

The Constitutional Conference - February 1969

BROADCASTING AND SATELLITE COMMUNICATIONS

Current Federal Initiatives

The federal government over the past year has taken the following initiatives in the field of broadcasting, and in all of these, questions are raised or have been raised by provinces (in nearly all cases Quebec) over federal justification of its position.

Initiatives have been taken in the fields of:

- General Broadcasting, where through a new Broadcasting Act, the federal government has reconstituted an independent public regulatory authority (the Canadian Radio-Television Commission) with the objective of creating a stronger regulatory instrument for supervising the Canadian Broadcasting System - itself redefined and given new general objectives (for both the private and public systems) in the Act.
- Satellite Communication, where, as set out in the White paper tabled last April, steps are being taken to develop, as a joint government and private undertaking, a Canadian domestic communications satellite, in order to provide more extensive, faster and cheaper communications, including broadcasting, telephonic, and data communication purposes.
- Educational Broadcasting, where, as the government has announced, legislation is to be proposed providing for the establishment of a Crown corporation to own and operate transmission facilities to serve provincially controlled educational broadcasting requirements and interests.

The Federal Interest

The broad basis for federal involvement is of course that broadcasting and public communication vehicles are a vital national resource that require regulated development for the public good, so that competing demands are regulated, a coherent and progressive system can develop, and abuses can be prevented. That the federal initiatives have expanded so rapidly in the past few years is merely a reflection of course the "expanding universe" of communications and its significance as a major national resource.

The Exercise of Federal Jurisdiction

The federal government's jurisdiction over broadcasting rests not simply on the interpretation of the Constitution by the courts (notably the 1962 Privy Council decision that the federal government has

exclusive legislative power to regulate, and control radio communication in Canada), but just as important is the uninterrupted exercise of that jurisdiction over many decades, and the recognition of the federal government's competence to do so throughout that period by Canadians and by foreign states, as well as in fact by all provinces. While the original Privy Council decision did not relate to broadcasting but to radio communication, the exercise of federal regulatory authority in respect of broadcasting (one of the several uses to which radio can be put) has never been challenged, and is not now being challenged by any province. Subject to challenge is the way in which, as a matter of federal policy, the jurisdiction has been exercised.

Federal policies

Federal jurisdictional responsibilities in respect of the uses to which radio transmission facilities, subsequently television, and now satellite, may be put. The essential of that policy has always been that the content of broadcasting must in a free society be freely formulated - that governments must keep themselves at "arm's length" from involvement in and control over broadcasting. Government's only role is to lay down in the public and national interest the general principles that must guide broadcasting, and intervene only where the abuses occur. Thus the independence from government of the Canadian Radio-Television Commission. Thus the stipulation that provincial governments shall not be licenced to enter the field of general broadcasting.

Subject to the principles laid down by the Parliament of Canada, then, and to the application of these principles by a completely independent authority representing the interests of all Canadians, the real force in determining broadcasting content in Canada is the owners of the broadcasting facilities and their employees, and their determination is largely governed by the rules of free enterprise. The government's ownership of the national broadcasting service, the CBC represents the only involvement of a public authority in the field of broadcasting, and there, too, elaborate measures have been taken to preserve the independence of the Corporation.

Provincial Claims

Provincial governments have never been owners of facilities for general broadcasting. That no licences are to be issued to provincial governments or their agents will be the subject of a new directive from Cabinet to the CRTC shortly. It has always been national policy that except for the Canadian Broadcasting Corporation, only private parties should be licenced for general broadcasting purposes.

The case developed by any province supporting their right to enter the field of general broadcasting arises of course in relation to broadcasting content. To the extent that some types of broadcasting content relate to matters of provincial jurisdiction or prime provincial interest, the case can be made that the provinces have a right to be permitted control, in some sense, of broadcasting content and by extension the required transmission facilities. Quebec has mounted such a case, claiming that its jurisdiction over education and responsibility for related cultural pursuits entails a right to control educational broadcasting.

In the areas of general broadcasting, educational broadcasting and satellite communications, the essentials of provincial arguments will be that federal jurisdiction ought to be limited to a regulatory control over transmission processes, the allocation of frequencies and related housekeeping matters. The federal role in these terms would be to prevent broadcasting chaos rather than to ensure that a Canadian broadcasting system is developed, and developed in the public interest.

The federal case is that a responsibility for transmission in the field of general broadcasting cannot be divorced from control of the general uses to which transmission facilities are put, and that the exercise of this responsibility will not prevent provinces from pursuing their legitimate interests - particularly in educational broadcasting. In fact, positive steps are being taken to encourage provinces to take initiatives in the field at an early date.

As regards, general broadcasting, however, provincial competence in matters of education would appear to be no more germane than federal competence in other matters of its own jurisdiction, and there would seem to be no more reason to admit any special provincial interest now than there has been in the past. Culture is no more a field of constitutional jurisdiction than is information or research, and it cannot be considered a basis for provincial competence in any aspect of broadcasting, at least in so far as the present Constitution is concerned.

In what follows, the provincial, and the federal cases will be set out concretely in respect of the three areas of current federal initiative.

EDUCATIONAL BROADCASTING

"L'éducation étant de notre ressort exclusif, et son complément, la culture, une responsabilité prioritaire pour le Québec, tout le domaine de la radio et de la télévision éducatives doit être contrôlé par le Québec sur son territoire, et sous tous ses aspects." Premier Bertrand, le 25 novembre, 1968.

The Proposed Federal Policy

To introduce legislation to provide for the creation of a Canadian Educational Broadcasting Agency which, subject to the Broadcasting Act, would conduct transmission facilities and rent them out as required to meet the needs of provincial educational broadcasting. Provision would be made for the broadcasting of programs approved by an educational broadcasting authority each province would be expected to establish. What is to constitute "educational programming" will be stipulated in the proposed Bill.

The policy was designed to draw a sharp distinction between the content, "educational programming" (to be defined in a narrow and formal way) and the transmission facilities, and correspondingly a sharp distinction would be drawn between provincial control over the educational programming and federal control over transmission facilities.

Quebec's Case

Its case has been stated in different ways. Most relevant is Premier Bertrand's November speech to the "Association canadienne de la radio et télévision de langue française". The tone of his argument is best set out in this proposition (which had a certain moderacy to it), "in broadcasting, it is obvious that Quebec must reserve a role that is exclusive in matters of teaching and formal education, and a necessary role in matters of culture and education in a broader sense". Exclusive jurisdiction in educational broadcasting, he argued, entailed the right to define what constitutes such broadcasting, and the right to control of the transmission facilities. If private enterprises were entrusted with licences, why not Quebec in matters of educational broadcasting? He attacked the federal policy as being based upon the political consideration of distrust of provincial activities. The federal government feared it would be impossible to effectively regulate provincial governments if licenced to broadcast (this is so), and he charged this was unfounded. A control of transmission facilities can lead, he argued further, to influence of content. Premier Bertrand argued that the Constitutional discussions must take up "broadcasting", and that in the meantime Quebec would totally reject the federal policy on grounds not so much of its unconstitutionality (Ottawa has licencing authority, he recognized), but in terms of a bad policy, based upon distrust of provincial governments.

A Federal Response

There are many types of response.

A discussion of broadcasting during the course of the discussions of division of powers could be recognized as desirable.

A debate on the current federal policy on educational broadcasting is, however, what Quebec will press for, and the response here can be twofold. We can indicate that the federal policy over educational television is being discussed with all provinces by the Task Force on Educational Television, particularly to clarify the points that might concern provinces as being intrusions into the jurisdiction over content - the definition of educational broadcasting, the "spare time" issue, the proposed functions of the ETV Agency. There has been in fact insufficient consultation on these matters to date, and during future consultation a number of provincial points should be examined carefully. To date, only Alberta has been visited.

As regards the basic policy decision over federal ownership of transmission facilities as a means of protecting the regulatory powers of the federal government, the public defense of this cannot be based upon distrust. Its single base must be "content and carrier" in this field are separable....if education is defined as a formal and narrow way. To the degree that Quebec at this point publicly argues that it wished to define "education" in a much broader way than has the federal government, the implicit fears of the federal government will find their

own public justification. This again suggests, however, that the federal government must, while insisting upon the final stipulation of what will constitute educational broadcasting, be prepared to negotiate the definition.

SATELLITE COMMUNICATIONS

"Nous voulons agir avec ordre et efficacité. Nous voulons un système intégré et complet couvrant non seulement l'éducation et la culture, mais aussi la transmission de données et les échanges entre les banques de savoir. C'est d'ailleurs dans cette perspective que nous avons songé aux satellites de communication. Ce système intégré, l'efficacité exige que nous le contrôlions en entier, ce qui n'empêchera pas une collaboration et des échanges avec les autres provinces et avec le gouvernement fédéral le cas échéant".

Premier Bertrand, le 25 novembre, 1968.

The Government Policy on Satellites

Satellites in general, and communications satellites in particular come within exclusive federal jurisdiction through their nature, as essentially international objects, and also through their use of radio waves. This statement of policy was made in the White Paper on a Domestic Satellite Communications System for Canada, published on 28 March 1968 (p. 63).

It is an established policy that Government control of communications is a basic element of national security (White Paper p. 56).

A domestic communications satellite system consisting of satellites and earth stations is a national undertaking operating under the jurisdiction of the Government of Canada (White Paper p. 44). Such a system is capable of extending national television services in the French and English languages to all parts of Canada and is an important part of Government policy (White Paper p. 56).

The Government intends that a corporation will be formed by special statute of Parliament to develop, own and operate both the satellites and earth stations of a (domestic) system (White Paper p. 50). The Government intends to regulate both rates and practices of a satellite system as necessary, to safeguard the public interest (White Paper p. 58, 60).

Under the COTC Act, Parliament has given to the Canadian Overseas Telecommunications Corporation responsibility for overseas international communications, including those by satellite. The COTC is the Canadian signatory to the interim INTELSAT agreement, and the entity responsible for the Canadian presence in INTELSAT.

Reasons for this Policy

The International Character of Space

The Treaty on the Peaceful Uses of Outer Space, which was ratified by Canada and which entered into force on 10 October, 1967, states that space "is not subject to national appropriation". The space segment of a communications system is international by its very nature (White Paper p. 62).

Negotiations with foreign countries for launching services, and the use of radio frequencies and satellite positions in synchronous orbit, touch upon complex and sensitive areas of national and international policy. The Government of Canada is the only Canadian body which can negotiate with other countries in these fields (White Paper, p. 56).

National Undertaking

By pre-empting the field, the Government is exerting its jurisdiction and control over satellite communications systems as "works or undertakings extending beyond the Limits of a Province" (BNA Act Section 92, 10(a)). The Government is also forestalling provincial ownership of earth stations, or the control or regulation of satellite undertakings by Provinces, which might bring a Province into conflict with areas of jurisdiction of the Federal Government such as international affairs, or the regulation, registration and licensing of users of radio, or of space vehicles.

International Communications

The Government occupies the area of jurisdiction of international communications through its chosen instrument, the Canadian Overseas Telecommunications Corporation, a telecommunications common carrier which provides communications services to public and private users, without restriction or limitation on message content, use, etc.

The Government negotiates internationally on behalf of Canada, in the field of communications, for example for the use of radio frequencies, participation in the International Telecommunications Union, INTELSAT, or with the USA for trans-border broadcasting.

The Position of Quebec

Quebec maintains that her exclusive jurisdiction over education requires that the Province control the means of distributing educational material, for example, via communications satellite. M. Cardinal has called the satellite "a black-board in the sky".

Secondly, Quebec has international aspirations, in this field, as evidenced by the recent letter (attached) from the Foreign Minister of France, to the Minister of Education of Quebec concerning joint activities by France and Quebec in the symphonic satellite communications project, and its successors.

The Arguments of Quebec

Quebec argues that jurisdiction over education gives concurrent jurisdiction over the means of distribution of educational material. Quebec therefore claims shared jurisdiction with the Federal Government over telecommunications, including satellites, and broadcasting.

Secondly, Quebec may claim that an earth station is a provincial work or undertaking, wholly situate within the Province, though such a statement has not yet been made formally.

The Role of the Provinces

Provinces may make use of domestic or international satellite systems for provincial purposes through a commercial agreement with the corporations established by Parliament, e.g., TELSAT Canada or COTC.

Provinces may produce and distribute by satellite educational or other program material by this means, without any limitations other than those of purely technical or economic nature.

Provinces may also, either directly or through provincial corporations, participate in the ownership of corporations established by Parliament to develop, own and operate communication satellites and earth stations.

All communications satellites or earth stations, including those which might be owned by or for a Province or Provinces, are subject to licensing under the Radio Act, and are also subject to such regulations as may be prescribed by Parliament in accordance with the laws of Canada, or in consonance with Canada's international obligations and commitments.

GENERAL BROADCASTING

"La radio et la télévision ne sont pas dissociable des autres moyens audiovisuels dans l'éducation. Comme moyens techniques, la radio et la télévision ne sont pas appelés à servir exclusivement les besoins de l'éducation, mais d'autres besoins qui sont aussi de la compétence du Québec. Et tout cela fait partie d'un ensemble encore plus vaste qui fait qu'un système intégré de télécommunications n'est qu'un aspect du problème des communications en général. Dans ce domaine, nous avons plusieurs projets à l'étude".

Premier Bertrand, le 25 novembre, 1968.

The argument of the province of Quebec in respect of general broadcasting is dependent upon what it now would term its "necessary" roles in matters affecting culture and public education. The argument set out by Premier Bertrand in his November statement was that, in a federal

state, the provincial governments have the right to at least the same degree of entry into broadcasting as has the central government. In mounting its case in relation to general broadcasting, Quebec continually makes reference to educational broadcasting, since the terms of its arguments here are a natural extension of these former ones. The federal responsibilities are really over the licencing of transmission facilities, for reason of good order and coherence, ... "but allocating frequencies is something quite different from controlling broadcasting".

What of a concrete nature Quebec might wish to argue is unclear, as is clear from Premier Bertrand's statement quoted above.

At the February 1968 Constitutional Conference, Quebec focussed its comment upon the make-up of the regulatory authority and the CBC. "The composition of these two organizations must give a truer image of the country's bicultural dimension. To that end, a number - to be determined later - of members of the boards of directors of both organizations should be appointed directly by Quebec".

A Possible Response

Unlike educational broadcasting, a long standing policy exists, and no serious challenge or argument has been made against it. It is, in fact, the federal practices that are seriously under attack, namely the way in which the governing boards of the CBC and the CRTC are in practice constituted. The response must be on such particular questions as this - that the federal is taking seriously the proposal adopted by the 1968 Conference to study "the reform of institutions linked to federalism, including the Senate and the Supreme Court", and would consider the examination to include its major institutions in the field of broadcasting.

Conclusion and Recommendation

Quebec will surely outline in its brief and during debate its position that jurisdiction over education and related areas entails control in some circumstances, at least a necessary involvement in others. It will argue the interrelatedness of broadcasting content, and thereby the interrelatedness of controls over the "carrier". It will most likely acknowledge federal responsibility for 'control of frequencies', and related regulations responsibility but consider them purely technical functions.

The federal response can be, if detailed arguments are taken up, that in the area where carrier and content are separable, i.e. education broadcasting, the federal government has in its proposed policy recognized the exclusive jurisdiction of the provinces. If Quebec disputes the policy on BWV adopted by the federal government, it can pursue the points in the process of consultation that is now being systematically undertaken.

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CETTE UNIVERSITE ON PERSONNELS FRANCAIS, QU'IL SAGISSE D'AUTRES PROFESSEURS, DEQUIPES DE CHERCHEURS OU DE PERSONNALITES EMINENTES DE L'ENSEIGNEMENT SUPERIEUR FRANCAIS. FINCIT.

4. TEXTE DE LA LET CONCERNANT LES SATELLITES: CIT

M. LE PRESIDENT,

AFIN DE DISPOSER DANS LES MEILLEURES CONDITIONS DES MOYENS TECHNIQUES NECESSAIRES POUR LE DEVELOPPEMENT DES ECHANGES ET DE LA COOPERATION DANS LES DOMAINES DE L'EDUCATION ET DE LA CULTURE, ET VU L'IMPORTANCE QUE REVETENT A CETTE FIN LES MOYENS DE TELECOMMUNICATIONS PAR SATELLITE, J'AI L'HONNEUR DE VOUS FAIRE SAVOIR QUE MCN GOVT EST PRET A ETUDIER AVEC LE VOTRE LE DEVELOPPEMENT D'UNE COOPERATION DANS CE DOMAINE.

A CET EFFECT, ET A LA SUITE D'ENTRETIENS CONSACRES A CE PROBLEME, JE VOUS PROPOSE CE QUI SUIT:

1) DES INGENIEURS ET DES TECHNICIENS QUEBECOIS SERONT ASSOCIES A LA CONSTRUCTION DU SATELLITE SYMPHONIE, DES STATIONS TERRIENNES, ET DES INSTALLATIONS AU SOL NECESSAIRES, ET EVENTUELLEMENT DES SATELLITES QUI SUIVRONT EN EFFECTUANT DES STAGES DANS LES DIVERS ORGANISMES NATIONAUX FRANCAIS CHARGES DE LA GESTION DE CE PROGRAMME.

EN OUTRE, TOUTES DEMARCHES UTILES SERONT ENTREPRISES EN VUE DE FAVORISER DES STAGES ANALOGUES DANS LES DIVERSES SOCIETES FRANCAISES CHARGEES DE LA REALISATION DE CE PROGRAMME.

2) LA FRANCE ET LE QUEBEC COOPERERONT POUR L'UTILISATION DE CE SATELLITE, DANS LE CADRE DU PROJET SYMPHONIE, PAR L'ECHANGE DE PROGRAMMES EDUCATIFS, CULTURELS ET SCIENTIFIQUES EN LANGUE FRANCAISE.

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4) D'AUTRE PART, LA FRANCE ET LE QUEBEC ELABORERONT ENSEMBLE UN PROJET DE SATELLITE DE TELECOMMUNICATIONS DONT LA MISSION SERA D'ASSURER D'UNE MANIERE PLUS CONSTANTE ET PLUS LARGE DES ECHANGES DE PROGRAMMES EDUCATIFS, CULTURELS ET SCIENTIFIQUES EN LANGUE FRANCAISE.

LA DECISION CONCERNANT LA REALISATION DE CE PROJET, OU DE TEL AUTRE QUI POURRAIT ASSURER DANS D'AUSSEI BONNES CONDITIONS LE MEMES MISSIONS, SERA PRISE EN TEMPS UTILE.

4) LES ORGANISMES FRANCAIS ET QUEBECOIS COMPETENTS COOPERERONT, EN TANT QUE DE BESOIN, POUR L'ETUDE ET LA CONSTRUCTION DES STATIONS TERRIENNES ET DES INSTALLATIONS AU SOL NECESSAIRES.

5) LE CENTRE NATL D'ETUDES SPATIALES POUR LA PARTIE FRANCAISE ET LE BUREAU DE LA PARTIE FRANCAISE ET LE BUREAU DE DEVELOPPEMENT AUDIO-VISUEL POUR LA PARTIE QUEBECOISE CREENT UN GROUPE DE TRAVAIL MIXTE EN VUE D'ASSURER LA BONNE EXECUTION DES ENGAGEMENTS PRIE.

6) IL EST DES MAINTENANT ENTENDU QUE LES DEUX GOVTS SUPPORTERONT A PARTS EGALES LES FRAIS ENCOURUS.

SI LES TERMES DE LA PRESENTE LET RENCONTRENT VOTRE APPROBATION, VOTRE REPONSE CONSTITUERA AVEC CETTE LET L'ACCORD DE NOS DEUX GOVTS VEUILLEZ AGREER, M. LE PRESIDENT, L'ASSURANCE DE MA HAUTE CONSIDERATION.

SIGNE: MICHEL DEBRE

POUR COPIE CERTIFIEE CONFORME A L'ORIGINAL

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