Canada et al. (1978), 83 D.L.R. (3d) 314, 315 (S.C.C.).

53. Supra, note 33, at 275.

local nature.

The question now arises as to legislative jurisdiction over communication satellites used in point-to- point telecommunication. The answer to this depends upon the character of the point-to-point service, of which the communication satellite is a part.[54]

In this respect the important characteristics of communication satellites are:

a) they do not comprise a point-to-point telecommunication system by themselves, rather they are always operated as a part of such a system, providing interconnection between terrestrial components

b) they utilize and are dependant upon radio communication for their operation

c) they are located extraterritorially from Canada and the provinces.

Given these characteristics a first constitutional consideration is whether the subject comes under section 92(10) "local works and undertakings" or under the section 92(10)(a) exceptions. The key here is connection beyond the limits of the individual provinces. Since most communication systems that utilise satellites operate interprovincially (for example Telecom) the arguments found in the Luscar Collieries and GO Transit cases support federal jurisdiction. Opposed to this, however, is the fact that

54. See the GO Transit and Dionne cases, supra, notes 45 and 33 respectively.

many of the systems connected by satellites are intraprovincial in character. If this were interpreted as mere connection of these systems then the reasoning of the City of Montreal case would limit the scope of any federal jurisdiction, allowing the provinces to control some aspects of point-to-point satellite service. A good example of this is a completely intraprovincial point-to-point telecommunication system utilizing satellites to reach remote points within the province.

A more compelling constitutional argument supporting exclusive federal jurisdiction in the field is the dependence of satellites upon radio communication. As has been noted the Radio Reference case, affirmed in Capital Cities,[55] holds that legislative jurisdiction over radio communication lies exclusively in the federal government. The decision of the Privy Council was based upon the peace, order and good government clause in section 91 of the Constitution Act, 1867, both because of the national dimension of radio communication and because of a need for the federal government to implement Canadian treaty obligations.

The communication satellite issue is on point with this case. These satellites have a national dimension, as

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55. Supra, note 21, at 199.

they are important to the existance of an effective Canadian point-to-point telecommunication system. Also, being extra-territorial they are, as mentioned earlier, per se subject to federal jurisdiction. Their international character has led Canada to enter into a convention[56] which is the direct successor of the International Radiotelegraph Convention of 1927 cited in the Radio Reference.

In addition, the reasoning of the Privy Council that "the system cannot be divided into two parts..."[57] has been affirmed in subsequent Canadian communication cases including Capital Cities and Dionne.

Thus there is a strong case that communication satellites used in point-to-point telecommunication come under the exclusive jurisdiction of the federal government. They are part of a single system of national dimensions, utilizing radio communication, and having an international aspect requiring federal implementation of a treaty.[58] This would seem to include even the totally intraprovincial system described above.

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56. Supra, note 5.

57. Supra, note 15, at 315.

58. Supra, notes 15 and 21.

2.5 Legislative Jurisdiction: Satellite Telecommunication

The federal government holds legislative jurisdiction over satellites and satellite telecommunication operations in Canada. This of course does not preclude the provinces from creating legislation within their own jurisdictional areas that would have an ancillary effect on satellite operations. The provinces may tax telecommunication and telecommunication companies, they have the power to set safety and health regulations and as seen from the Kellogg case they can incidently control broadcasting content. The provinces also have de facto regulatory power over some point-to-point communication systems and this power can have an impact on communication satellites.

The federal government, however, is the main source of regulation and it is this that must be examined to determine what law governs satellite telecommunication operations in Canada.

CHAPTER III

INTERNATIONAL LAW

Legislative jurisdiction over satellite telecommunications in Canada rests with the federal government. This power does not exist in a vacuum, however. As noted previously, communication satellites have an international dimension. This has resulted in several international agreements, to which Canada is a party, and which must be considered when regulating satellite telecommunications at the national level. This has a direct effect on the Canadian law that regulates this field.

The most important of these international agreements will be considered in this chapter. The purpose of these agreements and the obligations they impose on the signatories will be examined along with the manner and extent of their implementation by Canadian law. Initially, it is important to look at the relationship between international law and municipal (national) law in light of obligations that arise from international law and the manner in which it is implemented and applied in Canadian municipal law.

3.1 The Relationship of International Law to Canadian Municipal Law

International law, as derived from the sources described in Article 38 of the Statute of the International Court of Justice,[1] gives rise to obligations between states. The incorporation of these obligations into municipal law is not, however, automatic. The position of international law in relation to municipal law in Britain and the Commonwealth is best expressed by the Privy Council in Chung Chi Cheng:[2]

> It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistant with rules enacted by statutes or finally declared by their tribunals.

It is also well settled that a state, in answering

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1. Statute of the International Court of Justice, U.N. Charter, Annex.

2. Chung Chi Cheng v. The King, [1939] A.C. 160, 167-8 (P.C.).

a claim against it for the breach of its obligations that arise from international law, may not plead that its municipal law runs contrary to those obligations or does not implement them.[3] In order to meet its obligations a state must ensure that internal procedures exist that will place the international law into its municipal law, making it municipal law.

There exist two schools of thought on the manner in which municipal law makes international law an integral part of itself. The first is the "monist" school which argues that international law is "adopted" automatically under a premise of unity of international and municipal law. The other school, called "dualist" argues that international law is only binding within municipal law if it is "incorporated" specifically by municipal law. There is as yet no resolution to the debate.[4]

Mechanisms derived from both the "monist" and "dualist" approaches are used to combine international law and municipal law in Canada. The determination as to which

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3. See further, Brownlie, I., Principles of Public International Law, 2nd ed. (Oxford, 1973) at 36 et seq.

4. See further, Williams, S.A. and de Mestral, A.L.C., An Introduction to International Law, Chiefly as Interpreted and applied in Canada, (Toronto, 1979).

mechanism prevails depends upon the source of the international law.

As far back as Blackstone,[5] the dominant principle has been that customary rules of international law are to be considered part of the English common law and are to be enforced as such unless they conflict with a statute or fundamental municipal law. As for Canada:

> The conclusion must be, it is submitted, that there is room for the view that the law on the relationship of customary international law to domestic law in Canada is the same as it is in England; customary rules of international law are adopted automatically into our law, amid a few caveats about sovereignty, and then directly applied unless they conflict with statute or some fundamental constitutional principle in which case legislation is required to enforce them.[6]

Thus Canada takes a "monist" approach when the source of international law is custom.

This mechanism cannot be used under English common

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5. Blackstone, W., Commentaries on the Laws of England, Book the Fourth, 15th ed., (London, 1809), "...the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land.", Chapter 5, at 67.

6. Macdonald, R. St.J., The Relationship between International Law and Domestic Law in Canada, in, Macdonald, Morris and Johnson, eds., Canadian Perspectives on International Law and Organization, (Toronto, 1974) at 111.

law if the source of the international law is conventional. In England the making and ratifying of conventions is a Crown prerogative and to allow automatic adoption into municipal law would allow the Crown to legislate without the consent of Parliament. This would permit the Crown to exceed its constitutional powers and is beyond the power of the Crown acting alone. The Privy Council in the Labour Conventions[7] case stated in obiter:

> Within the British Empire there is a well-established rule that the making of a Treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.[8]

The Labour Conventions case was on appeal to the Privy Council from the Supreme Court of Canada and as such has important influence on Canadian courts. The Supreme Court also affirmed this position in the Arrow River case when it held that "the Crown cannot alter the existing law by entering into a contract with a foreign power".[9] More recently in the Capital Cities case it reaffirmed "There would be no domestic internal consequences unless they arose

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7. Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326 (P.C.).

8. Ibid., 247.

9. Re Arrow River and Tributaries Slide and Boom Co., [1932] 2 D.L.R. 250, 260 (S.C.C.).

from implementing legislation giving the Convention a legal effect within Canada."[10]

In Canada then, the rule is similar to that in England: conventions require implementing legislation in order to change municipal law. When the source of international law is conventional the "dualist" approach comes into play.

The international law which regulates the international aspect of telecommunication satellites is, for the most part, conventional international law, Canada must actively meet its obligations arising from conventions by passing implementing legislation. The obligations arising from and the law implementing these agreements affecting satellite telecommunication will now be considered.

3.2 The ITU Convention[11]

Most modern telecommunications and especially satellite telecommunications depend upon radio frequencies for the propagation of signals. The nature of radio

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10. Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al., [1978] 2 S.C.R. 141, 161; (1977), 18 N.R. 181, 199.

11. International Telecommunication Convention, Nairobi, 1982, ITU, Secretariat, Geneva.

frequencies, however, is such that they are susceptable to interference when transmissions of similar frequencies from separate sources intersect. It is essential for the efficient use of telecommunications that the location, power and frequencies used by transmitters be regulated. Within the framework of a sovereign nation this regulation is easily attained. However, radio frequencies are not contained by national boundaries and may move out beyond a source nation to cause interference in another. This creates a situation where it is vital to achieve international cooperation in order to ensure viable telecommunications throughout the world. To meet this challenge the world's nations have formed the International Telecommunication Union (ITU)[12] and the members of this organization have adopted the ITU Convention along with its attendant Radio Regulations.[13]

The major function of the ITU is the allocation of radio frequencies. This allocation is limited to the distribution of radio frequencies among various radiocommu-

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12. The ITU was founded in 1865 as the International Telegraph Union to establish international regulations for telegraphy. Since then through its Convention it has revised its jurisdiction and now regulates all current types of international telecommunication. As of July 1984 these were 157 member countries.

13. Radio Regulations, ITU, Geneva, 1982.

nication services, and not among its member nations. Its mandate is to "effect allocation of the radio frequency spectrum and registration of radio frequency assignments in order to avoid harmful interference between radio stations of different countries."[14]

"Allocation" here means specifically the entry by a competent ITU Conference[15] "in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radiocommunication services."[16] "Assignment" is an authorization granted by an individual State for a radiocommunication facility to use a particular frequency or channel.[17]

Along with "allocation" the ITU makes "allotments" of radio frequencies or channels. This too is done through international cooperation and involves the "allotment" of frequencies in a manner similar to reservation of a specific

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14. Supra, note 11, Art. 4(2)(a).

15. There are two types of Conferences mandated by the ITU Convention: the Plenipotentiary Conference (Art. 6) and Administrative Conferences (Art. 7). It is through the Administrative Conferences, either world (Art. 7(1)(a)) or regional (Art. 7(1)(b)) that the allocations of frequencies take place by revision of the Radio Regulations (Art. 7(3)(1)(a), (b)).

16. Supra, note 13, Art. 1(2.1); (No.17); Table of Frequency allocations in Art. 8.

17. Ibid., Art. 1 (2.3); (No. 19).

service for one or more specific nation.[18] The unwillingness of ITU member nations to place any restrictions on their sovereignty has made such allotments a rarity. One area where such an allotment has been agreed upon concerns the broadcasting-satellite service, though even here it is limited, as it is within the competence of the ITU to make allotment of all geostationary orbital positions and their associated frequencies.[19]

"Allocation" and "allotment" are the result of international cooperation, while "assignment" is a product of national action, maintaining sovereign right in this area. The principle of sovereign right is incorporated into the ITU Convention. The current Convention clearly states in the Preamble that the it has been adopted by the member nations in order to cooperate amongst themselves to ensure that their telecommunication services operate efficiently while "fully recognizing the sovereign right of each country to regulate its telecommunication." It follows that each nation has a right of access to and use of the radio

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18. Ibid., Art. 1 (1.8); (No. 10): Allotment (of a radio frequency channel) means an entry "of a designated frequency channel in an agreed plan, adopted by a competent conference, for use by one or more administrations for a terrestrial or space radio- communication service in one or more identified countries or geographical areas and under specified conditions."

19. Ibid., Appendix 30.

spectrum, subject only to limitations specifically agreed to in the Convention.

The agreed upon allocation of frequencies to services by the ITU members is set out in Article 8 of the Radio Regulations. The world, for this purpose, is divided into three Regions.[20] Region 1 includes Africa, Europe and the Soviet Union; Region 3 the rest of Asia and Australia and Region 2 is the Americas. Frequency bands are allocated to specific types of services by Region, thus similar frequency bands might be allocated to different services in the different Regions. A particular frequency band can also be allocated to several types of services at the same time, allowing nations a choice of utilizations.[21] Among the services to which frequency bands are allocated are "fixed-satellite service"[22] and "broadcasting-satellite service"[23] both important to satellite telecommunication.

In addition to alloting frequencies to services the ITU also provides for the registry of assigned frequencies

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20. Ibid., Art. 8(2); (Nos 392 to 398).

21. For example the 10.68-10.70 GHz band has been allocated worldwide to use in Earth Exploration-Satellite services, Radio Astronomy and Space Research.

22. Supra, note 13, Art. 1 (3.3); (No. 22).

23. Ibid., Art. 1 (3.18); (No. 37).

with the International Frequency Registration Board (IFRB) in order:

> to effect an orderly recording and registration of frequency assignments made by the different countries in accordance with the procedure provided for in the Radio Regulations and in accordance with any decision which may be taken by competent conferences of the Union, with a view to ensuring formal international recognition thereof.[24]

This in turn provides protection for the registered user because stations whose frequencies have been subsequently registered must, on receipt of advice thereof, immediately eliminate harmful interference.[25]

The procedures to be followed when obtaining the registration of a new frequency assignment are set out in the Radio Regulations. The first step is a coordination procedure[26] which is put into play by advanced publication of information about the proposed frequency assignment. "The purpose of this advance information procedure is to bring to light, in the very early stages of planning, any major system incompatibilities utilizing relatively simple

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24. ITU Convention, Art. 10 (4)(a).

25. Supra, note 13, Art. 13 (22)(2), (3); (Nos 1559, 1560).

26. The coordination procedures are found in Art. 11, ibid.

methods of calculation."[27]

Once the information has been published, however, the coordination procedure is a matter for bilateral negotiation between the states concerned over possible interference - there is no legal obligation to come to an agreement although it would facilitate the actual notification and registration procedure.[28]

Subsequent to the pre-registration coordination the applying nation must notify the IFRB of the assignment if a) it desires to obtain international protection from harmful interference; or b) the frequency to be assigned will be used for international service; or c) the use of this frequency is liable to cause harmful interference to any service of another administration.[29]

The IFRB scrutinizes each notice[30] looking at

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27. DuCharme, E.D., et al., The Genesis of the 1985/87 ITU World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Space Services Utilizing it (1982), VII Annals of Air and Space Law 261, 270.

28. Supra, note 13, Art. 13 (13) and (14); (Nos 1520 to 1532).

29. Ibid., Art. 13 (1)(1); (Nos 1488 to 1491 and A 13.1).

30. These must contain the relevant information including as a bare minimum the basic characteristics specified in Appendix 3 of the Radio Regulations.

its conformity with the ITU Convention, the Table of Frequency Allocations and the other provisions of the Radio Regulations;[31] its conformity with the pre-registration notification coordination;[32] and the probability that there will be harmful interference if the coordination has not been successful.[33]

After evaluating the assignment the IFRB will register it in the Master Register if it conforms favourably with respect to the above mentioned cases.[34] Procedures for completing registration are also provided for cases where conformity is not achieved, either wholly or in part.[35] In such cases, however, when an entry in the Master Register is made, appropriate remarks make note of the reasons for an unfavourable finding as to the assignment's conformity.[36] In the end though, only those assignments registered as a result of a favourable finding receive the protection from harmful interference from

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31. Supra, note 13, Art. 13 (8)(a); (No. 1503).

32. Ibid., Art. 13 (8)(b) and (c); (Nos 1504, 1505).

33. Ibid., Art. 13(8)(c), (d) and (e); (Nos 1506 to 1512).

34. Ibid., Art. 13 (14)(2) and (15)(2); (Nos 1526, 1534).

35. Ibid., Art. 13 (13)(1) and (16)(1); (Nos 1520, 1541).

36. Ibid., Art. 13 (19); (No. 1557).

subsequently assigned frequencies.[37]

The ITU through the ITU Convention and Radio Regulations thus creates an international regulatory system for telecommunications. This system organizes the use of radio frequencies through alloçation of specific frequencies to specific services and the registration of assigned frequencies thus reducing the chance of harmful interference and improving the efficiency of telecommunications in the world.

Canada as a party to the ITU Convention accepts the obligations created by it. These obligations include inter alia respecting the allocations of frequencies to services, the assignment of frequencies in Canada and their subsequent registration, and adherence to geostationary orbit positions and their attendant radio frequencies allocated or alloted through the mechanisms laid out in the Convention. In order to meet these obligations it is essential that all Canadian persons or entities who are involved in telecommunication in Canada are also under the obligations.

As we have seen, in Canada conventional international law is implemented and applied through the enactment of municipal law. In the field of telecommunication and in particular satellite telecommunication the federal govern-

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37. Ibid., Art. 13 (22)(2) and (3); (Nos 1559, 1560).

ment holds the main legislative jurisdiction. Implementation of the ITU Convention is thus the responsibility of the federal government. This has been met. The Minister of Communications has a duty to secure the rights of Canada in telecommunication matters. To do so:

> The Minister shall take such action as may be necessary to secure, by international regulation or otherwise, the rights of Her Majesty in right of Canada in telecommunications matters and shall consult the Canadian Radio-Television Commission with respect to all such matters that, in his opinion, affect or concern broadcasting. (emphasis added).[38]

The Minister is thus empowered to adopt the regulatory system created by the ITU Convention as a means of securing those rights. The Convention is thus implemented.

The Convention is further implemented through the operation of section 7 of the Radio Act. Adherence to the allocation of frequencies to specific services by the ITU is implemented through

> 7(1) The Minister may make regulations
> ...
> (b) classifying radio stations and prescribing with respect to each class of station
> ...
> ii) the frequencies and power to be used and
> iii) the nature of the service to be rendered except in the case of a broadcasting serv-

38. Radio Act, R.S.C. 1970, c.R-1, s8(1). This is reiterated in the Department of Communications Act, R.S.C., 1970, c.C-24, s.5(1)(f).

ice (emphasis added).[39]

This section, along with section 5(b)[40] implements the assignment of allocated frequencies to services within Canada in accordance with the Convention. The Canadian government has also assumed the responsibility for pre-coordination and registration of assignments through the operations branch of the Department of Communications.[41]

Futhermore, not only the Canadian government but also Canadian people and entities involved with radio telecommunication must fulfill the obligations arising from the operation of the ITU Convention. To implement this section 10 of the Radio Regulations, Part II[42] states:

> 10. The licensee shall observe the provisions of the International Telecommunication Convention and any bilateral or multilateral telecommunications agreements for the time being in force and those regulations pertaining to the operation of radio that are made under the said Convention and agreements.

Canada adheres to the ITU Convention and the mechanisms it creates for international regulation of

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39. Ibid., s.7(1).

40. Ibid., "determine the power, radio frequency and call letters to be used by broadcasting transmitting undertakings".

41. Registration of frequency assignments is the joint responsibility of the Operations branch and International branch of the Department of Communications.

42. C.R.C., 1978, c.1372.

telecommunications for both legal and practical reasons. It has a strong influence on the planning and regulation of telecommunications nationally. This is especially true where satellite telecommunication is concerned because the ITU not only allocates the radio frequencies but also the geostationary orbital positions so vital to communication.

A good example of the Convention's influence can be seen in the development of a Direct Broadcasting Service (DBS) for Canada. Canadian planners have developed a scheme for the best way to implement such a service for Canada. In order to proceed with such a plan Canada had to bring it to the negotiating table at the Regional Administrative Radio Conference of 1983 (RARC '83) where an international plan for allotment of frequencies and geostationary orbital positions for DBS was formulated for Region 2. RARC '83 was successful in creating an a priori type plan for DBS and Canada got most of what it desired, to including the satellite power limits it felt were best for the proposed Canadian system.[43] Only subsequent to this agreement

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43. As of this writing DBS systems have yet to be established in Canada. RARC'83 has given Canada the international legal framework to go ahead with its proposed system. RARC'83, however, overreached its mandate by adopting certain technical parameters for DBS in Region 2 that are contrary to those of the WARC '77 Plan. Canada will have to delay their explicit implementation until they are incorporated into the Plan that will come out of WARC'85 and thus be strictly

could Canadian regulation of DBS begin to take place, because only then was the exact nature of the service properly defined.

3.3 The INTELSAT Agreement[44]

The ITU Convention and Radio Regulations are applicable to all areas of international radiocommunication whereas the INTELSAT Agreement deals exclusively with satellite telecommunication. The objective of the INTELSAT Agreement is to create an international organization responsible for the provision, on a commercial basis, of the space segment[45] for use in international telecommunica-

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legal. The current state of DBS in Canada can still be said to be tentative.

44. Agreement Relating to the International Telecommunication Satellite Organization "INTELSAT", 23:4 U.S.T. 3813 (1972); opened for signature 20 Aug. 1971; entered into force 12 Feb. 1973 (hereinafter referred to as the INTELSAT Agreement) and a similar agreement to this that has an effect on Canadian telecommunication law is the Convention on International Maritime Satellite Organization "INMARSAT"; 31:1 U.S.T. 1 (1979); opened for signature 3 Sept. 1976; entered into force 16 July 1979. The INMARSAT Convention is not discussed in detail here because of its similarity to the INTELSAT Agreement.

45. Defined in Art. I, para. (h) of the INTELSAT Agreement as "the telecommunications satellites and the tracking, telemetry, command, control monitoring and related

tions.

The INTELSAT Agreement gives birth to an organization with its own international juridical personality[46] and a structure comprised of four organs. The principal organ is the Assembly of Parties which is composed of all the states party to the Agreement. Here each member state has one vote since decisions are made on aspects of INTELSAT which concern the members as sovereign nations.[47] The Assembly makes recommendations concerning INTELSAT's general policy and long term objectives. These powers of recommendation[48] are limited in commercial matters and since INTELSAT is primarily a commercial entity the principal organ is not the supreme one.

The second organ, the Meeting of Signatories,[49] is also not the supreme one. It exists to provide all the investors equal participation in the making of INTELSAT's general policies. Here again all signatories get one vote.

(continued from previous page)
facilities and equipment required to support the operations of these satellites."

46. INTELSAT Agreement, Supra, note 44, Art. IV.

47. Ibid., Art. VII.

48. Ibid., Art. VII, para. (c) lists the detailed functions and powers of the Assembly of Parties.

49. Ibid., Art. VII.

The supreme organ is the Board of Governors.[50] It is responsible for the design, development, construction, establishment, operation and maintenance of the INTELSAT space segment.[51] To perform the management of INTELSAT the Board of Governors has been given wide powers[52] that are exercised through a weighted voting system based on each Governor's investment share size in INTELSAT. This creates three categories of Governors: those who represent signatories whose share does not fall below a specified minimum size; those who represent a group of signatories, not represented in the first category, who combined, have a share greater than the minimum; and those who represent any group of at least five signatories, not otherwise represented, from any one of the ITU regions, regardless of the amount of shares held by the group.[53]

Direct management of the daily affairs of INTELSAT is carried out by the fourth organ: the Executive Organ headed by the Director General.[54]

In agreeing to form INTELSAT the Parties and

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50. Ibid., Art. IX.

51. Ibid., Art. X, para. (a).

52. Ibid., Art. X, para. (b) sets out these powers.

53. For details see ibid., Art.X para. (a).

54. See ibid., Art. XI.

Signatories acquired rights and obligations. These are referred to in a number of the articles of both the INTELSAT Agreement and the Operating Agreement.[55] The most important of these concern coordination between INTELSAT and other satellite telecommunication systems operated by member states.

While the stated goal of the INTELSAT Agreement is:

> to continue the development of telecommunications satellite system with the aim of achieving a single global commercial telecommunications satellite system. (emphasis added)[56]

the members have not lost the right to set up and use satellite telecommunication systems other than INTELSAT. They are obligated, however, to coordinate such systems with INTELSAT so as to ensure technical compatibility in order to avoid harmful interference with and economic harm to INTELSAT.[57]

In the case of separate domestic public telecommunications services the Party or Signatory shall, prior to establishing the service, consult with the Board of

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55. Operating Agreement Relating to the International Telecommunication Satellite Organization "INTELSAT"; 23:4 U.S.T. 4091 (1972); opened for signature 20 Aug. 1971; entered into force 12 Feb. 1973.

56. INTELSAT Agreement, supra, note 44, Preamble.

57. Ibid., Art. XIV.

Governors which shall make recommendations regarding the technical compatibility between the proposed service and the INTELSAT space segment.[58] Where the proposed service is international the Party or Signatory consults the Assembly of Parties through the Board of Governors. Recommendations concerning both the technical compatibility and economic harm are then expressed by the Assembly.[59] These recommendations must be forthcoming within six months of commencement of proceedings.[60] Experimental systems and those for national security purposes are not required to be coordinated.

An important element in this coordination is the concept of "economic harm". Procedures adopted by the Board of Governors include tests for such harm which focus on questions concerning the impact the separate service might have on costs and utilization charges for planned and existing INTELSAT facilities, and how much signatories not participating in the separate system would have their investment shares increased. It leaves, however, a criterion of "other factors" to be assessed on a case-by-case

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58. Ibid., Art. XIV, para. (c).

59. Ibid., Art. XIV, para. (d).

60. Ibid., Art. XIV, para. (f).

basis.[61] "Economic harm" is thus flexible enough to ensure separate systems do not develop to the detriment of the INTELSAT system. Yet perhaps it is too flexible, in that the "economic harm" evaluation could be used to maintain the INTELSAT monopoly to the detriment of international telecommunication development.

Canada, as a Party to the INTELSAT Agreement has accepted the obligations which arise from it. Canada must therefore implement these obligations in municipal law. One of the first steps in doing this was the creation of a designated Canadian Signatory.

It is one of the unusual features of the INTELSAT Agreement that while states are the Parties to the Agreement the Signatories may either be the state itself or the telecommunications entity designated by the state.[62] Canada has opted for the designated signatory and created Teleglobe to serve in this role.

Teleglobe is a corporation created by an act of Parliament. The original act was known as the Canadian

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61. Intersystem Coordination Procedures: Proposed Procedures for Implementation of Article XIV(d) Requirements Concerning Significant Economic Harm, INTELSAT Document No. BG-28-63E M/6/77, June 29, 1977.

62. INTELSAT Agreement, supra, note 44, Art. I, para. (g).

Overseas Telecommunications Corporation Act[63] but this was changed to the Teleglobe Act[64] in 1975. The main purposes of Teleglobe are set out in section 7 of the Act:

> a) to establish, maintain and operate in Canada and elsewhere external telecommunication services for the conduct of public communications;
>
> b) to carry on the business of public communications by cable, radiotelegraph, radiotelephone or any other means of telecommunication between Canada and any other place;
>
> c) to make use of all developments in cable and radio transmission or reception for external telecommunication purposes as related to public communication services;
>
> d) to conduct investigations and researches with the object of improving the efficiency of telecommunication services generally; and
>
> e) to coordinate Canada's external telecommunication services with telecommunication services of other nations.[65]

Teleglobe also has a legal personality that specifically empowers it to enter into agreements and arrangements with any government.[66] Teleglobe thus becomes the means of implementing the INTELSAT Agreement in Canada.

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63. R.S.C. 1970, c.C-11.

64. S.C. 1974-75-76, c.77.

65. Supra, note 63, s.7.

66. Ibid., s.9(1)(b).

The results of Canadian participation in INTELSAT have a significant effect on the regulation of satellite telecommunications in Canada. Any satellite system that operates separately from INTELSAT whether by Teleglobe, the federal government or any other Canadian entity must be coordinated with INTELSAT. This has potential for impeding the efficient development of Canadian satellite telecommunications because Canada is obligated to sustain the INTELSAT monopoly even at the expense of national interests.

The question thus arises as to the means by which Canada can protect its telecommunications development within the INTELSAT structure. The first issue is the control of the Signatory, Teleglobe. Can Teleglobe as Signatory follow policies contrary to the Government's where furtherance of INTELSAT is concerned? It is unlikely. The Teleglobe Act clearly states the role of Teleglobe as follows:

> 8(1) The Corporation is for all purposes of this Act an agent of Her Majesty and its powers under this Act may be exercized only as an agent of Her Majesty. (emphasis added)

The ultimate control of the powers exercized by Teleglobe thus rest with the government. This also means that should the federal government adopt policies contrary to those of Teleglobe, the government policies take precedent. This is of current importance because the role of INTELSAT as the sole means of international satellite

telecommunication is being questioned, in the U.S. in particular, but also in Canada. As we shall see in the next section agreements between Canada and the U.S. have broadened the possibilities for international use of each others communication satellites. Furthermore a situation is arising in Canada where private firms utilizing leased Canadian satellite transponders are selling relayed signals emanating in the U.S. to places outside Canada. This too raises issues concerning Canadian obligations to INTELSAT.[68] The situation is still novel and there is, as yet, no indication of how the legal questions will be answered. It may be, however, that Canada will have to re-evaluate its membership in INTELSAT and the consequences this will have on the development and regulation of the Canadian satellite telecommunication industry.

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68. As an example of this, currently a Canadian telecommunications company that provides a satellite service, picking up U.S. television broadcasts (terrestrial propagation) and relaying them to the Canadian north, wishes to sell these retransmissions to another country. This raises the issue of whether or not Canada must seek coordination with INTELSAT over this service.

3.4 Bilateral Agreements

Canada, over the years, has entered into a number of bilateral agreements on a variety of subjects concerning telecommunications. These agreements have been principally with the United States and have usually taken an informal form: the exchange of notes or letters. Despite this form they have played a significant role in achieving an efficient telecommunication service for Canada.[69] In this section the exchanges of letters between the U.S. and Canada on use of communication satellites will be examined. The question arises first as to the legal effect of such exchange agreements.

The ultimate legal expression of bilateral agreement in international law is the treaty. The Vienna Convention on the Law of Treaties[70] defines a treaty as:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two

69. There are now over 15 agreements between Canada and the United States concerning telecommunications. They cover such issues as the assignment of frequencies on the North American Continent, the coordination and use of radio frequencies above thirty megacycles per second and pre-sunrise operation of certain standard (AM) radio broadcasting stations.

70. The text of the Convention is reproduced in (1969), 8 Int'l Legal Mat. 679.

> or more related instruments and whatever its particular designation.[71]

This encompasses a wide variety of agreements and implies that there is little need for any "formality". As Brownlie states when writing about treaty form:

> The manner in which treaties are negotiated and brought into force is governed by the intention and consent of the parties. There are no substantive requirements of form, and thus, for example an agreement may be recorded in the minutes of a conference. In practice form is governed partly by usage, and thus form will vary according as the agreement is expressed to be between states, heads of states, governments (increasingly used) or particular ministers or departments.[72]

An exchange of notes or letters is thus an acceptable mechanism for establishing a treaty relationship so long as it expresses in writing the intent and consent of the parties. Indeed, the adoption of treaties by this simplified method is becoming more and more commonplace.[73]

Given that such agreements are treaties, the impact they have on municipal law is, as mentioned earlier in this chapter; if they affect the rights of entities or persons in Canada they must be implemented through legislation.

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71. Ibid., Art. 2(1)(a).

72. Brownlie, I., supra, note 3, at 584-5.

73. See further, Gotlieb, A., Canadian Treaty Making, (Toronto, 1968).

Satellite telecommunication traffic between Canada and the U.S. is governed by an arrangement created by an exchange of letters. The initial agreement was formulated in 1972 when letters were exchanged between Bert W. Rein, the Deputy Assistant Secretary for Transportation and Telecommunications of the United States and K.B. Willianson, Minister of the Embassy of Canada of Washington[74] and F.G. Nixon, Administrator, Telecommunications Management Bureau, Canadian Department of Communications.[75]

The impetus for the agreement was an amendment of the Telesat Canada Act[76] changing the objects of the company from providing strictly intra-Canada telecommunication services to providing international service. The exchange clarified the new situation. Canada asserted that the primary purpose for Canadian satellites was to provide domestic telecommunication services and that any services to or between points outside Canada would only be incidental to

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74. U.S. Letter of Nov. 7, 1972 the text of which appears in the U.S. Department of State Bulletin, Feb. 5, 1973, at 146.

75. Canadian Letters of Nov. 6 and Nov. 8, 1972 the text of which appears in ibid., 145 and 147.

76. Letters Patent 4.1.73, persuant to s.33 of the Telesat Canada Act, R.S.C., 1970, c.T-4 tabled in the House of Commons 4.1.73 and effective 15.2.73; Canada Gazette Part I, No. 6, Vol. 107, p. 542.

the primary purpose. Canada also reassured the United States that the new Telesat objectives would not be inconsistant with Canada's obligations under the INTELSAT Agreement. The United States accepted Canada's position and confirmed that they would continue to provide launching facilities for Canadian telecommunication satellites. Furthermore, the agreement provides for special emergency conditions under which the satellite telecommunications facilities in one country may assist those in the other country. It is made clear that satellite transborder services need the consent of both countries to be implemented.

This agreement was signed by relatively low level officials of each government and has never been ratified by the internal ratification processes of either nation. Even so it still fits the treaty definition set out in the Vienna Convention; the parties showing their willingness to be bound by this agreement from their actions. Canada in particular has shown this through its prosecution of Canadian owners of earth stations that pick-up and retransmit U.S. satellite signals.[77] It has only become evident recently that Canada may not have passed appropriate municipal legislation to implement this aspect of the

77. See for example C.R.T.C. v. Shellbird Cable Ltd. (1981), 60 C.P.R. (2d) 215 (Nfld. P. Ct.).

agreement.[78]

The level of this agreement does indicate, however, that while it may be a "treaty" neither party considers it to have the same status as a regular treaty. In Canada, because it was never approved by the Cabinet or Parliament, it may not have the force of law municipally. This, of course, may not be used to excuse non-performance of obligations that arise from the agreement.

The effect of this 1972 agreement was to limit transborder telecommunications via satellite to a significant extent. The bulk of such service was being provided by terrestrial telecommunications services. This limited the potential growth of the Canadian telecommunications industry and with the rapid advance of that industry pressures mounted indicating changes were needed in the agreement. In August 1982 an addendum to the 1972 exchange of letters increased the transborder satellite service.[79]

The addendum took the form of an exchange of letters between the Canadian Ambassador to the United States of America, Allan Gotlieb and the Assistant Secretary of

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78. See further Chapter V, infra.

79. The text of this exchange of letters is found in a Department of Communications News Release, Canadian and United States Communications Satellites to be Used for Transborder Services, Aug. 26, 1982.

State for Economic and Business Affairs, U.S. Department of State. The level of the signatories here shows more expressly each country's consent and a wish to be bound by the agreement.

The agreement recognizes the considerable economic contribution that transborder fixed-satellite services could bring the U.S. and Canada and in order to bring this about increases the limited use of such facilities set out in the 1972 agreement. The joint use of facilities of U.S. and Canadian domestic systems is authorized under the following principles:

a) the services will be provided jointly between Canada and the U.S. by entities authorized by Canada and recognized as operating entities in the U.S.

b) such services must conform to the applicable regulatory procedure of each country

c) ownership of Canadian earth stations shall be Canadian and U.S. stations in conformity with U.S. law.

d) The concept of INTELSAT is still supported.[80]

Pursuant to this agreement Canada immediately authorized Telesat to enter into such a venture.[81]

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80. INTELSAT agreed to this arrangement in Oct. 1982.

81. Announced in the Department of Communications News Release supra, note 79. The first U.S. company to reach agreement with Telesat on such a venture was the American Satellite Company.

This argreement, at present, defines the regulation and policy towards U.S./Canada transborder satellite services. It pertains only to fixed-satellite services and thus is considered by the Canadian government to fall within the prohibitions of international and domestic radio regulation on the authorized reception of private signals.[82] The agreement also does not derogate Canada's authority to regulate the reception and destribution of radio and television programming in Canada. It does, however, expand the potential for different kinds of communication services to be developed by Canadian entities. They may now have greater access to U.S. markets, though this will still be subject to Canadian regulatory authority.[83]

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82. News Release, ibid.; see also, infra, Chapter IV.

83. Ibid., the Gotlieb letter, para. 8.

CHAPTER IV

THE REGULATION OF SATELLITE TELECOMMUNICATION IN CANADA

Canadian satellite telecommunication policy is designed to further the national telecommunication policy in Canada.[1] Consequently, the regulatory framework that governs satellite telecommunication is a by-product of the legal regime developed from national telecommunications policy. This chapter examines that legal regime and the framework it creates for satellite telecommunication.

The jurisdiction over telecommunication in Canada is divided between the federal government and the Provinces; the legal regime thus comes from both sources.[2] The communication satellite, however, falls within the exclusive jurisdiction of the federal government. Therefore, the legal regime created by the federal government for telecommunications is the only one that provides the regulatory framework for satellite telecommunication.

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1. For further see supra, Chapter I.

2. See supra, Chapter II for detail.

4.1 Federal Regulation of Telecommunications

The Federal regulatory structure for telecommunications is not derived from one omnibus "Telecommunications Act". Instead, there are a number of sources of regulation. The predominant reasons for this are the technical complexity of and the Canadian policy for telecommunications. The complexity of telecommunications has given rise to regulation derived from sources as varied as the Criminal Code[3] and the Railway Act.[4] Regulation has had to address issues such as technical equipment standards, frequency spectrum allocation and licensing.

Canadian telecommunications policy has greatly contributed to the multiplicity of regulatory sources. As examined in Chapter I, Canadian policy developed in reaction to the technical complexity of telecommunications, and, more importantly, to the potential effects of telecommunications on Canada as a sovereign multicultural nation. A major part of Canadian telecommunications policy has been the division of telecommunications into two categories for regulatory purposes; broadcasting and point-to-point telecommunications. This consequently divides the regulatory

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3. R.S.C., 1970, c. C-34, as am.

4. R.S.C., 1970, c. R-2, as am.

authority over telecommunications. Regulatory authority for point-to-point telecommunication lies, for the most part, with the Minister of the Department of Communications (DOC). That for broadcasting lies, for the most part, with the Canadian Radio-television and Telecommunications Commission (CRTC).[5] Authority over the technical aspects of telecommunications rests with the DOC. Together they create the regulatory framework for telecommunications and oversee its implementation.

4.2 The Department of Communications

The source of the Department of Communications' general authority over telecommunications is the Department of Communications Act.[6] The duties, powers and functions of the Minister, given therein, extend to all matters over which the Parliament of Canada has jurisdiction relating to telecommunication and the development and utilization of communication undertakings, facilities, systems and services for Canada.[7] More specific authority is given in other

5. As will be seen, however, the CRTC's authority does extend to certain aspects of point-to-point telecommunications.

6. R.S.C., 1970, c. C-20, as am.

7. Ibid., s. 4.

Acts dealing with particular aspects of telecommunication.[8]

The most important of these other Acts in terms of vesting authority to the Minister over telecommunications in Canada is the Radio Act.[9] The Act states:

> 3.(1) Subject to subsections (2) and (3), no person shall
> (a) establish a radio station, or
> (b) install, operate or have in his possession a radio apparatus
> at any place in Canada or on board any
> (c) ship or vessel that is registered or licensed under the Canada Shipping Act or owned or under the direction or control of Her Majesty in right of Canada or a province,
> (d) aircraft registered in Canada, or
> (e) spacecraft under the direction or control of Her Majesty in right of Canada or a province, a citizen or resident of Canada or a corporation incorporated or resident in Canada,
> except under and in accordance with a licence and, to the extent that it is a broadcasting undertaking, except under and in accordance with a technical construction and operating certificate, issued by the Minister under this Act.[10]

The establishment of a radio station[11] and the

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8. See for example the Telegraphs Act, R.S.C., 1970, c. T-3 and the Federal Canada Act, R.S.C., 1970, c. T-4, as am.

9. R.S.C., 1970, c. R-1, as am.

10. Ibid., s. 3(1).

11. The definition given by the Act is: "Radio station means a place wherein radio apparatus is located".

utilization of radio apparatus in Canada are subject to mandatory government approval and it is the Minister who gives that approval.

In giving approval the Minister may issue either radio licences or technical construction and operating certificates.[12] The minister may prescribe classes of licences and of technical construction and operating certificates[13] and make them subject to such terms and conditions as he considers appropriate to ensure the orderly development and operation of radiocommunication in Canada.[14]

Radio licences are issued "in respect of radio stations and radio apparatus to the extent that they are not broadcasting undertakings."[15] Technical construction and operating certificates are issued "in respect of radio stations and radio apparatus to the extent that they are broadcasting undertakings".[16] This wording creates an important distinction between the two types of approval. It

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Ibid., s. 2(1).

12. Ibid., s. 4(1)(b).

13. Ibid., s. 4(1)(a).

14. Ibid., s. 4(1)(b).

15. Ibid., s. 4(1)(b)(i).

16. Ibid., s. 4(1)(b)(ii).

gives the Department of Communications complete authority to licence point-to-point telecommunication by radio and limits its authority over broadcasting by radio to approval of its technical aspects. Ministerial authority in relation to broadcasting is set out in section 5 of the Act where he is given the duty to "regulate and control all technical matters relating to the planning for and the construction and operation of broadcasting facilities."[17]

The Minister is given wide discretion to issue licences and technical construction and operating certificates. He may set terms and conditions to their issue and may amend conditions where he considers such amendment necessary for the purpose for which the original conditions were provided.[18] The scope of this discretion is so great that in the case where a technical construction and operating certificate is issued this wide discretion could be used to usurp the licensing authority of the CRTC over broadcasting.

The Minister has the power to suspend or revoke a licence or technical construction and operating certificate where the holder fails to live up to the conditions of

17. Ibid., s. 5.

18. Ibid., s. 4(1)(e).

approval or has obtained that approval through fraud.[19] This power, however, may only be invoked with the consent of the operator or if both proper notice and a reasonable opportunity to be heard have been given to the holder.[20] The Act further gives the Minister the authority to make exemptions from this approval in certain circumstances[21] through regulations.[22]

The Radio Act also gives the Minister a great deal of power to regulate telecommunication in Canada by giving him the authority to make regulations prescribing the type of radio apparatus to be utilized with each class of radio station, assigning frequencies and power to be used and setting out, except in the case of a broadcasting service, the nature of the service to be rendered.[23] The Minister thus controls the fundamental aspects of radiocommunication in Canada.

The procedure for attaining the appropriate approval is determined by the Minister. He has the

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19. Ibid., s. 4(1)(d).

20. Ibid., s. 4(2).

21. Ibid., s. 3(2); the circumstances are set out in ss. 3(2)(a), (b) and (c).

22. Ibid., s. 7(1)(1).

23. Ibid., s. 7(1)(b) and s. 5(b).

authority to prescribe by regulation the form and manner of applications for licences[24] and the form of and information to be submitted with an application for a technical construction and operating certificate.[25] The determination of who may apply to the Minister for a licence is a power of the Governor-in-Council.[26]

The General Radio Regulations, Part I[27] set out specifically, in sections 5 to 17, persons who may hold licences. The actual application procedure for a licence is not detailed in the Regulations. The only regulation regarding licence application states only that:

> Applications for licences for radio stations shall be dealt with on their individual merits and shall be made on the prescribed form obtainable from the Department, Ottawa, or a departmental radio inspector.[28]

There are no provisions for a formal hearing of the application and no provision in the Act or the Regulations

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24. Ibid., s. 7(1)(a).

25. Ibid., s. 5(a).

26. Ibid., s. 6(1)(c)(i).

27. C.R.C., 1978, c. 1371.

28. General Radio Regulations, Part II, C.R.C., 1978, c. 1372. There is no comparable regulation for applications for technical construction and operating certificates.

allowing an appeal to the decision of the Minister.[29] A hearing is only required in the case of suspension or revocation of a licence.

4.2.1 Implications for Satellite Telecommunication

The Department of Communications, through its Minister, is responsible for the licensing of point-to-point telecommunication by radio, the assignment of the frequency spectrum to radio services and the regulation and control of all technical matters relating to both point-to-point and broadcasting facilities. The telecommunication satellite functions through radiocommunication and must abide by the regulation of the Department to the extent that it is not a broadcasting undertaking. The General Radio Regulations, Part II specifically makes "space stations" one of the classifications of radio stations under their author-

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29. While it is beyond the scope of this thesis to analyse the administrative law aspects of this process it should be mentioned that the licensing procedure may be an admistrative decision as opposed to judicial or quasi-judicial. There is nothing in the language of the Act that suggests a hearing is contemplated before a decision is reached. It is a question of granting rights and there are substantive criteria to be applied to all cases. Furthermore, the adversarial process is not in effect. See MNR v. Coopers and Lybrand, [1979] 1 S.C.R. 495; 92 D.L.R. (3d) 1.

ity.[30]

A point-to-point satellite telecommunication system must be licensed by the Department of Communications in order to operate.[31] It must meet the standards set out by the Minister for that type of service. Also, to the extent that the system is a broadcasting undertaking, it must be issued a technical construction and operating certificate, subject to the terms and conditions of the Minister. The scope of the term "broadcasting undertaking" under the Act encompasses all aspects of a satellite telecommunication: transmitting earth stations, communication satellites and receiving earth stations.

The regulation of receiving earth stations is of particular interest in satellite telecommunications. One of the most important exemptions to licensing made by the Minister is to radio receivers that are not part of a broadcasting receiving undertaking and intended only for the reception of broadcasting.[32] This exemption eliminates the need for licensing of receivers like televisions and radios and has been extended to some types of satellite

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30. Supra, note 28, ss. 4(f) and 7(1)(e).

31. Supra, note 9, s. 3(1)(e).

32. Supra, note 28, s. 6.

television receive-only (TVRO) earth stations.[33] This has opened up the potential of satellite telecommunications but, as will be shown in Chapter V, it could also intensify the conflict over which satellite signals may be received and whose rights in those signals will be protected. This has created controversy in this area.

The Radio Act gives the Governor-in-Council the authority to determine who may be issued licences by the Minister.[34] This, in effect, allows the determination of who may operate a satellite telecommunication system in Canada. There is no government monopoly expressed in regulation as regards the ownership of communication satellite systems. Private ownership is possible. In fact, the wording of section 3(1)(e) of the Radio Act, "spacecraft under the direction or control of ... a citizen or resident of Canada or a corporation incorporated or resident in Canada", would suggest that private ownership is not only permitted, but expected. Privately owned satellite systems, as found in the United States have not, however, come to Canada. This is a product of Canadian policy as much as any other factor and illustrates the effect governmental policy

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33. General Radio Regulations, Part II, Amendment, S.O.R./83-422.

34. Supra, note 9, s. 6(1)(c).

has, even when regulation does not specifically disallow a thing. The authority to allow ownership of satellite telecommunication apparatus rests with the Department of Communications.

4.3 The Canadian Radio-television and Telecommunication Commission (CRTC)

The Canadian Radio-television and Telecommunications Commission Act[35] is the constitutional Act of the CRTC. Section 14 establishes its objects and powers dividing them into two distinct categories; those in relation to broadcasting, which are set forth in the Broadcasting Act,[36] and those in relation to telecommunication other than broadcasting set forth in the Railway Act[37] and the National Transportation Act.[38]

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35. S.C., 1974-75-76, c. 49.

36. R.S.C., 1970, c. B-11, as am.

37. Supra, note 4.

38. R.S.C., 1970, c. N-17.

4.3.1 Powers in Broadcasting Matters

Jurisdiction in relation to broadcasting in Canada rests with the federal government which through the Broadcasting Act vests powers in the CRTC to exercise this jurisdiction. Section 15 of the Act sets out the broad objects of the CRTC. These are to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act.[39] In order to carry out these objects the CRTC is given regulation making powers[40] and licensing powers.[41]

The CRTC may make regulations in several specific areas respecting program standards, the character of advertizing, the political use of broadcasting and network operations.[42] It also has the broad power to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects".[43] Licensing powers include the abilities to prescribe classes

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39. See supra, Chapter I, p. XX for detail.

40. Supra, note 36, s. 16.

41. Ibid., s. 17.

42. Ibid., s. 16(1)(b).

43. Ibid., s. 16(1)(b)(ix).

of licences,[44] to issue licences in "furtherance of the objectives" of the CRTC[45] and to revoke licences.[46] The CRTC has broad discretion in using its powers under these sections of the Act and

> ...has not declined the invitation of such sections to exercise its discretion expansively. The breadth of the Act's language has tended to insulate the Commission against legal attack.[47]

The Courts have upheld the CRTC's broad use of its discretionary powers when this use has been challenged.[48]

A broadcasting undertaking[49] cannot be carried on without a valid and subsisting broadcasting licence.[50]

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44. Ibid., s. 16(1)(a).

45. Ibid., s. 17(1).

46. Ibid., s. 16(1)(c).

47. Johnston, C.C., The Canadian Radio Television and Telecommunications Commission, A Study of Administrative Procedure in the CRTC, study prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1980).

48. See, for example, In re Capital Cities Communications Inc., [1975] F.C. 18 (F.C.A.)

49. The Broadcasting Act, s. 2 defines "broadcasting undertaking as including a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada."

50. Supra, note 36, S. 28(3).

The CRTC may issue broadcasting licences for terms not exceeding five years, subject to such conditions deemed appropriate for the implementation of the broadcasting policy enunciated in section 3 of the Act.[51] These factors make the licensing function of the CRTC its most important power in carrying out its objects. The majority of applications made to the CRTC concerning broadcasting matters are for the issue, amendment or renewal of broadcasting licences.[52]

The CRTC must hold a public hearing in connection with an application for the issue of a broadcast licence.[53] In all other matters that come before it, however, it has the discretion to decide whether it would be in the public interest to hold a public hearing.[54] The CRTC is given wide powers with which to conduct its hearings and may make rules respecting the procedure for making applications and the conduct of hearings resulting from those applications.[55]

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51. Ibid., s. 17(1)(a).

52. Johnston, op. cit., note 17, at 21.

53. Supra, note 36, s. 19(1).

54. The nature of this discretion is discussed in National Indian Brotherhood et al. v. Juneau et al. (No. 3), [1971] F.C. 498 (F.C.T.D.)

55. Supra, note 36, ss. 19(7) and 21.

The procedures for application to the CRTC for the issue, amendment or renewal of a broadcast licence are explicitly laid down in the Act and the CRTC Rules of Procedure.[56] The Rules provide that all applications shall be in writing containing particulars outlined in section 3 of the Rules. Public notice is to be given of any public hearing to be held in connection with the application.[57] Any interested person may become an intervener following the procedures laid down in the Rules, section 14 and the applicant may object to an intervener stating the grounds for so doing. The application then proceeds to hearing.

The character of the broadcast hearings is informal. No new evidence may be introduced except in support of statements contained in the application, intervention or reply and it is not taken under oath. Applicants and interveners make presentations and are questioned by the Commissioners and Commission Counsel on both their written and oral presentations. Cross-examination beyond the questioning of the CRTC does not take place.[58]

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56. C.R.C., 1978, c. 375.

57. Supra, note 36, s. 20(1).

58. The lack of a right to cross-examine during the hearing

The decision of the CRTC in an application is final, except as provided for in the Broadcasting Act. The Act provides two exceptions. An appeal lies from a decision of the CRTC to the Federal Court of Appeal, upon leave of the Court, on a question of law or jurisdiction.[59] The appeal must be laid within one month of the date the decision was issued. The second exception is that CRTC decisions are subject to Cabinet review, a consequence of which is that the Governor-in-Council may set aside the decision or refer it back to the CRTC for reconsideration and rehearing.[60] This exception is limited, however, because the Governor-in-Council must act within sixty days of the issue, amendment or renewal of the broadcast licence and since the section only refers to the Governor-in-Council, he must act on his own motion and not in response

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(continued from previous page)
procedure was upheld by the Federal Court of Appeal in Lipkovits v. C.R.T.C. [1983] 2 F.C. 321; (1982), 45 N.R. 383, (F.C.A.) where it was held that no statutory requirement existed creating such a right. For an assessment of the CRTC Rules of Procedure see Johnston, C.C., New Developments in Broadcasting Practice and Procedure, in, Grant, P.S., ed., New Developments in Canadian Communications Law and Policy, (Law Society of Upper Canada, 1980)

59. Supra, note 36, s. 26.

60. Ibid., s. 23.

to petitions of interested parties.[61]

The supervisory powers of the CRTC create for it the function of policy-maker. As noted in Chapter I the CRTC has been very active in formulating policies especially as guidelines for its licencing decisions. The Courts have upheld this use of policy statements.[62] This power of the CRTC to make policy has in fact supplanted to a significant extent the use of its regulation-making power in the exercise of the licensing function. Of this the Courts have said:

> I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any

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61. An examination of the deficiencies of Cabinet review of independant tribunals is beyond the scope of this thesis. Concern over this has been expressed by certain publicists as, for example, in the discussion found in Janisch, H.N., The Role of the Independant Regulatory Agency in Canada (1978), 27 U.N.B.L.J. 83. A number of Bills have also been introduced to Parliament over the years to amend the Canadian Radio-television and Telecommunications Act, supra note 3, to allow Cabinet directions to the CRTC of a wider type and with a clearer legal basis than is now found in the Act. The latest effort, Bill C-20, 32-33 Elizabeth II, 1983-84, s. 15 died with the calling of the Sept. 4, 1984 Federal election.

62. See statement by Laskin, C.J.C. (as he was then) in Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, 171; (1977), 18 N.R. 181, 208.

policy statements.[63]

The CRTC, in this area and with the blessing of the courts has elevated policy statements to the status of regulation, absent any actual regulation. Thus, the CRTC furthers its regulatory powers with respect to broadcasting matters.

4.3.2 Powers in Point-to-Point Telecommunication Matters

In addition to broadcasting regulatory powers, the CRTC has vested in it regulatory powers over aspects of point-to-point telecommunication. These powers are narrower in scope than those it has in broadcasting matters and its jurisdiction is not as great. As noted in Chapter II jurisdiction to regulate point-to-point telecommunication in Canada is divided de facto between Federal and Provincial spheres. The jurisdiction of the CRTC is thus limited to those services and facilities coming under Federal jurisdiction. The CRTC Act,[64] which constitutes the CRTC, transfers to the Executive Committee of the CRTC all the powers, duties and functions related to point-to-point telecommunication that had been vested in the Canadian

63. Ibid., 208 (N.R.).

64. Supra, note 35.

Transport Commission (CTC).[65]

The CRTC's principal regulatory powers in this area are found in sections 320 and 321 of the Railway Act[66] and in the National Transportation Act.[67] All tolls to be charged by federally regulated entities for telephone or telegraph services must meet the approval of the CRTC under the standard that:

> tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.[68]

The CRTC has power of approval over all agreements in relation to the connection of federally regulated systems to any other systems.[69] The CRTC also has the power to hold hearings,[70] to issue orders and to make regulations[71] with respect to its jurisdiction in point-to-point telecommunication.

Section 3 of the Broadcasting Act provides policy

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65. Ibid., ss. 14(2), (3).

66. Supra, note 4.

67. Supra, note 38.

68. Supra, note 4, s. 321(1).

69. Ibid., s. 320(1).

70. Supra, note 38, ss. 17-19.

71. Ibid., s. 46.

principles to guide the CRTC in the carrying out of its mandate in broadcasting matters; no such statutory policy principles exist for point-to-point telecommunication. As with the Broadcasting Act however, the CRTC interprets the language of the Railway Act, pertaining to itself, in an expansive fashion. At the assumption of jurisdiction over point-to-point telecommunication the CRTC stated that:

> The principle of "just and reasonable rates" is neither a narrow nor a static concept. As our society has evolved, the idea of what is just and reasonable has also changed, and now takes into account many considerations that would have been thought irrelevant 70 years ago, when regulatory review was first instituted. Indeed, the Commission views this principle in the widest possible terms, and considers itself obliged to continually review the level and structure of carrier rates to ensure that telecommunications services are fully responsive to the public interest.[72]

This has led to the CRTC being a major policy-maker in this area, policy that is important to the regulation of the point-to-point telecommunications.

The processing of applications to the CRTC in point-to-point telecommunication matters is different from that in broadcasting matters. The process is set out in the

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72. Telecommunications Regulations - Procedures and Practises July 20, 1976. Public announcement made in preparation for a public hearing scheduled for October, 1976. Cited in Johnston, op. cit., note 47; at 46.

CRTC Telecommunications Rules of Procedure.[73] The Rules divide applications into several major categories including, inter alia, approval of new tariffs, general rate increases and approval of connection agreements. In each category the procedure is unique. Generally, however, an application is submitted in writing. Public notice of the application is then made in the required form. Those interested parties wishing to intervene may then file with the CRCT, submitting the required information. At this point the Rules allow for the submission of interrogatories in the various proceedings and set out the obligations of the applicants to answer them.[74] The application then proceeds to hearing (if required).

The hearings in point-to-point telecommunication matters before the CRTC are more formal than those in broadcasting matters. The proceedings have more the aspect of a court trial with witnesses giving evidence under oath, cross-examination allowed, and concluding arguments. The applicant presents evidence, subject to cross-examination

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73. S.O.R./79-554.

74. Ibid., ss. 17-18, which along with ss. 13, 15 and 16 "provide a wide range of mechanisms for obtaining and clarifying the issues which will have to be determined by the Commission" Kane, G., The New CRTC Telecommunications Rules of Procedure: A Practitioners' Guide, in, Grant, P.S., op. cit., note 58, at 69.

by the interveners and the CRTC's own counsel. Each of the interveners then present their evidence, subject to cross-examination from interveners of adverse interest as well as the applicant and CRTC counsel. Concluding arguments are then made, either orally or in writing.[75] A decision is then rendered.

The Federal Court of Appeal exercises appellate jurisdiction over these decisions. An appeal will lie on a question of law or jurisdiction upon leave of the Court.[76]

The decision is also open to Cabinet review. Section 64 of the National Transportation Act allows the Governor-in-Council to rescind any order, decision, rule or regulation of the CRTC on point-to-point telecommunication matters. This may be done at any time, either on the Governor-in-Council's own motion or on the petition of an interested party. The power to review telecommunication decisions of the CRTC is much broader than that to review broadcasting decisions and the review, because it can be commenced on the petition of an interested party, may constitute a second avenue of appeal from the CRTC decision.

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75. For a more detailed discussion of the hearing process see Johnston, op. cit., note 47, at 54.

76. Supra, note 38, s. 64(2).

As with Cabinet review of broadcasting decisions, questions arise concerning the propriety of Cabinet reviews of independent tribunals.[77]

4.3.3 Implications for Satellite Telecommunication

The CRTC has vested in it regulatory jurisdiction over a major part of telecommunications in Canada. Its power in broadcasting matters is pre-eminent because it has the duty to carry out the broadcasting policy enunciated in section 3 of the Broadcasting Act and has been given the power of licensing "broadcasting undertakings" as a means of implementing that mandate. The CRTC also regulates point-to-point telecommunications with its powers of tariff and interconnection approval over such systems that are under federal jurisdiction. Satellite telecommunication systems, as integral parts of both types of telecommunication, fall within the CRTC's jurisdiction.

The Broadcasting Act, and the other Acts where the powers of the CRTC are found, does not speak, as the Radio Act does, of "space stations" or "spacecraft" when setting out the extent of the vested powers. The link between satellite telecommunication systems and the CRTC's

77. See supra note 61.

broadcasting licensing powers is through the expression "broadcasting undertaking". The definition of this encompasses satellites and the terrestrial systems that are necessary for a satellite telecommunication system.[78]

The legal link for point-to-point telecommunications is found in the definition of "telecommunications".[79] Satellite systems fall under this definition either as part of larger telecommunication systems or by themselves. Furthermore, they are subject to exclusive federal jurisdiction. The CRTC thus has regulatory power to approve tariff and the interconnection of satellite systems with any other point-to-point system.

The CRTC has considerable regulatory control over satellite telecommunication in Canada. The CRTC consolidates this control through its power to formulate policy guidelines for the exercise of its licensing powers in broadcasting. In 1979, for example the CRTC formulated objectives and guidelines for the Satellite Distribution of

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78. The precision with which all aspects of satellite broadcasting systems comes under the term "broadcasting undertaking" is not as accurate as it may at first seem and has given to legal dispute, especially where it concerns broadcasting receiving undertakings. See infra, Chapter V.

79. See supra, Chapter I.

Television Programming.[80] This laid down the basic strategy for the utilization of satellite telecommunication for television and represents the regulatory direction Canada was taking in this area.

In Canada the operation of a satellite telecommunication system, to the extent that it is a broadcasting undertaking, requires a licence issued by the CRTC. There are three general types of broadcasting undertakings that can be licenced: broadcasting transmitting undertakings, broadcasting receiving undertakings and network operations. Satellite systems can fall under all three of these categories. For the most part, satellite systems are part of larger terrestrial systems and are licenced within that framework, either as broadcasting transmitting undertaking or as part of a network operation. The emergence of the satellite as a separate broadcasting entity unto itself in the form of Direct Broadcasting Satellites (DBS) is still in the experimental stages but it could present systems which were analogous to terrestrial ones and in the words of a recent Department of Communications publication on DBS:

> It is reasonable to expect that the CRTC would license such a vertically integrated operator in the same way as a terrestrial TV station - as a broadcasting transmit-

80. 5 C.R.T. Part 2, 49.

ting undertaking.[81]

The CRTC also licences broadcasting receiving undertakings as related to satellite signal reception. Until recently all receivers required licences but there has been a move in the direction that radio and television receivers have gone, exempting individual use of such receivers from licence.[82] The issues involved here as opposed to those that arise in conjunction with television receivers are not as clear cut, however, and have not yet been resolved in this regard. They are linked to controvery between the right to receive broadcast signals and copyright/protection of private signals. It is a major area of dispute in Canadian satellite telecommunications law and is discussed in the next chapter.

The CRTC in licensing satellite telecommunication systems has the same broad powers to set terms and conditions to the licence it has for other systems. As mentioned, the CRTC has set policy guidelines so that prospective licensees will understand the criteria they must meet. As with regular broadcasting systems these conditions include the nature of the service, Canadian

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81. Government of Canada, Department of Communications, Direct-to-Home Satellite Broadcasting for Canada, Ottawa, 1983, p. 100.

82. Supra, note 33.

content and Canadian ownership. An example of such guidelines for a specific service that incorporates satellite telecommunications into broadcasting, are those for pay television. The CRTC set out objectives and guidelines in a policy statement[83] affirming that this new service would adhere to policies of Canadian content, and equal access. The guidelines also significantly state that:

> The disbributors should arrange for the most appropriate method of delivering programs to local exhibitors. However, in order to ensure the availability of the service of equitable rates throughout Canada, satellite should be the preferred method of national delivery.[84] (Emphasis added)

Unequivocally, the CRTC promotes satellite telecommunication as the prime distribution system for this type of broadcasting service. This illustrates that under current legislation the CRTC has the ability to regulate through policy-making and does so with satellite telecommunications.

The CRTC's tariff approval powers regulate satellite telecommunications systems used for point-to-point telecommunication to the extent that they are either part of

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83. Pay Television Objectives and Guidelines, 5 C.R.T. Part 2, 49.

84. Ibid.

a larger network or that they are a separate system with its own tarrifs. Thus, for example an entity such as Telesat must have its tariffs approved by the CRTC.

Perhaps more significant, however, is the CRTC's power of approval over interconnection between a federally regulated point-to-point telecommunication system and any other such system. Satellite systems do not normally function alone. They exist as part of larger systems forming the means of facilitating long distance communication between terrestrial systems. Because of the divided jurisdiction in Canada there are many such terrestrial systems and that along with federal jurisdiction over satellites means that interconnection must occur to establish communications across Canada. This gives the CRTC enormous powers will respect to the nature of this trans-Canada system and the policy direction it will take.

The policy-making nature of this power is illustrated in one case where the Governor-in-Council later varied the CRTC's decision (using National Transportation Act, section 64(1)) because the CRTC used its policy-making power at odds with that of the government's.

The case involved the application of Telesat Canada for approval of its agreement to interconnect with the Trans

Canada Telephone System[85] (now Telecom). After a lengthy hearing and much deliberation by the CRTC, it decided not to approve the agreement based on its own policy considerations. This decision was varied by the Governor-in-Council,[86] the Minister stating in the accompanying news release that the Order was "dictated by broad issues of public policy," which lie beyond the reasonable purview of the CRTC." This action by the Cabinet is evidence that the CRTC may have too much policy-making power in this area. Cabinet intervention varying a well reasoned CRTC decision is detrimental to the CRTC's hearing process, however,[87] and the reduction of this policy-making power would be better done through the more direct route of legislative change.

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85. Telesat Canada, Proposed Agreement with Trans-Canada Telephone System, Telecom Decision CRTC 77-10, Aug. 24, 1977, 3 C.R.T. Part 2, 265.

86. Order-in-Council, P.C. 1977-3155, November 3, 1977.

87. Johnston, op. cit., note 47, at p. 89.

CHAPTER V

THE DOWN-LINK DILEMMA

The distinction between point-to-point telecommunication and broadcasting is artificial. It is based upon differences in the final format of the transmitted data and upon artificially imposed limits on the extent of its reception. The purpose of the distinction is to provide separate regulatory regimes for these two broad classifications of telecommunication. However, as in many cases where artificial distinctions are created, there are grey areas; subjects do not always fall neatly into one or the other of the classifications. Signals transmitted from communication satellites frequently fall within one or more of these grey areas.

The advantage of propagating radio transmissions by means of communication satellites is the distribution of the signal over a large area.[1] This makes possible highly efficient and relatively inexpensive communication over long distances. However, the broad dissemination of a radio signal is a liability. It creates so many potential recipients as to make effective regulation difficult.

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1. The area on the earth's surface within which a communication satellite's signal falls is called a "footprint".

Satellites are used in the same manner for both point-to-point and broadcasting telecommunication; they provide a long-distance link for a terrestrial system. Consequently, communication satellites represent a grey area; under some circumstances they are regulated as point-to-point telecommunication, under others as broadcasting. This ambiguous position contributes to current legal difficulties which arise when regulating signal ownership, privacy, copyright and the right to receive broadcasting.

Before discussing the current state of Canadian law in the areas of the right to receive broadcasting, rights to distribution, privacy and copyright, it is necessary to examine the legal distinctions between broadcasting and point-to-point telecommunication. The regulatory framework for telecommunications in Canada rests on these distinctions,[2] therefore the question of which classification applies to satellite telecommunication signals will be assessed in light of the distinctions which define broadcasting.

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2. See supra, Chapter IV. The regulatory authority of the federal government in telecommunications is divided into that for broadcasting and that for non-broadcasting. The applicability of laws and regulations to a particular telecommunication activity depends upon which division it is a part of.

5.1 Broadcasting in Canadian Law

As previously noted Canadian telecommunication policy divides telecommunication in two, separating broadcasting from all other forms of telecommunication.[3] In order to make this policy distinction it is necessary to have a clear and unambiguous legal definition. Canadian law defines "broadcasting" as distinct from all other telecommunication. This definition is important to the regulation of telecommunication in Canada and its application to the various telecommunication media should be beyond doubt. However, an examination of this legal definition when applied to satellite communication indicates that this is not the case.

5.1.1 The Criteria of the Definition of Broadcasting

Broadcasting has the following definition in Canadian legislation:

> "broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public.[4]

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3. See supra, Chapter I.

4. Canadian Radio-television and Telecommunications Act, S.C., 1974-75-76, c. 49, s. 2; Broadcasting Act, R.S.C., 1970, c. B-11, s. 2; Radio Act, R.S.C., 1970,

There are three important criteria to this definition which must be met in order for the definition to be applied to a satellite telecommunication transmission. The criteria are that the transmission must be a "radiocommunication", "intended", and "for the direct reception by the general public".

a) "Radiocommunication"

In Canadian law radiocommunication is defined as:

> ...any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide.[5]

As noted in Chapter II, communication satellites function by receiving and retransmitting signals propagated through electromagnetic waves. It would seem, then, that signals transmitted by means of a communications satellite fulfill the "radiocommunication" criterion in Canadian law. In a number of cases, however, the courts have been reluctant to accept this conclusion.

The issue of satellite transmissions as "radiocom-

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c. R-1, s. 2(1).

5. Ibid.

munication" was specifically dealt with in R. v. Lougheed Village Holdings Ltd.[6] There the accused was charged under the Radio Act[7] in the possession and use of radio apparatus and under the Broadcasting Act[8] in carrying on a broadcasting undertaking without a valid and subsisting licence. The trial judge dismissed the case against the accused stating:

> ...I am not satisfied that the Crown has led any evidence of electromagnetic waves propagated in space without artificial guide. As a matter of fact, from the evidence led by the Crown, there would seem to be an irresistible inference that the electromagnetic waves were propogated in space with artificial guide, that is the satellite. Having come to this conclusion and having come to the conclusion that this aspect of the charges laid by the Crown is an essential element of all three counts, and having come to the conclusion that the Crown has not proven this essential element, I have to now decide whether or not the no evidence motion should be granted in favour of the defence.[9]

The Judge held that satellite transmissions were not "radiocommunication".

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6. R. v. Lougheed Village Holdings Ltd. (1981), 58 C.P.R. (2d) 108 (P.Ct.B.C.).

7. R.S.C., 1970, c. R-1, s. 11(1).

8. R.S.C., 1970, c. B-11, s. 29(3).

9. Supra, note 6, at 110.

The trial decision was upheld on appeal.[10] McDonald, J. reviewed extensively the expert evidence given at trial for evidence that there were signals "propagated in space without artificial guide" and concluded that "...I can find no such evidence".[11] In addition he found that the evidence that was given

> ...also supports the view that the signal is "guided" and the trial judge could reasonably draw an inference that the transmission had been guided artifically from its original source and thus did not come within the definition.[12]

The appeal decision, therefore, upheld the trial Judge's ruling that there was no evidence on an important element of the case against the accused. It also seems to hold that, on the evidence, satellite transmissions are not "radiocommunication" because they are propagated by artificial guide.

A similar decision on satellites as artificial guides for the propagation of electromagnetic waves is found in The Canadian Radio Television Commission v. Shellbird Cable Limited.[13] Here the trial Judge stated:

I am satisfied from the evidence that the

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10. R. v. Lougheed Village Holdings Ltd. (1981), 59 C.P.R. (2d) 107 (B.C.Cty.Ct.).

11. Ibid., 113.

12. Ibid., 112.

13. (1981), 60 C.P.R. (2d) 215 (Nfld.P.Ct.)

> criteria set out in the definition of radiocommunication has not been met in that the artificial guide is contained in the TVRO or earth satellite.[14]

On this finding the Court held that the CRTC lacked jurisdiction under the Broadcasting Act to regulate the cable distributor's undertaking to receive and distribute the satellite signals.

The Court's conclusion, that the signals had been guided artifically met with immediate criticism. While the case was still under appeal the following analysis of its faults was made:

> Nevertheless, several points about the case suggest that the court was misguided not only in its conclusions, but also in its approach to the issues involved. The first difficulty is that there is no discussion of the meaning of "without artificial guide" which is the basis of the decision. Traditionally, the phrase was assumed to mean "over wire", with the actual cable being the artificial guide. If indeed the court's interpretation that the TVRO constitutes an artificial guide for the signal is correct, then it is difficult to understand why microwave receivers or even conventional antennae would not be classified in the same way for their position in the transmitting-receiving network is analogous to that of the TVRO. If, on the other hand, the court meant to say the satellite is the artificial guide, then the same type of argument can be made. This argument would be that:
>
> > [j]ust about every broadcast transmitting antenna...guides its signal. If it didn't that signal

14. Ibid., 219.

> would fire off equally in all directions.... A lot of it would be wasted up in the sky, where there's no audience.[15]

> Yet Parliament clearly intended the Act to cover such transmission, and the courts have implicitly accepted such signals as within the ambit of the broadcasting definition. It is very difficult to conceive of any logical distinction which might be made between "regular" transmissions and satellite transmissions, and between "regular" receptions and TVRO recepions.[16]

The reasoning in this case would also have a detrimental effect on the regulation regime for distribution systems. For example, a cable distribution system that received signals exclusively from satellites might not be within the regulatory jurisdiction of the CRTC.[17]

The decision of the trial Judge in Shellbird was

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15. Miller, J., Shellbird v. CRTC, [1981] (Dec.) Broadcaster 8, 10.

16. Saunders, R.P., Broadcast Policy - Regulatory Frameworks and Judicial Responsiveness (1982), 60 Can. Bar Rev. 495, 499-500 (footnote #20 deleted).

17. The Supreme Court of Canada held in Capital Cities et al. v. CRTC et al., [1978] 2 S.C.R. 141; (1977), 18 N.R. 181, that the federal government has exclusive jurisdiction over cable television distribution systems because they are broadcasting receiving undertakings receiving signals from broadcasts. If the signal received was not broadcasting they would no longer be considered broadcasting receiving undertakings and might then come within provincial jurisdiction, though the Court did not rule specifically on this point.

reversed on appeal[18] on the grounds that:

> The policy of the Act is not confined to broadcasting per se, but is concerned with the use of broadcasting undertakings and, most importantly, the programming provided by the Canadian broadcasting system. The Commission would not be able to control the use of broadcasting facilities and programming if it were unable to state in its licence to a broadcasting undertaking exactly what programs that undertaking could provide. The whole purpose of the Act would be frustrated.[19]

In coming to this decision the Court did not determine whether the transmissions had been artificially guided, leaving this question open and the definition of "radiocommunication", as it pertains to satellite telecommunication, still unfixed.

b) "Direct Reception by the General Public"

This second criterion has two elements: "the general public" and "direct reception". The first element concerns the "character of the audience".[20] The "general public" is not meant to refer to the entirety of the world's

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18. R. v. Shellbird Cable Ltd. (1982), 38 Nfld. & P.E.I. R. 224; 108 A.P.R. 224 (Nfld. C.A.).

19. Ibid., 234.

20. This test was set down by Wright, M.R., in Jennings v. Stephens, [1936] 1 All E.R. 409.

population nor even that of the whole of Canada. It includes by implication any number of people served by a limited distribution facility such as a cable company.

This issue arose in the case of R. v. Communicorp Data Ltd.[21] Here the defendant had set up equipment which intercepted television programs from the United States and retransmitted them by cable to subscribers in two apartment buildings and a group of condominuims. To determine whether the defendant was operating a broadcasting undertaking it was necessary for the court to determine whether the subscribers constitute the "general public". The finding was that while the subscribers were not the "general public" with respect to the defendant's cable system, they were the "general public" qua the U.S. television stations that made the original transmissions, intending them for the general public.[22] The key element in the court's determination was that the recipients represent the general public, not that they constitute the general public.[23] However, "[e]ach situation and case

21. (1974), 6 O.R. 680 (Ont. Cty. Ct.).

22. Ibid., 693.

23. The Courts finding that the defendant company itself is a member of the general public qua the U.S. television stations lends further support to this. Ibid., at 692.

must be considered on its own set of facts and circumstances".[24] The "general public" thus can be made up of a limited number of persons.

The issue of the make-up of the general public for the definition of broadcasting was also considered in Lount Corporation et al. v. A.G. Canada et al.[25] Here the Court found that:

> "Direct reception by the general public" must be understood in its statutory context to mean those of the general public who have bought or rented for their own use, or otherwise have access to, receiving apparatus which is in working condition. Such a meaning must be accorded because it is an obvious fact, of which judicial notice can be taken, that human facilities of perception simply cannot receive the transmissions of radiocommunication without the intermediation of radio receiving apparatus. Because the satellite transmissions in issue here are not scrambled or encoded, but are sent "in the clear", they are certainly available for direct reception by the general public within the meanings of the Radio Act and the Broadcasting Act.[26]

"Direct reception" is the second element and is important because satellite communication systems use intermediate steps in transmitting to recipients. Here it is of value to consider the definition of "Broadcasting Satellite Service" found in Article I (No. 37) of the Radio

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24. Ibid., 691.

25. [1984] 1 F.C. 332 (F.C.T.D.).

26. Ibid., 350.

Regulations:[27]

> 37. Broadcasting Satellite Service:
> A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.

It closely parallels the definition of broadcasting found in Canadian law, especially in its use of "direct reception by the general public". This definition, however, must be interpreted within the context of the entirety of the Radio Regulations and is thus elaborated by Article 1 (No. 124) which reads as follows:

> 124. Community Reception (in the broadcasting satellite service):
> The reception of emissions from a space station in the broadcasting satellite service by receiving equipment, which in some cases may be complex and have antennae larger than those used for individual reception, and intended for use:
> - by a group of the general public at one location; or
> - through a distribution system covering a limited area. (emphasis added)

Within this context the term "direct reception" does not apply only to signals received by the public without the benefit of an intermediate system. It applies to all signals that are intended to ultimately reach the general public.

The meaning of "direct reception" in Canadian law

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27. Radio Regulations, ITU, Geneva, 1982.

is less clear. There is no Article 1 (No. 124) in Canadian law to elaborate the definition of broadcasting, nór have the courts addressed this issue directly. It is touched upon by Shapiro, J. in Communicorp when considering the definition of broadcasting in Canadian law:

> Certainly, the defendant company receives the programme direct. Can it be said that its subscribers do? There may well be a very cogent argument that the subscribers do not receive the programme direct and that the defendant's refining and cabling of its results in an indirect reception. But does this matter? Is not the important aspect the intention of the transmitter? Where the transmissions are intended for direct reception by the general public, that is where the T.V. station sends out "radiocommunications" (which include, inter alia, signals, images, sounds) and it (the T.V. station) intends them to be received direct by the general public, then I believe that you have a "broadcasting" within the meaning of the Act. That being so, it is immaterial if some people do not receive the programme direct. It does not make the broadcast by the T.V. station any less a "broadcast" by reason thereof.[28] (last emphasis added)

More recently the issue was considered by Muldoon, J., in Lount Corporation et al. v. A.G. Canada et al. where, after an extensive analysis of the factual and legal aspects of satellite transmission he stated:

> The definition of broadcasting, as it is expessed, clearly is not concerned with whether such transmissions be actually received by the general public, but is

28. Supra, note 21, at 693.

concerned rather with intention.[29]

In order to determine whether a transmission is defined as "broadcasting", the criterion of "direct reception by the general public" must first be interpreted in the light of "intent".

c) Intent

As noted earlier the physical characteristics of communication transmissions are identical whether the end product is defined as point-to-point telecommunication or broadcasting and the differentiation is made by law. While in many cases the distinction may be obvious, in the case of signals retransmitted through communication satellites there is considerable ambiguity. These satellites serve to "transport" television and radio signals and for this reason it becomes difficult to differentiate between point-to-point and broadcasting telecommunication. Satellite-transported signals fall into a grey area of interpretation.

It is here that the criterion of intent, found in the legal definition of "broadcasting", emerges as the pre-eminant consideration in determinating whether or not a communication satellite transmission constitutes "broadcasting". The intent of the originators concerning direct

29. Supra, note 25, at 346.

reception of their transmission by the general public, becomes the only means of making the distinction under current law.

Intent involves the state of mind in which an act is performed. State of mind may only be assessed through inference. Thus the tests by which the law determines intention in legal matters, such as crimes or torts, are inferential. In defining broadcasting, "intent" must also be determined in this inferential manner.

The nature of intention in the definition of broadcasting has been addressed in a recent Federal Court of Canada case, Lount Corporation et al. v. A.G. Canada et al.[30] Here the plaintiffs sought declarations that their equipment, certain television receiving equipment situated atop a hotel they owned, was exempt from licensing and certification under the Radio Act and the Broadcasting Act.

The equipment was being used to intercept television signals transmitted via satellite by U.S. entertainment companies such as Showtime and Home Box Office (HBO). These signals were then displayed in the guest rooms of the hotel on television sets. The satellite transmissions consisted of general entertainment fare provided, for a fee, to contracting cable systems across the U.S. Sent

30. Ibid.

"in the clear", these transmissions were not encoded or scrambled. The originating companies testified that the transmissions were meant only for their paying subscribers and not for the general public. They did not deny, however, that these transmissions were readily available for direct reception by the general public.

In determining whether or not these signals constituted broadcasting Muldoon, J. examined the nature of intention with respect to the direct reception by the general public of these transmissions.

> It should be noted, however, that when a person's intention is to be inferred or found as a fact, and such intention is expressed through some instrumentality other than the thoughts or words of the person, the nature, capabilities, content and operational functions of the instrumentality wielded or operated by the person can certainly serve as inferential indications of intent. In this regard, determining what is or is not intended by the persons who cause the signals of Showtime and HBO to be propagated amounts to the same sort of exercise as is conducted in relation to offences, torts and delicts, even though no one is here seeking to fix those persons with civil or criminal liability. Here, the inference is to be drawn, or finding made, on a balance of probabilities and not beyond reasonable doubt.[31]

He is thus establishing an objective test for the determination of intent where it is germane to the meaning of "broadcasting" in Canadian law. It is not enough for the

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31. Ibid., 346-47.

originators of a transmission to subjectively state that the transmission is not intended for the general public: there must be objective evidence that this is the case. Muldoon, J. thus concludes:

> "This is not unlike the criminal law principle which holds that individuals are deemed to intend the natural and probable consequences of their acts."[32] Of course, this case sounds neither in tort nor in criminal law, but the principles are founded upon good sense and a profound appreciation of human behaviour, which are wholly pertinent in construing the meaning of "broadcasting" in the Radio Act and in the Broadcasting Act.[33]

It is too soon to state that this "objective" test will be Canadian law in this area. The case is currently under appeal and the implications need examining.

Detractors of the objective test prefer a subjective test because of the expense of encoding or scrambling the satellite transmission before delivery to subscribers. Nevertheless this is a way of establishing objectively that the transmissions are not intended for the general public.

Let us look, however, at some ramifications of a "subjective" test. First of all such an interpretation may be contrary to Canadian law. Section 3(c) of the Broadcasting Act states expressly that:

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32. Linden, A.M., Canadian Tort Law, 3rd ed., (Toronto: Butterworths, 1982), at 30-31.

33. Supra, note 25, at 352.

> ...the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned. (emphasis added)

This establishes a right for persons to receive broadcast programs. It is well established that if Parliament wishes to abrogate a right it must do so expressly.[34] If the right is to be abrogated through means of the statutory definition of broadcasting then it is done so more expressly if the test of intent is "objective". A "subjective" test of intent would allow originators of television or radio transmissions to themselves determine whether they were broadcasting or not. This would allow them to abrogate a right without being delegated express authority to do so by Parliament.

It is submitted here also that the "objective" test laid down in the Lount case is not new. Rather, it is the expression of the test previously used implicitly by the courts. In the Communicorp case, for example, Shapiro, J. finds the transmissions to be those "the T.V. station is sending out to all".[35] This statement is not based upon declarations made by the television station nor any other subjective criteria: it is based objectively upon the fact

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34. See Spooner Oil Ltd. v. Turner Valley Gas Conservation Board, [1933] S.C.R. 629, at 638.

35. Supra, note 21, at 692.

that television stations broadcast to the general public.

Furthermore, if the test of intent in the definition of "broadcasting" were subjective it might be detrimental to the proper regulation of broadcasting in Canada. Under such a test, the operator of a television transmitter (especially if it emmitted exclusively pay television) could declare its transmission as not intended for direct reception by the General Public. The transmission would then not be "broadcasting" and the CRTC would no longer have jurisdiction over the transmitter because it would not be a "broadcasting undertaking".

5.1.2 Broadcasting: The Judicial Outlook

In order to evaluate whether a particular communication satellite transmission constitutes "broadcasting" it is essential not only to look at the courts' interpretation of the criteria set out in the statutory definition, but to examine the manner in which they have dealt with the concept of "broadcasting".

The courts considered broadcasting in the Radio Reference[36] case. Here the provinces argued that they

36. Re Regulation and Control of Radio Communication, [1932] A.C. 304; 2 D.L.R. 81 (P.C.).

had jurisdiction over at least some aspects of radio communication. This argument depended "on making,...a sharp distinction between the transmitting and the receiving instrument".[37] The Privy Council was unwilling to make this distinction stating:

> Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts each independent of the other...[38]

This demonstrated a reluctance on the part of the courts to artificially partition broadcasting, and while this statement refers to broadcasting systems, later words in this decision pertain specifically to the transmitted message:

> Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears.[39]

The courts continue to be reluctant to divide broadcasting systems that are essentially unitary. The Supreme Court of Canada held in the Capital Cities[40] and

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37. Ibid., 314 (A.C.), 85-86 (D.L.R.).

38. Ibid., 315 (A.C.), 86 (D.L.R.).

39. Ibid., 306 (A.C.), 87 (D.L.R.).

40. Supra, note 17.

Dionne[41] cases that federal exclusive jurisdiction over broadcasting extends to cable systems having radiocommunication links. The provinces have argued that the cable systems are not engaged in broadcasting. Laskin, C.J.C., answered this:

> It does not advance their contentions to urge that a cable distribution system is not engaged in broadcasting. The system depends upon a telecast for its operation, and is no more than a conduit for signals from the telecast, interposing itself through a different technology to bring the telecast to paying subscribers.[42]

The court is not deciding that cable systems are "broadcasting", but that the distribution of television transmissions must be looked at as a whole. This is particularly pertinent when considering satellites as part of the distribution. The court's attitude can be seen in R. v. Shellbird Cable Ltd.[43] It held that it was not the nature of the one PBS satellite signal that determined the nature of the "undertaking"; since the station received broadcasting and was thus licensed, it was as a whole a "broadcasting undertaking" and consequently subject to CRTC regulation.

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41. Dionne et al. v. Public Services Board (Quebec) et al., [1978] 2 S.C.R. 191; (1977), 18 N.R. 271.

42. Supra, note 17, at 198.

43. Supra, note 18.

Once again, it must be stressed that in the above cases the courts are dealing with broadcasting systems rather than transmitted signals. However, they do serve to illustrate that the courts have found a unity in the concept of broadcasting.

Even Parliament in its legislation tends to see this unity of concept. In the offence provisions of the Radio Act, those covering the unlawful interception of radiocommunication make it an offence only for persons having become acquainted with "any radio communication transmitted otherwise than by a broadcasting undertaking" (emphasis added),[44] not "broadcasting". Parliament thus categorizes the radiocommunication not by its own nature but by the nature of the entity that transmits it.

5.2 "The Right to Receive Programs...is Unquestioned"

The advantage that communication satellites have in their ability to propagate communication transmissions over a large area is a disadvantage from the perspective of communications regulation. A satellite transmission can be received anywhere its "footprint" falls. It is thus analogous to terrestrial radio or television transmissions

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44. Supra, note 7, s. 9(2).

in that anyone possessing receiving equipment within the transmission area can intercept the signal. Communication satellites, however, except the yet-to-be-realized DBS, are not used like terrestrial radio and television transmitters. The ability of satellites to propagate signals relatively inexpensively over long distance gives rise to their utilization in a manner analogous to microwave tower transmissions. Microwave transmissions travel long distances in a narrow beam relayed from tower to tower. The distribution of the signal is easily controlled and regulated. When communication satellites are used for this purpose, control and regulation of the distribution is more difficult.

The difficulty for Canadian communication policy and law stems from the indiscriminant nature of the transmission propagation. This affects the balance between the right to receive broadcast programs (as set out in S. 3(c) of the Broadcasting Act) and the protection of those who hold rights in the telecommunications transmitted. The latter rights include inter alia copyright and privacy. The issue is illustrated by the regulation of satellite television receive-only (TVRO) earth stations.

A major use of communication satellites in North America is to relay television transmissions between their point of origin and centres of distribution such as television stations and cable distributors. At times this

involves relaying programs, including advertising as when a network relays transmissions to affiliates. At other times the relayed transmission may be a pay television service provided for a fee to cable distributors who, in turn, offer that service to their subscribers.

Currently, most relay transmissions of television signals are "in the clear" and are not encoded or scrambled.[45] It is thus easy to intercept them with the appropriate equipment. This equipment is readily available and relatively inexpensive.[46] Furthermore, many such relay transmissions are now available in Canada from both Canadian satellites and United States satellites whose "footprints" extend into Canada. The situation resembles that of regular terrestrial television reception.

The right of Canadians to receive broadcast programs is unquestioned,[47] "subject only to generally

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45. Encoding or Scrambling is a technique for preventing unauthorized reception of a signal by electronically altering it so that it cannot be received without the use of a descrambler which restores the signal to its original form for display by a standard television receiver.

46. Projections for the likely cost of earth stations indicate a likely bottom figure of $400-$500 for a viable home unit. See Direct-to-Home Satellite Broadcasting for Canada, infra, note 47, at 82-3.

47. Supra, note 8, s. 3(c). Section 3 of the Broadcasting

applicable statutes and regulations".[48] The Radio Act is such a generally applicable statute which, as noted in Chapter IV, requires a radio apparatus to be licensed.[49] Section 3(3) of the Act, however, specifically exempts:

> (3) Any radio station or radio apparatus that is capable only of receiving radiocommunications and that is not a broadcasting receiving undertaking is exempt from the requirements of subsection (1) if it is intended only for the reception of
> (a) broadcasting; or
> (b) broadcasting and any class of radiocommunication, other than broadcasting, prescribed by the Minister.

Under this, television sets in general use are not required to be licensed. By analogy it could be argued that the use of TVRO for satellite transmission reception would also fall under this exception. The Department of Communications (DOC) and the CRTC have not taken this position, however.

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Act is headed "Broadasting Policy for Canada" and thereby places policies into law. This fact is at times played down by the federal government, as, for example, can be found in a recent DOC publication: Direct-to-Home Satellite Broadcasting for Canada, (Ottawa, 1983). Here in an enunciation of the "essential elements" of the policies set out in section 3, sub-section 3(c) was paraphrased as simply "individual broadcasting licenses are repsonsible for the programs they broadcast", entirely omitting any mention of the rights set out there.

48. Supra, note 8, s.3(c).

49. Supra, note 7, s.3(1).

As TVRO began to appear on the Canadian scene the federal government adopted the position that all TVROs had to be authorized under the Radio Act and Broadcasting Act. Furthermore, it was government policy to restrict licensing of TVROs to only broadcasters, common carriers and cable television operators.[50] With increasing numbers of TVROs, especially individual home units, the government has liberatized its authorization policy. Current policy is expressed in a regulation which became effective in May 1983.[51]

With this regulation, passed under powers given in the Radio Act, the government policy on TVRO is that private individuals may own and operate TVROs for their own use without being required to obtain the permission of the CRTC and without a radio licence. Some establishments which are not broadcasting undertakings or private individuals will be considered under the same exemption provided the received signals are displayed only in a room to which the general public is permitted access and which is not used for boarding, lodging or accommodation. The government considers that:

> Condominiums, apartment buildings, hotels,

50. Dept. of Comm., News Release, 24 November, 1980.

51. General Radio Regulations, Part II, amendment, S.O.R./83-422.

> motels and other multi-unit buildings that receive and distribute local radio and television programming signals via their own cable systems (known as master antenna TV or MATV systems), are classed as broadcasting receiving undertakings and must also apply to the CRTC for authority to receive and distribute radio and television signals transmitted by satellite. Where permission is granted by the CRTC under such conditions, a radio licence will not be required under the Radio Act.[52]

The federal government has thus brought its TVRO policies close to those set out by the CRTC in 1977 for MATV[53] and this is in keeping with their general communication policies that protect the cable distribution industry. It should also be noted that this liberalization of policy is directed towards the reception of Canadian satellite signals and not those from U.S. satellites.[54]

This TVRO policy illustrates that the DOC and CRTC consider these powers, as vested under the current legal regime, to be adequate to allow them to make regulations as to the classification of and exemptions for TVRO. Such a conclusion concerning the vested powers has come into

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52. Dept. of Comm., News Release, NR 83-39, 17 May, 1983.

53. See MATV Licensing and Exemption (1977), 2 C.R.T. 668 which outlines the criteria for exemptions and the rationale of the CRTC policy for MATV. It has since been modified by MATV Licensing and Exemptions, Public Notice CRTC 1983-255, 10 November, 1983.

54. Supra, note 52, at 3.

question recently in Lount Corporation et al. v. A.G. Canada et al.[55]

This case arose when the government, through DOC, demanded that a TVRO installation operated by Lount on one of their hotels be shut down or the company would face prosecution in:

> (a) That the said earth station was a broadcasting undertaking not properly authorized under either the Broadcasting Act or the Radio Act.
>
> (b) That a radio licence was required for any satellite earth receiving station.
>
> (c) That Lount's earth station would not be licenced, since its operation would violate certain international agreements to which Canada was party.
>
> (d) That unlicenced operators were subject to prosecution.[56]

Lount Corporation went to the court seeking declarations that their equipment was exempt from licencing and certification under the Radio Act and the Broadcasting Act. The motion for the declaration stated, inter alia, that "the Department of Communications and the Minister of Communications...are acting illegally and in virtue of no

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55. Supra, note 25, the case is under appeal see infra, note 62.

56. From a warning letter from DOC to Lount Corporation cited, ibid., 338-9.

statutory or other authority"[57] in giving orders for the TVRO to be shut down.

The case turned on two points; whether or not the TVRO was receiving "broadcasting" as defined by Canadian statutory law and whether or not the TVRO was a "broadcasting receiving undertaking". If the former were true and the latter false then the exemption found in s. 3(3) of the Radio Act would apply and the radio apparatus would not fall within the jurisdiction of the CRTC.

As noted previously in this chapter Muldoon, J. found that:

> The transmissions of Showtime and HBO must be found to be intended for direct reception by the general public, even though that result is not really desired by them, because that is the wholly foreseeable and, indeed, known consequence of their conduct.... That which the plaintiffs receive from HBO and Showtime is therefore "broadcasting" as defined in the Radio Act and in the Broadcasting Act[58]

He then turned to the question of the status of the radio apparatus as a broadcasting receiving undertaking and the scope of the authority of the CRTC. There being no statutory definition of "broadcasting receiving undertaking"

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57. Lount Corporation et al. v. A.G. Canada et al. File #T-5512-80 of the Federal Court of Canada: Trial Division, May 27, 1981 (unreported).

58. Supra, note 25, at 353.

the Judge reviewed extensively the case law, considering the nature of "undertaking" in Canadian law. From this he concluded that the plaintiff's radio apparatus did not constitute an "undertaking" under current law.

The Judge then considered the effect the "unquestioned" right of persons to receive programs (found in s. 3(c) of the Broadcasting Act) had on the authority of the CRTC. Apart from the scope of the meaning of "undertaking" section 3 accords:

> independant vitality to the premise that the two statutes [Radio Act and Broadcasting Act] are not to be regarded as contemplating the plaintiff's circumstances unless they do so by means of cogently apt expression.[59]

The right to receive programs is "subject only to generally applicable statutes and regulations", and the Broadcasting Act and its regulations are the only ones so applicable. Muldoon, J. then concluded:

> Obviously, the intended scope of the regulatory and licencing system committed to the authority of the C.R.T.C. is very large; and that authority must prevail wherever it can be supported by an apt expression of legislative intent. So, subject only to the provisions of the Act and regulations, the unquestioned right of persons to receive programs must be understood to be an unlimited, unfettered, unregulated or unrestricted right, since Parliament characterizes it as unquestioned. Hence, the plaintiffs' and the hotel guests' right to receive the programs transmitted via satellite is and

59. Ibid., 361.

> remains "unquestioned", because the plaintiffs are not engaged in a broadcasting receiving undertaking. That is the crucial negative status under the Broadcasting Act since, as counsel for the CRTC neatly encapsulated the situation here:
>
> > ...it comes to that regulation and supervision [of the Canadian broadcasting system] through broadcasting undertakings and in S. 17 it deals with licences which we have seen by virtue of s.2, are issued to carry on broadcasting undertakings. In other words, the Commission is not concerned with "apparatus" or "systems" or pieces of equipment. It is concerned with undertakings and that underlines its concern in this particular case.
>
> Because Parliament, in its generally applicable statute, did not evince an intention through any aptly defined expression to subject the plaintiff's operation to the regulatory supervision of the CRTC (although it might have done so, and might yet do so if such were to become the legislative intent, by defining "undertaking"), one must conclude that the plaintiffs' use of their radio apparatus, apart from their unquestioned right to receive programs, is simply not contemplated under the present Broadcasting Act.[60]

The Court thus finds that Canadian law does not vest in the government or its agencies the power needed to implement their current policies on TVRO. The court has not said that it is ultra vires the power of Parliament to make law to implement its policies. On the contrary Muldoon, J.

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60. Ibid., 362-63.

states:

> No doubt, by the choice of clear and specific words Parliament could enact that the circumstances disclosed in this case are meant to be comprehended in that term ["undertaking"]. Parliament's competence to do so is not disputed, nor could it be successfully be disputed.[61]

It follows that the inadequacies of current law in implementing policies cannot be rectified simply by making regulations[62] and as a result that which is allowed under Canadian law may not be in accord with Canadian policies on TVRO. Under the unquestioned right to receive programs it may not be necessary to have authorization for a TVRO to the extent that it is not an "undertaking" in the generally established legal meaning of that word and what it receives is "broadcasting", which includes satellite television transmissions of all kinds made "in the clear". If the Lount Corporation case is affirmed, a wide variety of TVROs are legal under current law and do not need DOC or CRTC exemptions to be operated.

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61. Ibid., 361.

62. Even though the federal government and the CRTC have appealed this decision, (Federal Court file #A-1736/83, no hearing date has been set as of the time of writing) the government had placed Bell C-20, 32-33 Elizabeth II, 1983-84 before Parliament in which s.28 was to specifically modify section 2 of the Radio Act to deem this type of radio operation a broadcasting undertaking regardless of the final outcome of the case. The Bill died with the disolution of Parliament in June 1984.

The Canadian experience in regulating TVROs, especially those individually-owned and operated as limited distribution systems, illustrates that law and policy in telecommunications do not always coincide.

This has resulted from a reluctance on the part of Canadian governments to establish all the needed legal powers through legislation. This is due, in part, to the rapid pace at which the involved technologies are advancing and, in part, to government preference to use policy and regulations rather than create new law. It is argued that this preference allows for the greater flexibility needed to meet rapid advances. While this may be true, it still remains that the government may not have the authority to use policy and regulations in this manner. There is a need, therefore, to at least create such authority in law for these preferred tools of government, even at the cost of potential political difficulties that might arise from the introduction of this legislation. If this is not done, results in court similar to the Lount Corporation decision and contrary to government policy may inhibit controlled development of satellite telecommunications.

5.3 Legal Rights in Satellite Signal Transmission and Its Content

The extensive area on the earth's surface covered by a communication satellite footprint gives rise to issues concerning the protection of rights held in the signals themselves or the information they contain. The issue arises at both the national and international levels since these transmissions do not conform to national boundaries.

The rights involved include copyright in the telecommunication, those rights which neighbour on copyright such as protection from the interception of transmissions by "poachers", and privacy where it concerns the content of the telecommunication, particularly in point-to-point telecommunication. Several types of situations could arise that would infringe these rights such as:

(1) The interception of telephone or more sophisticated forms of long-distance related point-to-point telecommunication with a view to access and use of the information being thereby transmitted.

(2) The transmission by satellite of television signals intended for subscribers who relay them by cable picked up by non-subscribers who also relay them by cable though unauthorized to do so.

(3) The interception of television transmissions, intended for authorized cable distributors, by unauthorized TVRO that do not

redistribute the signal widely, eg. private individuals, hotels, taverns, and apartment complexes.

(4) The recording and later unauthorized distribution of programs intercepted by either authorized or unauthorized receivers.

In the following, the nature of Canadian law concerning such situations and protection given to rights in telecommunication is examined. Initially, questions concerning jurisdiction and applicable law must be resolved.

The determination of the applicable law is potentially a conflict-of-law issue. There are a number of possible sources of law:

(1) the law of the place where the transmission originated;

(2) the law of the state which controls the satellite;

(3) the law of the country whose nationality the holder of the rights has; and

(4) the law of the place where the alleged violation took place.

The proper choice of law rule, when considering conflicts of law in the Common Law system, traditionally approaches the issue by applying a test of lex loci. This test holds that the law to be applied is that of the place where the wrong was alleged to have been committed.[63]

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63. The foundation case for this test is Phillips v. Eyre (1869), 4 Q.B. 225; affd. (1870), 6 Q.B. 1. It is followed in Canada; O'Connor v. Wray, [1930] S.C.R.

Another test is emerging, however; that of the "proper law of the issue". This test holds that the law which, on policy grounds seems to have the most significant connection with the acts and consequences of a particular situation should be the applicable law.[64]

For the first test to hold, the infringement of the right must occur in Canada. Clearly this is the case if the signal originates and is received here. What about the situation where the signal originates outside Canada? The Supreme Court of Canada addressed this issue in CAPAC v. International Good Music Inc.[65] The case involved leave to serve ex juris a defendant broadcasting certain muscial works into Canada from the United States in violation of Canadian copyright law. Concerning the fact that the signals were broadcast from the U.S. the Court stated:

> [I]t seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some million persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programmes, has thereby communicated in Canada such musical works by radio

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(continued from previous page)
231.

64. This test has emerged in English law in Chaplin v. Boys, [1971] A.C. 356 (H.L.) per Lord Hodson.

65. [1963] S.C.R. 136; 37 D.L.R. (2d) 1; 40 C.P.R. 1.

communication, within the provisions of the Copyright Act.[66]

It would, therefore, appear that the Canadian courts hold the infringement to occur in Canada, regardless of the place of origin. Thus under the lex loci test, since the infringement took place in Canada, Canadian law applies. In fact, if the infringement took place in Canada there may be no need to rely upon conflicts-of-law rules: Canadian law would apply.

Because of a trend towards the "proper law of the issue" test, the potential that foreign law may apply still exists and must be examined. The "proper law of the issue" has generally led to the application of the law of the forum where the case is heard. Thus Canadian law would again be applicable. Contrary to this, however, common law courts in personal property issues have held that valid title under lex citus will be recognized even if the rule there is different from that of the forum.[67] Consequently, a foreign law - in all likelihood that of the place of origin of the transmission - may be applicable, if it were to be found to be the "proper law of the issue". This would be especially true if the Canadian law dealing with the

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66. Ibid., 144 (S.C.R.), 8 (D.L.R.), 8-9(C.P.R.).

67. As in the recent example of Winkworth v. Christie, Manson & Woods Ltd., [1980] 1 All E.R. 1121 (Ch.D.).

situation was inadequate or non-existant.

It would appear that Canadian law is applicable in defining the rights and protecting them and if Canadian law is inadequate there may be an argument that the law of the place of origin will apply. In any case the applicable law is subject to any relevant international treaty regulating these issues.

As the basic document governing activities in outer space, the 1967 Space Treaty[68] makes international law applicable to satellite telecommunications. Articles 1(2) and (3) state that activities and exploration in outer space shall be "in accordance with international law". Beyond this, however, the 1967 Space Treaty says little concerning rights in telecommunications.

One of the more important and relevant treaties is the International Telecommunication Convention.[69] This is the governing document of the International Telecommunication Union (ITU), an organization charged with the

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68. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies; adopted in U.N.G.A. Res. 2222(XXI), 19 Dec. 1966; 610 U.N.T.S. 206 (1967); 18:3 U.S.T. 2410 (1967), T.I.A.S. 6347; [1967] Can.T.S. No. 19; entered into force 10 Oct. 1967 (the 1967 Space Treaty).

69. International Telecommunications Convention, Nairobi, 1982, ITU, Secretariat, Geneva (the ITU Convention).

international regulation of the radio spectrum and geostationary orbit.[70] As part of this the Convention in Art. 22 states:

> 1. Members agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.
>
> 2. Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties.

Furthermore, the Radio Regulations[71] in Art. 23 oblige the member states to take the necessary measures to "prohibit and prevent the unauthorized interception of radio-communications not intended for the general use of the public" and the divulgence without authorization of the contents of these communications. Thus at the international level the right of privacy in correspondance via telecommunication is intended to be protected.

Canada, as a party to the ITU Convention, has taken on this obligation to maintain a right of privacy. To fulfill it, Parliament has enacted legislation. The Radio Act makes it an offence for a person who has become acquainted with any radiocommunication, not transmitted by a

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70. See supra, chapter III, p. 79.

71. Supra, note 27.

broadcasting undertaking, to make use of such a communication or to divulge it to any person.[72]

Thus, the privacy of correspondance by satellite telecommunication is protected in Canada. These protections, however, relate only to point-to-point telecommunication and are aimed at protecting signals from unauthorized monitoring. They do not deal with the protection of copyright nor with the interception of non- broadcasting, emanating from broadcasting undertakings.[73] Resort must be made to international copyright conventions and Canadian copyright law to determine the extent of these rights and protections for satellite telecommunication.

The Berne Convention of 1886 in its 1971 Paris Revision[74] protects authors' rights over their literary and artistic works.[75] This Convention, however, is found

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72. Supra, note 7, s.9(2), the secrecy provisions of the ITU Convention are further implemented in the Telegraphs Act, R.S.C. 1970, c.T-3, ss. 5 and 6, where telegraph operators are sworn to keep secret the content of telegraph messages they become cognizant of.

73. Ibid.

74. 77 British and Foreign State Papers 22, as reproduced in (1886-1887), 168 C.T.S. 185 and (1887), 91 Parl. Papers 297 (c.5167), as revised to 1971. Canada is currently a party to this Convention at the level of the Rome Protocol of 1928.

75. Ibid., Art. 1.

wanting where it concerns copyright infringement in satellite communication. As one authority has stated:

> First, the plethora of revisions has resulted in a lack of uniformity among States since the numerous signatories are at various levels of adherence. Moreover, neither the United States nor the Soviet Union are parties. Most importantly, the protection extended to "literary and artistic works" as defined in article 2 of the original Convention can in no way be construed to include broadcasts. The author's exclusive right to authorize the radiocommunication of his work was recognized by article 11 bis of the Rome revision of 1929. Where, as is evident from the article, the signatory countries reserve the power to regulate the conditions whereby the right may be exercised, the possibility of inconsistent treatment is obvious. Finally, the Berne Convention, as amended by the Rome Protocol, does not extend copyright protection to the rediffusion of communications.[76]

The alternative Universal Copyright Convention (UCC) of 1952[77] is also of limited use as regards satellite transmissions, and the Rome Convention of 1961[78] evolved to rectify the fact that protection of

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76. Nesgos, P.D., Canadian Copyright Law and Satellite Transmissions (1982), 20 Osg.H.L.J. 232, 235-236 (footnotes deleted).

77. Done at Geneva, Sept. 6, 1952; 6 U.S.T. 2731; T.I.A.S. 3324; 216 U.N.T.S. 132. Canada has complied with the U.C.C. since Aug. 10, 1962.

78. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,

broadcasts is not implicitly outlined in the UCC. It is generally held by publicists in this area that these Conventions are of limited value in protecting copyrights in satellite telecommunications. One authority has stated:

> Many experts believe that the Rome Convention applies only when signals received by a satellite circuit are converted into signals destined for conventional home receivers, so that a pirated, unauthorized taking of signals right off the satellite and the use of them would not infringe the broadcasting right recognized by the Convention because the signal is not yet a broadcast in the technical sense used in the Convention. In any event, the Rome Convention is in effect among only eleven countries.[79]

There is one treaty that has attempted to resolve the issues with respect to copyright and attendant rights in satellite telecommunications. This is the Brussels Convention of 1974.[80] Article 2(1) of the Convention provides that:

> Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distribu-

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open for signature, October 26, 1961, 496 U.N.T.S. 44 (the Rome Convention).

79. Evans, R.V., Satellite Communications - The Legal Gap (1970), 11 Jurimetrics J. 92, 97.

80. Brussels Convention Related to the Distribution of Programme - carrying Signals Transmitted by Satellite, open for signature at Brussels, May 21, 1974, 866 U.N.T.S. 67 (the Brussels Convention).

> tor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.

A state which ratifies this Convention is thereby obligated to enact or apply domestic legislation to prevent the unathorized distribution of satellite signal broadcasting within its territory. There are several deficiencies in this Convention, however.

First, the Convention is of limited scope in that it does not apply where satellite signals are intended for direct reception by the general public.[81] This leaves signals emanating from DBS outside the Convention, opening a possible course of copyright infringement.

The Convention also leaves ratifying states free to adopt the measures they deem adequate to meet their obligations. This puts the emphasis on domestic law and:

> [i]f national legislation is to be the determining factor in the protection of copyright, one might wonder why a state would not proceed to adapt its own laws...rather than proceed with the complicated requirements of acceding to an international convention of limited application.[82]

Most importantly, however, the Convention has been designed to prevent the unauthorized distribution of

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81. Supra, note 78, Art. 3.

82. Nesgos, op.cit., note 76, at 238, 39.

programme-carrying signals transmitted via satellite. The rights created are not in the signals; no protection is directed at the works and performances transmitted. Consequently, the Convention concerns itself only with distribution rights and not copyright.

Canada has not ratified this Convention and is therefore not obligated by it. Nor does it seem likely that it will ratify this treaty in the foreseeable future.[83] Nevertheless, Canada has been active in attempting to prevent unauthorized distribution of satellite signals. Current legislation protects distribution rights from unauthorized reception and redistribution by commercial enterprises. The deficiencies of Canadian law in this area appear when the reception and redistribution is done by commercial enterprises which are not primarily broadcasters such as hotels, apartment complexes or taverns. Legislation is probably necessary to close any loopholes in the current law, although if this were not done Canada would not be in violation of any international law.

The other international conventions mentioned above

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83. The Keyes and Brunet Report of 1977 considered that in view of potential difficulties concerning compliance and procedural requirements it was premature to recommend adoption of this convention. See, Keyes and Brunet, Copyright in Canada: Proposals for a Revision of the Law, (Ottawa, 1977).

are also of no particular significance in creating or protecting copyright with respect to satellite transmissions in Canada. It is in Canadian domestic copyright law that are found the rights and protections afforded in this country.

The applicable legislation is the Copyright Act.[84] It provides that the holder of copyright has the sole right to produce or reproduce a work, to perform that work in public and to publish it. Copyright also includes the sole right "in case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication".[85] This is of particular importance with respect to satellite communications. Therefore, copyright infringement of satellite transmissions exists if it can be characterized as a performance in public or as a radio communication of a literary, dramatic, musical or artistic work.

Does a satellite transmission constitute a "performance in public"? Canadian courts have never ruled directly on this point but a similar issue was considered in Canadian Admiral Corp. v. Rediffusion Inc.[86] In this

84. R.S.C., 1970, c.C-30 as am.

85. Ibid., s.3(1)(f).

86. (1953), 20 C.P.R. 75; [1954] Ex.C.R. 382 (Ex.).

case the defendant intercepted and redistributed, by a cable system, the broadcast signals of a live football game transmitted by the plaintiff. Plaintiff claimed copyright infringement. Considering the issue of whether a cable rediffusion system going to private homes constituted a "performance in public", Cameron, J. applied the generally-used test of the "character of the audience".[87] Upon reviewing applicable cases he concluded:

> ...a performance in a private home where the performance is given, heard or seen by only members of the immediate household, could [not] be considered a performance in public
> ...
> The character of the audience was therefore a purely domestic one and the performance in each case was not a performance in public
> ...
> I find, therefore, that the performances in the homes and apartments of the subscribers of the defendant company were not performances "in public".[88]

On this reasoning, the rediffusion of intercepted satellite transmissions by a cable distribution centre is unlikely to constitute a "performance in public".[89]

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87. Supra, note 20.

88. Supra, note 86, at 407-8.

89. In Communicorp. Data Ltd., supra, note 21, a case dealing with the rediffusion of terrestrial television transmissions, Shapiro, J. reiterated this reasoning, concluding at p. 691:

> Each situation and case must be considered on its own set of facts and circumstances. On the evidence

The question then arises as to whether a satellite transmission is a "radio communication" by which there is "a communication of the work". Radiocommunication is defined in the Radio Act as follows:

> "radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electro-magnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artifical guide.[90]

As has been noted radiocommunication as thus defined is essential to the control and operation of a communication satellite. Satellite transmissions would, on the face of it, seem to be covered by s. 3(1)(f) of the Copyright Act and fall under its protection, whether or not they constituted a "performance in public".

This reasoning does not strictly follow, however. Doubt has been cast by the courts as to whether satellite transmissions are "radiocommunication". The courts in the Shellbird[91] case and the Lougheed[92] case held that the

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> before me I find that qua the defendant company its subscribers were not members of the general public and this I find, even though the defendant did not originate programmes but passed them on from another originating source.

90. Supra, note 4.

91. Supra, note 13.

92. Supra, note 6.

transmission of signals via satellite is transmission using an "artificial guide" and thus not "radiocommunication". These cases were decided in Lower Courts and were appealed, but the reasoning on this point was not reversed,[93] and they constitute precedent holding that satellite transmissions and radiocommunication do not equate.

Furthermore, the courts have held that "radio communication" in the Copyright Act and "radiocommunication" in the Radio Act are not the same. In CAPAC v. CTV Television Network Ltd.[94] Pigeon, J. found that the equivalent word in the French text of the Copyright Act was radiodiffusion which in several Canadian acts including the Broadcasting Act, the Radio Act and the Interpretation Act,[95] is defined as "broadcasting". The difference, he summarized, came from a poor translation of the original text of the Rome Convention from which section 3(1)(f) of the Copyright Act was drafted. He went on to state:

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93. The Lougheed case was upheld on appeal, supra, note 10, and the Shellbird case was reversed, supra, note 18, but on another issue. Thus the holding that a satellite constitutes an "artificial guide" may still stand.

94. Composers, Authors and Publishers Association of Canada Limited v. CTV Television Network Limited and the Bell Telephone Company of Canada, [1968] S.C.R. 676; 68 D.L.R. (2d) 98; 55 C.P.R. 132.

95. Interpretation Act, R.S.C., 1970, c.I-23.

> Bearing in mind that the Rome Convention is in French no other conclusion is possible but that the intent is to provide that copyright includes the exclusive right of public performance or representation by radio broadcasting (communication au public par la radiodiffision).[96]

"Radio communication" in this context may properly be construed as "broadcasting". Satellite transmissions would thus be afforded copyright protection if they were used for broadcasting. As noted earlier the definition of "broadcasting" in Canadian law is interpreted broadly and if used in context with section 3(1)(f) of the Copyright Act it may provide a means to construe this Act as protecting satellite transmissions.

Under such a construction, the rights and protections of the Copyright Act can certainly be applied to Direct Broadcasting Satellite (DBS) transmissions, for by definition they provide communication to the public by broadcasting. This construction, in conjunction with the broader interpretation of "broadcasting" set out in the Lount Corporation case,[97] would apply the rights and protections of copyright to all program signals transmitted via satellite "in the clear".[98] This would leave encoded

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96. Supra, note 94, at 682.

97. See, supra, p. 145.

98. Thus evidencing a further benefit of a wide interpretation of the term "broadcasting".

satellite program signals and all forms of point-to-point telecommunication outside the ambit of these rights and protections. Point-to-point has its own form of protection given in the Radio Act with respect to the unlawful interception and use of radiocommunication.[99] This protection, however, is not copyright protection and may not apply at all to satellite transmissions in light of the Lougheed decision.[100] In any case, it does not apply to non-broadcasting signals transmitted by broadcasting undertakings.

Canadian copyright law, even with the above mentioned construction of "radio communication" as "broadcasting" is unsatisfactory in that it fails to establish and protect copyright in works transmitted by satellite. While it has been suggested that:

> it may be possible to construe the existing Copyright Act so as to protect works transmitted by satellite. Copyright exists in any work performed in public and, in the case of any literary, dramatic, musical or artistic work, communicated by radio communication. This definition of copyright seems wide enough to cover most satellite transmissions communicated to the public that emanate from point-to-point or distribution

99. Supra, note 7, s.9(2).

100. See, supra, note 93, on the interpretation of "artificial guide" by the courts.

satellites;[101]

this can at best be a temporary solution. A revision of the Copyright Act reflecting the technological advances since its introduction in 1924[102] is necessary. This is especially so for communication satellite technology because with the increasing numbers of TVRO's, particularly those of private individuals, it must be made clear in law that their right to receive such signals does not include a right to copy for commercial purposes. The Canadian government has expressed a desire to bring about the needed revisions and has initiated the process.[103] At this writing, however, several years after the announced intention to affect a revision, none is yet forthcoming. The protection of copyright in satellite transmissions is thus less than adequate under existing Canadian law.

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101. Nesgos, op.cit., note 76, at 245.

102. Dept. of Comm., News Release, N.R. 81-39, 21 July 1981.

103. Dept. of Comm., News Release, N.R. 81-37, 16 July 1981, entitled New Copyright Bill to be Introduced Within One Year.

CONCLUSION

This thesis presents an overview of Canadian policy and law with respect to satellite telecommunication. Canadian policy as regards satellite telecommunications is important to the Canadian perspective on the law in that area because it is through law that policies are implemented. Canadian law should reflect the policies which are directed towards the development and regulation of satellite telecommunication.

The development of satellite telecommunication policies in Canada has gone hand in hand with overall telecommunications policy development. A fundamental premise of this policy is that satellite telecommunication is to be dealt with as an integral part of a Canadian telecommunications system and not as a separate entity. Satellite telecommunication policy is founded on the four principles of:

1) freedom of expression

2) freedom of access

3) the protection of the privacy of the individual

4) Canadian autonomy.[1]

Policies concerning satellite telecommunication

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1. See supra, Chapter I, at 10.

systems are directed at their use in both broadcasting and point-to-point telecommunication and parallel those developed for these categories concerning telecommunications in general. These policies, developed on the four principles, in conjunction with the general policy of treating satellite telecommunications as simply a part of the whole Canadian system have led to a well integrated system, albeit with satellite systems playing a merely supporting role.

As mentioned, the implementation of policy comes through law and thus while the Canadian perspective on satellite telecommunications law begins at the policy level it is developed through the Canadian legal system.

The first element to a Canadian legal perspective is the establishment of jurisdiction over the subject matter, for without jurisdiction law cannot be made. To make a determination on jurisdiction in Canadian law, constitutional law must be examined. Chapter II develops the argument as to whether satellite telecommunication is under federal or provincial legislative jurisdiction. The subject itself, a satellite, is clearly in the federal domain. It is a subject not covered in the Constitution Act, 1867[2] and is extraterritorial to Canada thus can

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2. British North America Act of 1867, 30-31 Vict. c.3, as

fall under federal jurisdiction by virtue of the peace, order and good government power.[3] For legislative jurisdiction over satellite telecommunication, however, it is necessary to look to the case law developed on the question for broadcasting and point-to-point telecommunications.

The issue in the field of broadcasting is settled. The Radio Reference[4] case and Capital Cities[5] have given the federal government exclusive jurisdiction over all aspects of broadcasting. The field of point-to-point telecommunications is not so clearly settled.

The de facto situation is that there is divided jurisdiction over different aspects of point-to-point telecommunication. The de jure position has never been finally decided by the courts, in fact there seems to exist a conscious policy on the part of both the federal government and the provinces to refrain from bringing the issue to

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am. (U.K.) now Constitution Act, 1867.

3. Ibid., s.91.

4. Re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54 (P.C.).

5. Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al., [1978] 2 S.C.R. 141; (1977), 18 N.R. 181.

a resolution before the courts.

An analysis of the case law regarding this issue in other constitutional fields leads to the conclusion that jurisdiction lies, in all likelihood, with the federal government. The federal government would then have jurisdiction over both fields where satellite telecommunication is employed, giving it jurisdiction over that as well. Furthermore, the unique attributes of satellite telecommunications such as the extraterritorial nature of the satellite part of any system would counter arguments that support provincial jurisdiction in point-to-point telecommunication. Satellite telecommunication would thus fall under the exclusive legislature jurisdiction of the federal government.

The effect of international law on the Canadian law regarding satellite telecommunication was also examined. This is because of the basic properties of satellite telecommunication which cannot be contained by political boundaries. The effective management of the radio spectrum and geostationary orbit, so important to satellite telecommunications, depends upon international cooperation.

To this end Canada is a member of the International Telecommunication Union (ITU). The ITU, through the ITU Convention,[6] regulates the use of the radio spectrum for

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6. International Telecommunication Convention, Nairobi,

radio communication. The obligations which arise from this membership effect Canadian regulation of satellite telecommunication in the areas of radio frequency assignment, the protection of correspondence by radiocommunication and the regulation of the different types of satellite services.

Canada is also a member of the international satellite telecommunications organization, "INTELSAT".[7] The obligations that arise from this membership effect the regulation of satellite telecommunication. Canada has had to regulate the setting up of satellite systems in such a manner that they will not harm, by radio interference or economically, INTELSAT.[8] This includes both domestic and separate international systems.

The Canadian perspective on satellite telecommunications law considers the international element as an important one. Canada recognizes the necessity of international cooperation for effective satellite telecommunication and is willing to take on international obligations that

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1982, ITU, Secretariat, Geneva.

7. Agreement Relating to the International Telecommunication Satellite Organization "INTELSAT"; 23:4 U.S.T. 3813 (1972); open for signature 20 Aug. 1971; entered into force 12 Feb. 1973 is the constitutional instrument of INTELSAT to which Canada is a signatory.

8. Ibid., Art. 14.

effect domestic regulation in the area.

Falling under exclusive federal jurisdiction and influenced by international obligations, a regulatory framework for satellite telecommunications has emerged in Canada. Basically satellite telecommunication is regulated as part of the entire Canadian telecommunications system. Following policy in this field, regulatory authority is roughly divided between authority over point-to-point telecommunication and authority over broadcasting.

The Department of Communication (DOC) has authority over point-to-point telecommunication and regulates all aspects of that field except tariffs and interconnection. The main instrument vesting this power in the DOC is the Radio Act. Regulatory authority in broadcasting is vested in the Canadian Radio-television and Telecommunications Commission (CRTC) through the Broadcasting Act. The CRTC also has powers concerning the regulation of tariffs for point-to-point telecommunication systems that fall under federal jurisdiction and the authorization of interconnections between all telecommunication systems when they extend across provincial boundaries. This includes satellite systems.

The existing regulatory framework seems to create a tightly regulated telecommunication system implementing the government policies in this area. The adequacy of the

framework to provide the necessary legal basis in order to effect policy implementation has, however, come into question. The courts have recently found the current legislation, especially as it concerns satellite telecommunications, inadequate in creating the necessary powers to implement policy. Regulation is thus being affected through policies that do not always have the necessary legal foundation. This is particularly true where the regulation of satellite television receive-only (TVRO) earth stations is concerned.

The inadequacy of the regulatory framework with respect to satellite telecommunication also means that necessary regulation in the area is lacking. This is especially so in areas of copyright in satellite signals and protection from unauthorized interception of signals. It is essential, therefore, for Canadian law to be created that specifically addresses issues concerning satellite telecommunication.

While it is essential to provide a proper legal framework, specifically dealing with the unique aspects of satellite telecommunication, that framework should not be rigid. The rapid advances in the field dictate this. Legislative changes should not address each issue on a one on one basis. Any change in legislation will have to create framework allowing flexibility, probably through a mechanism

that continues the current system of regulation by policy statements, regulations and orders. The difference however, would be that legislation would then provide a legal basis for the system. This is essential for the rule of law to prevail.

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