

Pay Television and CRTC Jurisdiction

by Chris Johnston

Whether or not there is federal jurisdiction over pay television depends largely on whether it is being distributed on a conventional MATV or CATV system which also distributes signals received from the air. There is little doubt that systems which integrate closed-circuit with off-air services fall under federal jurisdiction.⁽⁷⁾ If there is no such integration and closed-circuit services only are distributed on the cable system, it is probable that the system falls outside federal jurisdiction subject to the following qualifying factors.

If the system crosses provincial boundaries or becomes part of a network connecting provinces it may fall within federal jurisdiction under para. 92(10)(a) of the *B.N.A. Act*. If the method of program delivery involves the use of the radio frequency spectrum (e.g. microwave) the system may come under federal control because of Parliament's jurisdiction over radiocommunication. Also, it may not be sufficient to physically separate closed-circuit services on different cable from that carrying off-air signals if the management and operations of the separate systems are integrated. The same may be true where the operations of a subsidiary company which might, when taken alone, be said to be carrying on a provincial function, form an integral and necessary part of a federally regulated parent company. (8)

Another possibility of federal control may occur where the distribution of pay television is accomplished through use of telephone wires of federally regulated carriers. Jurisdiction of such carriers was on April 1st, 1976, transferred to the newly formed Canadian Radio-Television and Telecommunications Commission. Assuming that Bell Canada, for example, will charge a toll for

the delivery of pay television, such tolls are subject to regulation by the CRTC. Subsection 321 (5) of the *Railway Act* is relevant in this connection in that it gives to the Commission jurisdiction to "make orders with respect to all matters relating to traffic, tolls and tariffs or any of them".

Finally, if pay television were to spread throughout Canada and were to result in a serious threat to the Canadian Broadcasting System or otherwise "attain such dimensions as to affect the body politic" (9) of Canada, the federal government might find jurisdiction under the opening words of s.91 of the *B.N.A. Act*, "peace, order and good government".⁽¹⁰⁾

7. Examples of cases in analogous fields which support this conclusion are *City of Toronto v. Bell Telephone Company* (1905) A.C. 52; *Luscar Collieries Ltd. v. McDonald et al.*, (1925) 3 D.L.R. 275, (1925) S.C.R. 460, aff'd. (1927) 4 D.L.R. 85, (1927) A.C. 925; *A.-G. Ont. v. Winner* (1954) 4 D.L.R. 657, (1954) A.C. 547; *The Queen v. Board of Transport Commissioners (GO Transit)* (1968) 65 D.L.R. (2d) 425; *Canadian National Railway Co. v. Board of Commissioners of Public Utilities of Newfoundland* (1976) 59 D.L.R. (3d) 71.
8. *Northern Electric Co. v. United Steelworkers of America Local 8001* (1972) 25 D.L.R. (3d) 368.
9. Per Lord Sankey in *In Re Regulation and Control of Aeronautics* (1932) A.C. 54 (1932) 1 D.L.R. 58, where it was held that the field of aerial navigation had attained such dimensions and therefore came under federal control.
10. For an interesting analysis of the scope of this general power see The Honourable Mr. Chief Justice Laskin's "Note on the Residuary Character of the General Power" contained in his text *Canadian Constitutional Law*, 3rd edition at page 269 where he states at page 270 "Nonetheless, in the *Canada Temperance* case, Lord Simon cited the *Aeronautics* and *Radio* cases to illustrate the proposition that if legislation is such 'that it goes beyond local or provincial concern or interests and must from its inherent nature to the concern of the Dominion as a whole', then it will fall within the general power of the Dominion".

Chris Johnston is CRTC General Counsel. This article is an excerpt from "Broadcasting Law - Notes on recent cases and developments" published in "New Developments in Communications Law".