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Daniel Jay Baum
Osgoode Hall Law School of York University

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BROADCASTING REGULATION IN CANADA: THE POWER OF DECISION

By Daniel Jay Baum

A. BEFORE THE PARLIAMENT OF BROADCASTING

In February of 1974 fourteen commissioners of the Canadian Radio-Television Commission (CRTC) sat in judgment of the Canadian Broadcasting Corporation. The occasion was the license renewals for the CBC. The hearings were anything but perfunctory or legalistic. An array of what may be termed television sophisticates, the intellectual elite of broadcasting, were asking the CRTC for a restructuring of the nation's broadcasting system. More precisely, they were asking for a severance of the CBC's technical operations from those of programming. They wanted "to free" the creative process of the national network from a bureaucracy that had become technically oriented, that was more concerned with "hardware" than "software." They presented their arguments to the CRTC which they called "the parliament of broadcasting." And, as we shall see, the strange thing was that the CRTC listened to the arguments. It seemed to accept the plenipotentiary label of "the parliament of broadcasting".

From The Committee on Television, a public interest group of television producers such as Patrick Watson, and academics such as Abraham Rotstein, came proposals for CBC reorganization based upon disenchantment with the existing system:

The CBC's central flaw is a confusion of priorities. The CBC exists to provide programmes, but programmes are not given priority. Bureaucratic structure, physical plant, technical services — these seem more important, within the CBC, than the making of programmes. As a result, the producers of programmes are downgraded. They should be the central figures in the Corporation, yet they are pushed to the margin of decision-making.

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* Professor of Law, Osgoode Hall Law School of York University.

† On June 19, 1975 Royal Assent was given to the Canadian Radio-Television and Telecommunications Commission Act, S.C. 1974-75, c.49. The Act replaces the CRTC with the Canadian Radio-Television and Telecommunications Commission (CRITC), but for the purpose of this article, it does not represent any significant new development. The former federal Minister of Communications, Gerard Pelletier, referred to the Act as "an internal reshuffle of regulatory agencies of the federal government. That brings no change whatsoever to the respective authority nor to the administrative disposition between the provinces and the federal government as regards the regulations of Telecommunications". [Can. H. of C. Debates (Oct. 3, 1974) at 631]. The Act is to come into force on proclamation. References in this article to the CRTC are made with this in mind.

‡ For a popular version of the CRTC hearings see, V. Cleary, "The CBC Under Siege — A Corporation Programmed for Failure", Macleans, June 1974, at 43.

§ CRTC, Intervention of the Committee on Television, Saving the CBC (Vol. 2, No. 100, February, 1974) at 133, para. 240.
In the view of the Committee on Television the remedy was splitting the present CBC function into two parts. 4 For convenience these may be called the Service Establishment and the Programme Corporation. The Service Establishment would own the physical plant, facilities, and equipment of CBC. It would, in addition, and, most importantly in terms of the Committee on Television, retain most of the executive staff presently within CBC. "It will devote itself to what it can do well; providing the country with the facilities for a public broadcasting system". 5

The Programme Corporation, according to the Committee, would be entirely devoted to programming. Its officers, from president to vice-president, would be experienced programmers, and would be judged entirely as such. The dissemination of programmes would be done through the Service Establishment which also might be called upon to assist in production. But, in this regard, through outside contracting, the Programme Corporation would be free to use private facilities or other public agencies such as the National Film Board. The Committee felt that

[T]he Programme Corporation will thus present itself coherently to Parliament and public. It will be in a position to ask that it be judged on its programmes alone. It will have all the usual difficulties of a publicly owned communications corporation, but it will not suffer the same confusion of values and priorities the CBC now suffers. It will be cured, at a stroke of the illness . . . diagnosed [by a former president of CBC, George Davidson] in 1970 when he told the CRTC: 'Part of our financial problems arise from what I choose to call the deadweight burden of providing the capital plant, maintaining the capital plant and maintaining the support elements in our total personnel and operation which are related to the transmission and distribution of the program service rather than to the content and improvement of the program service itself.' 6

The Committee on Television cited the CRTC's license-granting powers and asked the Commission to annex to the CBC's English-language network television license a requirement that the CBC produce within a year (from the grant of license) a plan for reorganization into two parts—a Service Establishment and a Programme Corporation—along with a timetable for the implementation of this plan.

There were "problems" associated with the Committee's proposal. But, it must be emphasized, the Committee apparently did not feel that the problems were legal or even political in the sense that the decision to sever the CBC would be ultra vires the CRTC and, fundamentally, a matter for Parliament. On the contrary, the view seemed to be that the CRTC is Parliament in matters relating to broadcasting. It is the function of the CRTC to make the relevant decision, and once that decision is made it is then the function of Parliament and the appropriate ministries to implement that ruling.

In the context of parliamentary democracy such a position seems specious; it seems hardly worth serious thought. The fact remains, however, that that position received serious thought, not only by an intellectual elite familiar

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4 Id. at 134, para. 243.
5 Id. at para. 244.
6 Id. at 135, para. 247.
with broadcasting, but also by William H. Neville, the former Executive Assistant to the Secretary of State, Judy La Marsh, during whose tenure (1966-1968) the Broadcasting Act was considered and enacted by the Parliament. In his individual intervention before the CRTC Mr. Neville took essentially the same tack as the The Committee on Television. He, too, limited his remarks to the CBC's English-language television network. He referred to the CBC as an essentially publicly-owned hardware system delivering an essentially commercial programming service. It is essentially a publicly-owned hardware system because more than 180 stations are CBC-owned outlets, even though it relies heavily on privately-owned affiliates to complete the delivery system. Yet, these privately-owned affiliates, coupled with the CBC need to supplement its Parliamentary budget, have an important impact on the Crown corporation. They tend to make the CBC essentially a commercial programming service. In that regard, according to Mr. Neville, it is not relevant that the CBC obtains most of its revenue from Parliament and that it does engage in some "non-commercial programming."7

The CBC developed into its present hybrid state for reasons that are entirely understandable. The first priority of government and of the CBC was to reach throughout Canada, to establish a hardware system capable of reaching most Canadians. Emphasis had to be placed on the means to achieve that end; CBC management, initially at least, had to be hardware-oriented. Further, the CBC had to rely to some extent on private affiliates to complete the system. This necessarily had an effect on programming, for the private affiliates were not subsidized by Parliament; they needed programmes with mass appeal which could generate adequate advertising revenue, their sole support. Indeed, legislation requiring balanced and comprehensive programming could be seen as a Parliamentary endorsement of mass programming.

Mr. Neville asked for something more than a publicly-owned network with basically commercial programming. He asked the CRTC to make the CBC into a public broadcasting enterprise which he proceeded to define as "the anti-thesis of private commercial broadcasting".8 First, and most significantly, public broadcasting means no dependence on advertising revenue. Such dependence can heavily influence the nature and quality of programming, which must be of a type that will attract advertising dollars. More often than not, this in turn means designing programmes that will attract mass audiences tuned to listen at designated hours. It is programming that tends to cater to the lowest common denominator; to be successful it is only necessary to induce a viewer to view the programme and not necessarily to be deeply touched by it. Moving away from advertising reliance also means a flexible use of time. That "sacred period" known as "prime time" might be used to cover conferences and other private events of interest to sizeable numbers of Canadians; it might even be used for open-ended programming including viewer participation.9

7 CRTC, Intervention of W. H. Neville, Submission to the CRTC Re Application by the C.B.C. for Renewal of its English Language Television Network Licence, (Vol. 6, No. 202 February, 1974) at 2.
8 Id. at 4.
9 Id.
Mr. Neville continued:

In particular Canadian terms, [public broadcasting] should mean more regional emphasis — more regional production centres both for programming within a region and for initiating programming interpreting that region to the rest of the country. It means seeking out Canadians of interest and merit beyond the small clique of talents and 'personalities' currently receiving exposure on our networks. It may mean more emphasis on adult educational programming during hours when adults are actually awake and watching television. It means doing what every country except Canada does and that is to give greater access to our private film-makers to the prime visual medium of the day.10

How is a new, sensitive CBC to be created? Mr. Neville, who must be taken as having some expertise in the law and the policy of Canadian broadcasting regulation, urged the CRTC to "transform" the management of CBC from a hardware-oriented group to an organization totally dedicated to implementing the programming philosophy of public broadcasting. This, he said, can best be accomplished by structural reorganization of the CBC: separate the hardware from the software.

Along with structural reorganization Mr. Neville argued for financial reorganization. It would be better, he felt, to prohibit the CBC from raising any commercial revenue and have it financed entirely by the Parliament. In that regard, he suggested long-term financing budgets to allow for better planning and enhanced flexibility. What Mr. Neville sought before the CRTC was a 'commercial-free CBC', as he defined such an enterprise.

Only by way of postscript did Mr. Neville question whether the CRTC was the proper forum for CBC reorganization. In his intervention he stated:

On re-reading . . ., I am struck by the fact that almost all of this submission is, in fact, 'ultra vires' of the Commission. That is, the issues raised and the proposals made should not be, under the terms of the Broadcasting Act, the subject of discussion before the CRTC, but rather are matters which rightfully should be for resolution by the Government and Parliament of Canada . . . I make no apology for placing them before the Commission, for in recent years it can fairly be said that the CRTC has become not just the regulator of broadcasting, but its de facto 'Parliament'.11

Whatever may be the merits of a CBC reorganization, there is an overriding question of legislative authority. Has communications policy for Canada been allowed to drift into the jurisdictional ambit of the CRTC? To put the question in such a manner assumes that broadcasting policy involves political judgments yet to be made by Parliament. Surely, if Parliament had formed a judgment about the nature of Canadian broadcasting, about the values that it should represent, there would be sound reason for entrusting the implementation of those values to an independent regulatory agency free of political influence. Indeed, it is even possible for Parliament to use an independent agency for assistance in shaping policy, gathering information, eliciting views, and even formulating issues.12

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10 Id. at 5.
11 Id. at 7.
B. CRTC OBJECTIVES

What then is the function of the CRTC, the most recent Parliamentary instrument for implementing a broadcasting policy? Is it an agency whose nine full-time and ten part-time members are only limited by the subject matter of broadcasting? And, in that regard, what is the CRTC's relationship to the CBC? Does the CRTC stand as a supervisory body, a broadcasting "Parliament", to the CBC? Is it meaningful that the CBC President, Laurent Picard, chose not to challenge CRTC jurisdiction when it came to the proposed severance of the Crown corporation into hardware and software components? Rather, Mr. Picard chose to answer the challenge on the merits: Take away the CBC's distribution system, and destroy the CBC.13

Lawyers and judges, as well as academics, may prefer an analysis of statute to a discussion of administrative policy. After all, a statute is the law of the land guiding both agency and court. If the statute is clear on any disputed issue, that will be the end of the matter — the court will apply it. We prefer, however, to set forth the intent of the Government at the time in establishing the CRTC. To the extent the Government's objectives were clear, to the extent the CRTC, with purpose, was handed authority to set broadcasting policy, then we can better understand the political role assumed by the agency and Mr. Neville's statement that the agency had become a "Parliament" in matters relating to broadcasting.

The Broadcasting Act (1968)14 can be seen, in one sense, as simply the most recent Parliamentary effort to shape an instrumentality for the control of broadcasting. Those efforts may be said to have begun with the Report of the Royal Commission on Radio Broadcasting15 in 1929, and continued to the Green Paper in 1973, Proposals for a Communications Policy for Canada — A Position Paper of the Government of Canada.16 From the 1929 report to that of 1973 there have been certain constants in the Government's approach to broadcasting. Without detailed comment or citation we will list those constants:

(a) Broadcasting cannot be left to the private sector, as it affects too deeply the national interest. There must be policy shaped by government. The federal government's role in that regard is derived from the British North America Act.17

12 L. Picard, "The CBC Under Siege — A Network That's Good and Getting Better", Macleans, June 1974, at 43: "And in Canada you can't separate programs from the distribution system; distribution in the lifeline, the spinal cord if you like, of Canadian broadcasting. Remove it and you have no CBC."
13 S.C. 1967-1968, c. 25 as amended. The recent Act, supra, note 1, s. 14, states that the objects and powers of the new CRTTC are as set forth in the Broadcasting Act.
14 (Ottawa: J. de L. Tache, 1929).
(b) The Canadian broadcasting system will be a public-private mix, but preference will be given to a national, publicly-owned system (the CBC), which has the capacity to reach most Canadians.

(c) Programming is of concern to governments in certain areas: there should be strong Canadian content (partly rationalized as a means toward developing a sense of Canadian identity), a balance in news presentation, and the opportunity for a full range of programming. Particularly in time of elections there should be some assurance of fairness in making broadcast time available. In all other respects government should ensure an absence of broadcast censorship.

(d) An independent agency should have some, but not complete power to make those decisions necessary to implement broadcasting policy. Parliament, or more particularly, the Government of the day, has felt a real need to insulate itself from the public while, at the same time, preserving to itself the power to take certain initiatives.

It may be that our summary of constants is not complete. There are perhaps additional points that can be added, such as Canadian ownership of the broadcasting system. Our list, however, is adequate for an understanding of the 1968 Broadcasting Act and the power granted the CRTC.

Historically, our beginning point is the 1957 Report of the Royal Commission on Broadcasting.18 It recommended the establishment of a single board to control both the public and private sectors of broadcasting, a recommendation that Parliament rejected, however, in the Broadcasting Act of 1958.19 A Board of Broadcast Governors, whose vice-chairman, Pierre Juneau, was to become chairman of the CRTC, was created with broad powers. But they were powers that had to be shared with a CBC board,20 and they were powers that not infrequently brought the two boards into positions of conflict.

In 1965 there came another report on broadcasting (which must rank as the most investigated and reported subject matter within the competence of government).21 Again, there was a recommendation for a single regulatory body:

We do not believe it is possible to give adequate supervision and direction to the private sector without a detailed and intimate knowledge as to what the other half of Canadian broadcasting is doing. Nor is it possible to give effective direction to the CBC without taking into account the activities, purposes and problems of the private section.22

The committee, whose terms of reference were on the whole quite broad, (but

18 (Ottawa: Queen's Printer, 1957).
19 S.C. 1958, c. 22.
20 Id., s. 22, 29.
21 Report of the Committee on Broadcasting, (Ottawa: Queen's Printer, 1965) [This was an advisory committee on broadcasting appointed by the Secretary of State. Its chairman was Robert M. Fowler. Other members of the committee were Marc Lalonde and G. G. E. Steele].
22 Id. at 97.
excluded a consideration of CATV — cable television), directed strong criticism at both the CBC and the private sector. It suggested that an independent regulatory body of a chairman and fourteen members be established.

Among the key points made by this committee was one relating to broadcasting policy: "What we think is necessary is that the goals of the Canadian Broadcasting system should be clearly set in the Broadcasting Act to the fullest extent possible in a statute, and supplemented by an approved declaration of policy in a White Paper." The committee felt that the clearer the statement of goals, the better licensees, and particularly the CBC, could understand and implement their mandate.

In 1966, the Secretary of State issued a White Paper on Broadcasting which provided the basis for the 1968 Broadcasting Act. The White Paper cannot be seen as any full endorsement of the 1965 report. Perhaps, like so many political judgments it was a compromise. The bill that became the 1968 Broadcasting Act was laid before Parliament with objectives that lacked specificity, that were no more sharply defined than the 1958 Broadcasting Act. Consider the sweeping generalities of the objects provision of the 1968 Act:

2. (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian Broadcasting system, comprising public and private elements;

(b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

(e) all Canadians are entitled to broadcasting service in English and French as public funds become available.

In point of fact, the 1968 Act largely duplicates the objects provision of the 1958 Act, which stated in section 10 that the Canadian broadcasting system should be "basically Canadian in content and character". Yet, the 1968 Act does go beyond the 1958 legislation in one respect; it sets forth for the first time a mandate for the CBC. The statute requires that the CBC

(i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,
(ii) be extended to all parts of Canada, as public funds become available,

(iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and

(iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity.  

Viewing the objectives for the CRTC and the CBC the Secretary of State was able to tell the House:

The bill [which was to become the 1968 Broadcasting Act] accordingly sets out in clear language a broadcasting policy for Canada which includes for the first time a mandate for the national broadcasting service operated by the CBC. It should be clearly understood that this is a new technique in broadcasting policy. The mandate set out is more than a preamble; it is an integral part of the measure, expressing the intentions of Parliament, and it will have the force of law. Thus, the whole of the rest of the bill must be considered in the context of this declaration of policy. The objects of the regulatory authority . . . will quite simply be to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing this policy.  

The view expressed by the Secretary of State became the law. Yet, it is difficult to find in the statute, applied either to the CRTC or the CBC, a clear, firm delineation of goals. For the national broadcasting service the resultant burden in planning is even more difficult: the CBC has limited funds, derived in part from advertising, and a distribution system dependent in part on privately-owned affiliated stations. These facts were not changed by the 1968 Broadcasting Act. There was acceptance of the 1965 report finding that "the development of a completely separate publicly-owned system with full national coverage cannot be economically justified. For as long as this report has any relevance, the CBC must continue to depend substantially on privately-owned affiliated stations for distribution of its network programme services."  

How is the CBC to allocate its priorities? It must maintain the existing national broadcasting system, yet this cannot be done without catering, at least to some degree, to mass audiences. Without advertising revenue programmes could not be produced in the quantity needed for full-time broadcasting. And, perhaps more importantly the privately-owned affiliates would simply disappear for lack of revenue. The rejection of special programming catering to selected audiences, whether they are the intellectual elite or an ethnic grouping, must be done with care so as not to disrupt the mass appeal of the national network.

At the same time, the CBC must move to expand its hardware facilities to reach all Canadians and to keep them in touch with the world around them. These are not insignificant matters. They are not made less difficult when two other facts are borne in mind: (1) The Canadian land mass is immense. It would be hard enough under normal conditions to reach all Canadians with radio signals. But in the North where Canadians, including many diverse  

26 Id., ss. 39(i) and 2(g).
28 Supra, note 21 at 96.
Broadcasting Regulation

native groups, are scattered, there are periods of frequent black-outs. (2) Allied to the burdens of nature are those of man. The CBC is under a mandate to provide service in both official languages, English and French. 29

In principle CBC made a choice: it would emphasize development of its hardware system in an attempt to reach most Canadians as its first priority. Such was the testimony of CBC President George Davidson before the Special Senate Committee on the Media in 1970. 30 In the context of this hardware expansion CBC would adhere to its mass programming philosophy. CBC President Laurent Picard wrote in 1974:

The CBC has to have programs for everyone. I reject the idea of an elitist or highly specialized CBC and the Canadian people reject that idea too, or certainly most of them do. Our research studies tell us that people are looking for something extra, something different from the CBC in terms of program style, program quality, Canadian content and hard information. But they still want entertainment, they still want variety, they feel that the CBC is theirs and they want to be able to enjoy it. We believe the concept of balanced service, which is set out in the Broadcasting Act, is a valid one for the CBC. For one third our vast distribution system and technical plant, and the human and financial resources that support it, could hardly be justified for a specialized type of service directed only to a minority. 31

At best, the CBC must be seen as a compromise to most Canadians. It does not reach all Canadians, and it certainly does not reach them in both official languages. Moreover, its programming surely is not pleasing to all. Indeed, so strong can be the reaction against the CBC that provincial governments have become spokesmen for change. Consider the formal comments of Nova Scotia and British Columbia at the Federal-Provincial Conference on Communications in 1973. Nova Scotia addressed the conference on CBC's expanded coverage policy, noting the potential conflicts that can arise between federal (CBC) and provincial priorities. According to the CBC, second language broadcasting to communities of 500 or more is a priority. According to the Province of Nova Scotia, adequate first language broadcasting to communities much larger than 500 is a greater priority. 32

British Columbia spoke to the Federal-Provincial conference, inter alia, of its concern over the quality of communications services and their capacity to reflect and enhance the way of life found in the province. A new CBC seemed to be demanded by the province of British Columbia:

Much of the time, the CBC seems as relevant to our concerns and as representative

29 R.S.C. 1970, c.B-11 at ss. 3(e) and 3(g)(iii).
30 Mr. Davidson added that even full use of Telesat Canada's satellite, ANIK, would not bring full television coverage to Canada, as that depended on the size and location of earth stations. Can. Special Senate Committee on the Media, Proceedings, No. 30 (March 12, 1970) at 31.
31 Supra, note 13.
32 Notes for an address by the Honourable L. Pace to the First Federal-Provincial Meeting of Ministers Responsible for Communications, Province of Nova Scotia, Nov. 29-30, Ottawa, Document No. Com.-13, at pp. 3-4. The Nova Scotia Minister added: "A second example is exemplified by the policy of the CBC to emphasize national programming. The Province of Nova Scotia firmly believes that local, provincial, and regional programming should play a major role in the development of the CBC. These are but two examples of the underlying problem. Whatever form or structure is finally designed as a result of this process of Federal-Provincial consultation, the issue of selecting priorities must remain in the hands of the Provinces." Id. at 4.
of our interests as the BBC or the Australian Broadcasting Corporation [sic] might be expected to be. At least some British Columbians find it less relevant than the PBS system in the U.S.; one-sixth of the financial support received from Seattle's Channel 9 (e.g. the PBS station) comes from voluntary contributions of B.C. residents. Opportunities for West Coast productions by west coast artists, writers and producers about west coast culture are badly limited in the Toronto-dominated, Ottawa-regulated broadcasting system.32

It is indeed true that in 1968 Parliament gave for the first time a statutory mandate to the CBC. But it is a mandate that can also be a snare: the CBC can be called upon to do the impossible, to be all things to all people. For the moment, putting aside any direct action by either federal or provincial governments which might affect the CBC, there remains the 1968 Broadcasting Act, with its potential for CRTC control of the CBC. Under the terms of that legislation, the CRTC also is given a mandate and substantial power to implement its interpretation of that mandate. At this point, however, a rather important caveat must be interposed: while the CRTC mandate may be quite broad, it is not total. Moreover, agency power to enforce its view is circumscribed by statute.

To say that the CRTC is subject to statutory limitations is one matter. For the agency to impose upon itself self-restraint reflecting those limitations is quite another matter. This variance in the statutory view of function, as contrasted to the agency's perception of duty, has significant bearing in the making of broadcasting policy. The conclusion which surfaces is that of a vulnerable CBC subject to substantial influence from the CRTC. What follows is a general statement concerning the 1968 Broadcasting Act's regulatory scheme and an example, at least in our view, of agency ultra vires action.

C. ULTRA VIRES ACTION AND THE CRTC

It is fundamental law that an agency of the Crown, such as the CRTC, takes its power from statute; it has no other power save that bestowed upon it by Parliament. Further, in Canada's federal system the legislature itself is confined; it can only act upon those matters assigned to it under the appropriate headings of the B.N.A. Act.33

Section 16 of the Broadcasting Act is entitled "Powers of the Commis-

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33 The Report of the Royal Commission Inquiry into Civil Rights (Toronto: Queen's Printer, 1968), Vol. 1, at 35, 36 put the matter well:

In a matter of pure law, as long as it stays within the powers conferred on it under the B.N.A. Act, the Legislature has power to take away or curtail any of the rights that an individual may have, and in strict law it is not required to provide any compensation for the rights taken away or curtailed. Such encroachment cannot be said to be legally 'unjustified'. As a practical matter, in the absence of constitutional safeguards in the nature of a bill of rights, the full exercise of the Legislature's legal legislative power is only curtailed by its accountability to its electors . . . . The Legislature can and does confer legislative and administrative authority on subordinate bodies. This is often done in the widest terms. The subordinate body is, however, strictly confined in the exercise of the power conferred within the limits set out in the statute. (emphases added)
sion”. It provides for agency action in three different ways: (a) the establishment of classes of broadcast licenses; (b) making regulations; and (c) license revocation. As to (a) and (b) the agency is given a wide discretion, but it is one which cannot be exercised against individuals, as such. Rather, the agency must decide in general the classes of licenses and the regulations it thinks appropriate. It must then relate those decisions to the objects provision of the Act. Not least important, the CRTC must publicly announce its intention to act and afford licensees and other interested parties an opportunity to comment upon the agency’s intent.35

As to regulations, this is not the end of the matter for the CRTC. The agency is bound by the Statutory Instruments Act, which imposes other procedural safeguards.36 Final regulations must be forwarded to the Clerk of the Privy Council who, in consultation with the Deputy Minister of Justice, will examine those regulations “to ensure” that

(a) they are authorized by the statute pursuant to which they are to be made;
(b) they do not constitute an unusual or unexpected use of authority pursuant to which they are to be made;
(c) they do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with the purposes and provisions of the Canadian Bill of Rights;
(d) the form and draftsmanship of the proposed regulations are in accordance with established standards.37

Only after these procedures have been followed is the Clerk of the Privy Council to issue the necessary certificate to cause publication of the regulations in the Canada Gazette. The procedures set forth in the Broadcasting Act and the Statutory Instruments Act are designed to bring about public participation in the formulation of rules, as well as some intra-government effort toward ensuring that the agency will act intra vires. Only after that procedure is followed may the agency make public, only then may it enforce, its final rules.

Let us be clear: the rules about which we are speaking should constitute agency translation of general statutory objectives (section 2 of the Broadcasting Act) into specific criteria (by means of section 16) amenable to enforcement.

The mechanism for the exercise of agency power against licensees is the broadcasting license, issued by the agency for a period up to five years. Without that license there is no right to engage in a broadcast undertaking.38 The regulations of the CRTC can be applied individually to conditions of license. But, it must be emphasized, the power to impose conditions of license, though under a separate provision of the Act, must still be viewed in context. First, the right to issue licenses and impose conditions must be “in furtherance of

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35 R.S.C. 1970, B-11, s. 16(2).
37 Id., s. 3(2).
38 R.S.C. 1970, c. B-11, s. 29(3).
the objects of the Commission.”39 This is the introductory proviso to the licensing provision itself. Second, a mechanism, rather precisely defined, exists to give those “objects” specificity. That mechanism is section 16 dealing with rule-making. To allow the Commission to impose individual conditions of license under section 17, that it could not in law impose under section 16, would make meaningless the only statutory proviso that of right affords those affected an opportunity for a hearing, as well as an internal government check on an abuse of power. To permit such a reading of its licensing powers by the CRTC would be to give it an absolute discretion to make a broadcasting policy of its choosing, free of input from others except as the CRTC should choose to elicit that input. This can hardly be said to have been the intent of Parliament in enacting the 1968 Broadcasting Act. It certainly is not consistent with the words of the Secretary of State who spoke of clear standards and implied metes and bounds to agency action.

CRTC licensing power extends beyond the commercial sector; it embraces the national broadcasting system. The CBC, like other licensees, must appear before the CRTC for license renewal. Like other licensees, the CBC is subject to the imposition of agency conditions in the grant of license.40 Unlike other licensees, however, any agency-imposed condition is not self-enforcing, even if it bears a reasonable relationship to the objects provision of section 2 and the implementation of those objects in section 16. The CBC may compel CRTC consultation on any imposed condition. Impliedly, this can be done in camera, even without public knowledge that such consultations are taking place.41 On application,42 after consultation, the CRTC may relieve the CBC of the imposed condition. If, however, the CRTC holds to its position, and if the CBC believes that the condition would “unreasonably impede the provision... of the national broadcasting service” contemplated by section two of the Broadcasting Act, the CBC may refer the matter to the Minister for resolution.43 The Minister, after consultation with the CRTC and the CBC, may issue a written directive that must be accepted by the CRTC.44 That directive must be laid before Parliament within fifteen days of its issuance and published in the Canada Gazette.45

It was the power to impose conditions of license that the Committee on Television and Mr. Neville were asking the CRTC to use against the CBC. To them the power was near absolute; there were not conditions that would operate against the CRTC. Even if the power was abused, its exercise by the CRTC would force CBC reaction. The CBC would have no recourse but to seek consultation and ultimately have the matter referred to the Minister — and that meant the Government and Parliament. In essence, the CRTC could have been a catalyst to compel Parliamentary action.

39 Id., s. 17(1)(a)(ii).
40 Id.
41 Id., s. 17(2).
42 Id., s. 17(1)(b).
43 Id., s. 17(3).
44 Id.
45 Id., s. 17(4).
1975] Broadcasting Regulation 705

The CRTC rejected such a blanket approach to exercising jurisdiction. It reviewed and laid down conditions in a lengthy decision which it titled, *Radio Frequencies Are Public Property.* It addressed itself, *inter alia,* to advertising. As to advertising directed to children, the CRTC set forth deadlines which would require the complete elimination of such messages by January 1, 1975. The effect on the CBC was to compel a different type of programming for this audience.

Other examples of conditions could be offered as to the CRTC order renewing the CBC license. The Committee on Television and Mr. Neville might not have obtained a direct order of severance of programming and hardware, but they surely have seen the CRTC become intimately involved with CBC structure and programming. Needless to say, the agency order is now the subject of what the statute calls “consultation”. The meetings are secret; they are not open to the public. The meetings must also be seen as negotiations. The CRTC enters them, through its Executive Committee dominated by its Chairman and Vice Chairman, with a point of view made manifest in an order. So, too, the CBC enters the meetings attempting to carry forward a near impossible set of goals. Without much doubt compromises will be struck. Political intervention through Ministerial reference could hurt both the CBC and the CRTC. The public may see the ultimate compromise in a CRTC amendment to the license, but will not likely be made aware of the bartering that leads to the compromise.

1. Children’s Advertising

For our purposes, we choose to focus upon children’s advertising as an example of the interplay between agency and legislature, and the relationship of statute to the exercise of power. Children’s advertising is a matter of fairly current interest to the CRTC. In 1971, James McGrath (P.C., St. John’s East) introduced a private Member’s bill for CRTC control of advertising on children’s programmes. In hearings of the Bill before the House Standing Committee on Broadcasting, Mr. McGrath asked Chairman Juneau why the agency could not act without a bill. If advertising directed to children was “wrong”, then surely the CRTC had the power to eliminate the practice:

*Mr. McGrath:* The *Broadcasting Act* has given you a leadership role. It has given you wide regulatory powers.

*Mr. Juneau:* The *Broadcasting Act* does not give us the responsibility for establishing the broad objectives of broadcasting in Canada. We have never taken it upon ourselves to establish objectives that were not established in the *Broadcasting Act*. I think you will find it difficult to point to anything the CRTC has done, any leadership role the CRTC has taken, that cannot be related to a specific objective in the *Broadcasting Act* established by Parliament.

*Mr. McGrath:* How about your decision on Canadian content?

*Mr. Juneau:* There is a very specific relation to that in the *Broadcasting Act*. There

46 CRTC Decision 74-70.
47 Id. at 78, 92.
48 Bill C-237 (April, 1971). The Bill was reintroduced, as Bill C-22, on Jan. 15, 1973.
is no reference in the *Broadcasting Act* to the fact that children's advertising should be banned.

Mr. McGrath: Do you personally feel that children's advertising should be banned?

Mr. Juneau: Not unless Parliament decides that.\(^\text{40}\)

The CRTC Chairman did not see agency power over broadcasting as plenary. This must be stressed. As Mr. Juneau viewed the *Broadcasting Act*, there had to be a specific proviso touching upon children's advertising for there to be an assertion of jurisdiction by the CRTC. Apparently, it did not suffice that the Commission was assigned power to make regulations “respecting the character of advertising and the amount of time that may be devoted to advertising".\(^\text{50}\) Indeed, Mr. Juneau seemed to recognize that section 16, with its power over advertising, is a means proviso; that is, it can only be used in the pursuit of those objectives set forth in section 2. And, as Mr. Juneau stated, there is nothing in section 2 that speaks to children's advertising.

The House Standing Committee on Broadcasting responded to Mr. Juneau's statement by coming forward with a report on July 12, 1973, which offered, *inter alia*, the following recommendations:

1. that the CRTC pass regulations which would provide that advertising must not be directed exclusively to children;
2. that the CRTC limit further the number of commercial minutes per hour during children's programmes;
3. that the CRTC require deletion of advertising directed to children from American programming distributed on the Canadian cable systems. . . .

The Committee's report, the result of nine sittings and consideration of the testimony of 32 witnesses, was laid before the House and endorsed by it on July 24, 1973. But, Mr. Juneau did not feel that that endorsement gave him authority to act as the Committee and House had requested; he could not move forward and cause the CRTC to promulgate a regulation, for the CRTC lacked the power to do so in his view.\(^\text{51}\)

In that context Mr. McGrath presented still another Private Member's Bill to provide the CRTC with the specific power that its chairman thought was lacking.\(^\text{52}\) That Bill is simple in its thrust; it constitutes an amendment to the *Broadcasting Act*, providing:

Notwithstanding anything contained in this Act [the *Broadcasting Act*], no advertisement shall be permitted during the broadcast of a program devoted to children under the age of thirteen years. . . . In this section, 'programs devoted to children under the age of thirteen years' means such programs as are defined by the Commission by regulation.

The Bill assumes an absence of CRTC authority to promulgate regulations dealing with children's advertising and attempts to give the CRTC that power.


\(^{50}\) R.S.C. 1970, c. B-11, 16(i)(b)(ii).

\(^{51}\) Can. H. of C. Debates (April 19, 1974) at 1608, remarks of Mr. McGrath.

\(^{52}\) See, Bill C-211, 1st sess. 30th Parl., Dec. 12, 1974.
Once the power is given, the Standing Committee on Broadcasting and Mr. McGrath hoped that the Committee recommendations endorsed by the House would be implemented.

The Bill, as moved before the House, was seconded by the Chairman of the Standing Committee on Broadcasting, Ralph Stewart. In his seconding statement Mr. Stewart argued that the Bill should have been unnecessary; the CRTC had the power to act, and the House, in endorsing the Committee’s earlier report, had requested the CRTC to act. To Mr. Stewart the more fundamental question seemed to be the supremacy of Parliament. He said “... I feel the House must accept the Bill in order to let the CRTC know they are not running the show in Canada but that the Parliament of Canada has the last word.”

The Standing Committee, and, indeed, the House, wanted the CRTC to act upon children’s advertising by means of regulation. The CRTC, through its chairman, denied that it had the power to do so; it could only move if the Broadcasting Act were amended. So it was that a Private Member’s Bill was again introduced. Yet, it is important to note that although the CRTC expressly denied itself jurisdiction over children’s advertising, it nevertheless did act on the subject in the following manner:

1. As cable system licenses were presented for renewal the CRTC set forth terms for the deletion of American commercials. This was done as a condition of license renewal.

2. A CRTC “policy statement” was issued, in which the CRTC lent “its full weight” to endorsing and requiring licensees to comply with the “Broadcasting Code for Advertising to Children” of the Canadian Association of Broadcasters.

3. The CRTC attached as a condition of the CBC license the elimination of children’s advertising. Mr. Juneau explained that it was easier to act upon a single enterprise than “75, more or less, separate units.”

What surfaces is CRTC action, the imposition of real sanctions, over a subject matter that its chairman said was beyond agency jurisdiction. In this regard the chairman must be drawing upon a distinction between rule-making and licensing (to say nothing of general policy statements that have the effect of law). It is true that the making of regulations and licensing are treated as separate items in Section 16 of the Act, and that section 17(1)(a) deals with conditions of license. But it is also true that both sections 16 and 17 are powers to be used in a context; they are not ends in themselves. Section 16(1) conditions the use of power to the “objects” of the Act, and section 17(1) does precisely the same. It must be emphasized that it was the CRTC chairman, himself, who said advertising directed to children is not contemplated as an object of broadcasting policy.

63 Can. H. of C. Debates (April 19, 1974) at 1609, remarks of Mr. Stewart.
65 Id. No. 5 (April 2, 1974) at 19.
66 Id.
Let it be understood that our concern is neither the safeguarding of advertisers in general nor the prohibition of advertising directed to children in particular. Under law properly enacted and properly administered, let all broadcast advertising be regulated. Our point goes to agency abuse of statutory process and parliamentary impotence, even acquiescence in the CRTC "leadership role." The agency chairman came before the House Standing Committee on Broadcasting, which is as much a specialist body as will be found in the nation's legislature. The agency chairman pleaded, as he should have done, that the CRTC had limited powers expressed in terms of limited objectives to be achieved through regular processes. The Committee was not persuaded; it laid a report before the House urging agency action. When that action was not forthcoming, Committee members rebuked the agency before the House. Individual members threatened legislation to compel the CRTC to act as their report suggested. That legislation did not result; yet the CRTC found a way, and in our view, an improper way, to achieve the end sought: use of conditions of licence.

It was legislation that should have been enacted if the elimination of children's advertising was thought desirable. By not accepting some of the restraints that were written on the face of the Broadcasting Act, by permitting, even pressuring, the CRTC to make unexpected and unauthorized use of conditions of licensing power, Parliament in effect established a "parliament" for broadcasting of unelected persons who need not be responsive to law or the electorate. On analysis, it must be said that there are indeed some reasons for the Committee on Television and Mr. Neville to have petitioned the CRTC as a citizen might petition Parliament.

2. Cable Regulation: Another Case in Point

How far has the CRTC stretched its power? Is the example of children's television unique? After all, Parliament through one of its standing committees seemed to be demanding action of a sort. Moreover, the subject matter, children's advertising, is hardly one that excites academic defense. In sum, isn't the principle of agency abuse of power lost once the facts are examined?

The wrongful means used by the CRTC to control children's advertising is but one illustration of the misuse of license conditions. What the CRTC did to children's advertising, it did to all advertising emanating from American signals imported by means of Canadian cable. We will demonstrate the point by referring to and examining a condition of license imposed on Rogers Cable T.V. Ltd., Toronto, one of the nation's largest cable systems. The condition was imposed by CRTC order on May 1, 1974:

The Commission is aware that statements of claim have been filed in the Federal Court against the licensee by stations in Buffalo. Where litigation occurs that may affect the ability of licensees to carry out their obligations under the Broadcasting Act, the Commission is properly concerned that licensees not voluntarily settle such litigation on terms that may inhibit their ability to conform with Commission policy and requirements under the Broadcasting Act. Hence, in such circumstances,

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67 CRTC Decision 74-100 at 19, para. 2.
the Commission’s consent must first be obtained before any terms of settlement and in particular, any injunction is voluntarily consented to by any licensee. (emphasis added)

To say the least, prima facie, the condition is imprecise. The licensee is denied the right to voluntarily settle any litigation that may affect its ability to carry out obligations under the Broadcasting Act, and the licensee is prohibited from settling litigation initiated by “stations in Buffalo.” If we were concerned only with a legal attack on a poorly drafted condition of license, our task might not be overly difficult, but that is not our purpose.

The Rogers’ order provides a beginning point for determining substantive issues. That order refers to the “Buffalo litigation” which, in turn, deals with Canadian cablesystem “blackout” of American advertising and substitution of Canadian advertising. Three Buffalo television stations have challenged the “black-out” and the substitution. The CRTC Rogers’ order says nothing, as such, about the challenged acts; it refers only to CRTC “broadcasting

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68 This denial of opportunity to challenge before the condition of license is made a fait accompli is one which the Supreme Court of Canada by a 5-4 decision struck down in Confederation Broadcasting (Ottawa) Limited v. CRTC, [1971] S.C.R. 906. Mr. Justice Spence said:

It is quite plain that the requirements of natural justice demand that a person have full and complete notice of the charges against him and an opportunity to reply thereto. It has been said in this Court in two recent decisions: Regina v. Quebec Labour Relations Board, ex parte Komo Construction Inc. ([1968] S.C.R. 172) and Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd. et al. ([1968] S.C.R. 695) that the requirement of natural justice did not extend to demanding that a hearing [on] policy be had. These cases cited by counsel for the respondent on the present appeal are not, in my opinion, important on the present issue because here there was a hearing but in both judgments it is said plainly that “each party be given the opportunity to put its arguments” (Komo case) and “what is required is that the parties be given the opportunity to put forward their arguments” (Canadian Ingersoll Rand case).

In the present case, the complaint is not that there was not a hearing but that the respondent failed to indicate in any fashion whatsoever what issue would be considered on that hearing. Id. at 925-26.

On balance, the Court had no difficulty in affording standing to Confederation Broadcasting. The common law treatment of license as a privilege was not an issue, nor could it be, for, in essence, the CRTC had threatened revocation by non-renewal. And that revocation in turn threatened to destroy certain very real property interests [See R. v. Manchester Legal Aid Committee, [1952] 1 All E.R. 480, 489; Re Knapman and Saltfleet Board of Health, [1954] O.R. 360; Re Welfare Institutions Licensing Act, (1966), 55 W.W.R. 47]. In any event, the Broadcasting Act, itself, in Section 26 (as amended) provides for appeal to the Federal Court of Appeal from a decision or order of the CRTC upon a question of law or a question of jurisdiction. That appeal, however, is not of right; Section 26(1) requires that leave for appeal first be obtained from the Federal Court of Appeal.

69 See Capital Cities Communications Inc., et al. v. CRTC, [1975] F.C., 18, where the Roger's order (CRTC Decision 74100) was upheld by the Federal Court of Appeal as one made by the Commission under the statutory authority of s. 17(1)(b) of the Broadcasting Act. Referring to the condition not to settle litigation without CRTC consent, Mr. Justice Ryan, speaking for the court said that while it did not vitiate the decision of the Commission, one may still “question the wisdom of including in a formal decision a mandate such as that expressed”. Leave to appeal to the Supreme Court of Canada was granted. As of March, 1976 the appeal had not been heard.
policy and requirements”. The apparent basis for CRTC qualification of the Rogers’ license is the Commission’s policy statement on cable television.60 There is no other CRTC formal expression of policy or order dealing with advertising censorship of American stations.

The statement of the Commission is one of policy only; it is not a regulation, and it derives only in part from general hearings in Montreal concerning cable. Indeed, even as an expression of policy it is not clear that the Commission addressed itself totally to in intra vires matters. For example, in the policy statement the CRTC noted that some Canadian companies were purchasers of American television advertising. Therefore, “the Commission has decided to request the Government of Canada to amend section 12(a) of the Income Tax Act to include advertising purchased by Canadian advertisers on stations on licensed by the Commission”.61 That is, the Commission decided to request the Government to exclude the cost of such advertising as a business expense. It is trite to state the obvious: there is nothing in the Broadcasting Act giving the CRTC authority “to request” basic tax law amendment.

This brief mention of the tax law “request” was done only to place the policy statement in perspective. The Commission was not laying down rules; it was issuing broad policy statements precatory in nature. These largely were statements of what it hoped would happen to broadcasting through cable. Nothing more can be gleaned as to the policy statement applied to American advertising. The following, in itemized form, are the policy statement’s salient points:

(a) The Commission will not require the elimination of American advertising. To do so would be financially damaging to the cablesystems.

(b) The Commission withdrew the requirement that cablesystems could not alter received signals. The Policy Statement encouraged cablesystems to “make contractual arrangements with Canadian television stations in their areas to insert replacement signals carrying commercial messages sold by the Canadian television stations in their areas.”

(c) Canadian television stations wanting to “undertake the negotiation of such an arrangement with a cable television system” must so advise the CRTC. Commission approval of subsequent contractual arrangements between station licensees and cablesystems must be obtained.

(d) Where more than one Canadian television station in an area is interested in such an arrangement with a cablesystem, “the Commission will ensure that a sufficient and equitable opportunity be provided to the several stations.” Moreover, the CRTC will carve a place for stations to be licensed and “will also be concerned that marketing practices that develop shall not be detrimental to others.”62

60 CRTC, Canadian Broadcasting: A Single System, July 16, 1971. In the Capital Cities case, the Court felt that the policy statement was within the range of the CRTC’s mandate under s. 15 of the Act to “regulate and supervise all aspects of the Canadian broadcasting system”. Id.
61 Id. at 29.
62 Id. at 28-29.
The CRTC concludes this itemization, the basis for its ruling in Rogers, on a prectory note that also has in it a threat of further action:

The Commission is confident that where the commercial value is significant, both television stations and cable television systems will take advantage of this change in policy to help strengthen their ability to fulfill their obligations to the public. The Commission expects these licensees to take the opportunity thus provided to strengthen the Canadian broadcasting system. If this does not happen, the Commission will consider further action.\(^\text{63}\)

Thus, the following conclusions flow from the policy statement: (a) the Commission has not issued regulations, but rather a statement of policy; (b) that statement does not order cablesystems to eliminate American advertising; (c) rather, the CRTC has opened an area for bargaining and contract between the cablesystems and broadcast stations; (d) if bargaining takes place, the CRTC is to be informed, under the terms of its own policy statement, not by the cablesystem, but by the broadcast station; (e) the CRTC will endeavour to allow participation in such contracts by all licensee broadcast stations; (f) the CRTC hopes that policy articulated will strengthen Canadian broadcasting. If it does not, there will be agency re-evaluation.

The policy statement deals with a subject that is central to commercial broadcasting, namely, advertising. Without the kind of public hearing required under the Broadcasting Act for making regulations, and without the internal check that would come through compliance with the Statutory Instruments Act, the CRTC has laid a foundation for the exercise of substantial power. Its policy statement becomes the ultimate rationale for passing upon settlements arising from litigation between licensees and third parties. This is no mere “consulting” process that the CRTC is requesting; it is a condition of license for breach of which very real sanctions can flow.

The CRTC sets itself the task of acting in Star Chamber. Without publicly stated guidelines the Commission alone will determine whether any proposed settlement would allow the licensee to fulfill obligations under the Broadcasting Act. The licensee is given no opportunity to present a case and be judged openly and on the merits. The licensee, in the final analysis, must depend upon the discretion of the Commission.

To repeat, the CRTC did not choose to promulgate its policy statement in the form of regulations. It chose to avoid the procedural and substantive requirements of its own Organic Act and the Statutory Instruments Act. In this regard, it is worth noting that the Statutory Instruments Act,\(^\text{64}\) in section 4, provided the CRTC with an opportunity that it apparently chose not to use; the CRTC, under the terms of section 4, could have sought a ruling from the Deputy Minister of Justice that the policy statement was not a regulation. Section 4 declares:

Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether or not a proposed statutory instrument would be a regulation if it were issued, made or established by authority,

\(^{63}\) Id. at 29.

it or he *shall* cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established. (emphases added)

One could argue that section 4 goes beyond merely providing an opportunity; it could be that the section lays down a duty: If the agency is uncertain as to whether the instrument is a regulation, then it *shall* (i.e. must) obtain the opinion of the Deputy Minister of Justice.

It seems clear that there is a purpose in obtaining such an opinion. Related to the entire scheme of the *Statutory Instruments Act*, that purpose is to ascertain whether the agency should go through the registration procedure laid down in the Act. Now it must be said at this point that no regulation “is invalid by reason only that it was not examined” as required by the *Statutory Instruments Act*. But there is reserved to the Governor in Council, on recommendation of the Minister of Justice, authority to revoke the promulgated regulations in whole or in part.

No similar savings proviso exists in the *Broadcasting Act*. Failure to comply with the *Broadcasting Act’s* rule-making requirements probably would be a sufficient ground to set aside any CRTC promulgation of regulations. Elmer A. Driedger, a former Assistant Deputy Minister of Justice has written:

A statute sometimes requires a regulation-making authority to consult with some other person or organization before making a regulation. A provision like this is perhaps more common in the United Kingdom than it is in Canada. A recent example of this in Canadian statutes is subsection (2) of section 11 of the *Broadcasting Act*, which requires the Board to give notice in the *Canada Gazette* of its intention to make or annul a regulation that affects licensees and to afford licensees an opportunity of making representations to the Board with respect thereto. *If a statute requires an authority to consult with some other person or persons before it makes a regulation, then it must necessarily follow that the regulation is invalid if the authority does not so consult.* Although there do not appear to be any decisions where a regulation was held invalid on this ground, the conclusion expressed above appears to be supported by the case of *Rollo v. The Minister of Town and Country Planning*, ([1948] 1 All E.R. 13; see also *Fletcher v. Minister of Town and Country Planning*, [1947] 2 All E.R. 496.) In that case, the Minister was empowered to make an order designating an area as the site of a new town if he was satisfied, after consultation with any local authorities who appeared to him to be concerned, that it was expedient in the national interest that the land should be developed. The order was attacked on the ground that there had been no consultation, but the court held that the requirements of the Act had been complied with. Bucknill L.J. said that consultation meant “on the one side, the Minister must supply sufficient information to the local authority to enable it to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice.”

This point is further illustrated in *Ex Parte Brent*. In *Ex Parte Brent* the Governor-in-Council was given authority to make regulations for carrying into effect the purposes and provisions of the *Immigration Act*, including

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65 Id., s. 8.
rules governing the unsuitability, and thus exclusion, of persons because of certain conditions. By regulation, the Governor-in-Council simply repeated the broad terms of the statutory grant concerning rule-making. The result was that each immigration officer became vested with a wide discretion in interpreting the Act; there could be no uniformity, and, perhaps most importantly, there could be no Ministerial responsibility. Each immigration officer was left free to interpret for himself — to devise new, individual, and perhaps arbitrary law. The appellate court held, through Aylesworth, J.A.:

... In short, those limited powers of legislation, wide though the limits of the subject-matter may be, which Parliament has delegated to His Excellency in Council have not been exercised by the delegate at all, but, on the contrary, by him have been redelegated bodily, for exercise not merely by some one other individual but, respectively and independently of each other, by every Special Inquiry Officer who sees fit to invoke them and according to 'the opinion' of each such sub-delegate:

*I can find nothing in the Act expressly (or by inference if that is permissible) manifesting any intention to permit or authorize any such procedure. On the other hand, it is reasonable to suppose that what Parliament had in contemplation was the enactment of such Regulations relevant to the named subject-matters, or some of them, as in His Excellency in Council's own opinion were advisable and as, therefore, would be of general application to persons seeking entry into Canada regardless of the particular port of entry involved. Surely, what was intended was legislation enacted by His Excellency in Council according to his wisdom and broad experience, prescribing standards for the general guidance of Immigration Officers and Special Inquiry Officers operating at or near the borders of the country, not a wide divergency of rules and opinions ever changing according to the individual notions of such officers. The Regulation is invalid and the order of deportation based upon it is invalid likewise, *delegatus non potest delegare*... (emphases added)*

In *Ex Parte Brent* there was nothing in the Act which prohibited the Governor-in-Council from merely restating the statute as the regulations. The court implied from the Act a different procedure. *A fortiori* there is room for vitiating any CRTC rule which does not comply with the clear procedure laid down in the Act. Compliance with such a procedure cannot be considered directory only; it is mandatory. Without compliance there is no opportunity for licensee and public input; there is no need to lay the regulations before the Deputy Minister of Justice for comment as to legality; there is no recourse, no useful challenge to conditions of license rooted in improperly promulgated regulations.

Two relatively recent Ontario cases tend to emphasize the points made. They are *In Re Valade and Eberlee* and *In Re Lincoln County Roman Catholic Separate School Board and Buchler*. The following is typical of the fact patterns in both cases: a statute declares that upon discharge a government employee shall be given a statement of reasons. The discharged employee may file a grievance through his union with the employer, at which point the employer must demonstrate just cause for this discharge. The statement of reasons can be of obvious assistance in helping an employee (i) ...
termine whether to file a complaint, and (ii) if so, have a statement of particulars necessary for the preparation of his grievance hearing.

It was in such a setting as Valade and Lincoln County Separate School Board, that the court ordered that the statement of reasons be given before the discharge was a mandatory duty imposed by statute on the government. The statute was not merely directory, and the statement of reasons to be given before discharge was a procedural requirement which, if breached, vitiated the order of discharge.

So, too, the procedural requirements laid down by the Broadcasting Act for the promulgation of rules can be seen as imposing mandatory, not merely directory, duties. While the Broadcasting Act does not define a regulation, there is a definition offered by the more general Statutory Instruments Act:

'Regulation' means a statutory instrument (i) made in the exercise of a legislative power conferred by or under an Act of Parliament, or (ii) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament, and includes a rule, order, or regulation governing its practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament . . .

Can there be any real doubt that the policy statement under review, as used by the CRTC, is a body of regulations? These rules are binding upon cable licensees; that is, they have been made conditions of license, and the CRTC will not allow any settlement which runs counter to its policy statement. If such a settlement is made without CRTC permission, the agency has recourse, inter alia, to the criminal process. The CRTC has chosen to make its policy statement rules of general application binding upon licensees. In doing so, the Commission yielded an opportunity to issue merely a "Policy Statement". The Commission could have merely declared a policy (i.e. that it is desirable to eliminate American commercial signals). The Statutory Instruments Act even contemplates this kind of non-enforcing policy statement. That Act excludes from the definition of "statutory instrument" (and thus from the definition of regulation)

any instrument . . . whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto . . .

Thus, we end in a situation where the CRTC by its own action cast a policy statement into rules of general application having the force of law. When this happened, the agency was caught by the requirements of its own Act, as well as those of the Statutory Instruments Act. The point is that the Parliament has rather strictly circumscribed how the CRTC may formulate rules and decisions for violations of which sanctions can be applied.

We have already discussed rule-making which, in our view, is the most relevant subject. But consider at this point the second means for Commission
enforcement, namely, action upon a license. Parliament has laid down conditions on agency action upon a licensee that are far more severe than those in a rule-making proceeding. The Commission is mandated to hold a public hearing where it has under consideration the revocation or suspension of a broadcasting license. More important, perhaps, the Broadcasting Act also declares:

Any minute or other record of the Commission or any document issued by the Commission in the form of a decision or order shall, if it relates to the issue, amendment, renewal revocation or suspension of a broadcasting license, be deemed... to be a decision or order of the Commission.

To the extent that the CRTC acts to modify the conditions of license, the Act specifically treats that action as a final decision or order. In that posture the licensee has recourse to the courts. The CRTC cannot cloak its action by calling it a “minute” or “press release” or “policy statement”. If the effect of the document is to modify the conditions of license, it will be treated as a final decision or order subject to judicial review. In this respect the Act is very direct.

What the Commission did in Rogers was attempt to fall between the procedural requirements as to rule-making, and the substantive thrust flowing from the finality of any Commission decision or order. That is, the Commission imposed as a condition of license the requirement of settlement preclearance, with only a vague reference to the policy (i.e. rules) that would guide the agency’s actions in approving any settlement proposal. The condition of license (settlement preclearance) is abundantly direct and clear. The basis for passing upon settlements is rooted in a policy statement which the agency proposes to treat as non-rules. The effect of these machinations is an agency attempt to deny any challenge to the validity of their “non-rules”, their policy statement while, at the same time, treating that policy statement as having the force and effect of law.

D. STRUCTURING BROADCASTING: CABLECASTING AND CRTC USE OF POWER

The CRTC has taken power to itself, and where possible, it has used that power to shape a broadcasting policy. In its essential parts that policy is visible: Canadian content has become a more meaningful element in broadcasting; Canadian ownership of the broadcasting media is an accomplished fact; and the public and the creative artists have been encouraged to participate in some CRTC proceedings. Most important, however, the Commission has seized upon the old, but rapidly evolving medium of cablecasting to re-evaluate and even “restructure” the nature of television broadcasting.

It may have been that the Committee on Television and Mr. Neville did not key their proposals to the legal niceties of the Broadcasting Act and the Commission’s use of conditions of license. It may have been that those

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75 Id., s. 26(5).
76 Id., s. 26.
pleading for CBC severance by the CRTC were thinking of the agency's approach to cable where, in fact, Canadian television broadcasting has been restructured. While the discussion that follows to some extent will detail the CRTC approach to cable, there are points of a general nature to be made:

(1) If legislation can be defined as the formulation of policy, of rules of general application having the force of law, then the CRTC has acted as a legislature. It alone had determined how it would shape policy (i.e. through policy statements and public hearings). It alone set policy that recast the framework for much of the existing Canadian broadcasting industry.

(2) Many Canadians, many individual members of Parliament, and many provinces were in strong disagreement with the action of the CRTC. It appeared that some areas of Canada were to be denied access to U.S. stations and thus a variety of programming. Despite that disagreement, despite angry questions in the House of Commons, and special hearings before the House Standing Committee on Broadcasting, the CRTC decision held.

(3) The making of policy also implies a capacity for flexibility. The CRTC made clear that its decision was not fixed. The thrust of that decision was intended to protect existing Canadian broadcasters by preserving their markets. The Commission demanded that its licensees earn the right to such protection by building a Canadian broadcasting system that would do more than replicate American signals. If that challenge were not met, the Commission felt free to modify its decision, the effect of which could allow for the wholesale importation of U.S. signals.

Cable is both an old and a new technology. For Canada, cable television began in 1952 when distant television signals were brought to London, Ontario viewers by means of special receiving antenna and cable. For London, that meant signals from Cleveland, Ohio. In a period of less than twenty years, by 1970, 27.5 per cent of Canada's four million urban households were linked to cable television systems. The growth rate of cable (CATV) in Canada for 1969 was 37 per cent. In Ontario the growth rate for 1969 was 64 per cent, and for the Prairie provinces, 80 per cent during the same period. Seven Canadian systems are larger than any in the United States. With more than 100,000 subscribers, one system in Vancouver is the largest in the world.

More than half of Canada's population of about 24 million live in urban

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areas close to the U.S. border. For them CATV has special meaning. They may pick up U.S. signals from antenna and cable without the use of microwave relays. The rest of Canada's population must have relays to import distance signals (in a range exceeding 75 to 100 miles).\textsuperscript{79} With microwave relays, however, signals from very distant points can be transported without loss of quality.

Three final general points must be made concerning CATV. (1) Cable is capable of carrying a substantial number of channels. Theoretically, for Canada there is the possibility of cable carrying up to 82 channels (12 VHF — Very High Frequency — and 70 UHF — Ultra High Frequency.) Urban areas such as Toronto now carry about 30 channels, far more than a viewer might pick up over the air. (2) Historically, the lucrative license properties, those able to attract mass audiences, were sited on the VHF band (channels 2-13). In a real sense cable eliminates the distinction between VHF and UHF for the viewer who merely pushes a button for the channel desired. In Toronto, for example, the CRTC licensed on the UHF band a commercial station, CITY, which depends on cable for the larger part of its viewing audience. (3) Cable is also capable of broadcasting. It is true that the industry was fashioned by engineers interested largely in assisting in the carriage of clear signals. The same technology, however, permits the cable company to become a cablecaster. For the CRTC this opened the possibility of enhancing what has popularly become known as "citizen access" and community programming: the cable company, as a condition of license, is required to install broadcasting facilities which it must make available to citizen groups. The funding does not come through advertising revenue, but rather from the profits that cable systems derive in the sale of their systems to subscribers.

When the CRTC was established in 1968 the cable industry was well entrenched in Canada's major urban areas; millions of Canadians had integrated cable into their viewing pattern. This was no insignificant matter to the Commission. It did have power to subject cable systems to the \textit{Broadcasting Act},\textsuperscript{80} though, even today there are questions to be raised concerning

\textsuperscript{79}The brief to the CRTC submitted by City Cablevision Ltd., Moncton, New Brunswick, Sept. 3, 1969, estimates that 70 and 120 mile cable runs are technically feasible, but that the quality would be very poor. Moreover, the cost of such runs would be quite high. They would exceed by $600,000 the use of microwave to transmit the same signals.

\textsuperscript{80}The 1968 \textit{Broadcasting Act}, did subject CATV to CRTC licensing. In this regard, the CRTC stated that it "is instructed by the \textit{Broadcasting Act} of 1968 to regulate cable television. That Act, besides creating the CRTC, expressed the concept that cable television is a part of the Canadian broadcasting system." Supra, note 74 at 8. However, even at the federal level the CRTC shares power over cable. Under the \textit{Government Organization Act}, 1969, S.C. 1968-69, c. 28, ss. 9, 100, the Department of Communications had transferred to it from the Department of Transport regulation over the technical aspects of broadcasting, including cable.
the extent of that power. For years before the 1968 Broadcasting Act the federal Department of Transport had issued licenses to cable systems. In 1963 that Department sensed a danger that the rapid spread of cable systems might erode the economic base of existing television stations. The Department

81 The Commission in its original licensing of cablesystems refused to allow an alteration of received signals. The effect of this simply preserved an established system, but it did not necessarily legitimate the system. That is, cablesystems have an effect upon and are deemed part of the Canadian broadcasting system. As such they have been licensed by the appropriate agency, the CRTC. The license, however, does not, as such, legitimate the cable undertaking. It is possible, by way of illustration, for a cablesystem to be licensed, and for a municipality — in the enactment of a valid by-law — to deny that cablesystem the right to operate in the municipality.

This matter was considered in R. v. City of New Westminster, [55 D.L.R. (3) 613, 615-16 (B.C. C.A.)]. There McFarlane, J.A. sustained a municipal by-law which denied a licensed cablesystem of a Dominion company a trade license and with it, of course, the power to do business. The Court stated in part: "In later cases there has been developed the concept that Dominion companies (to use the recognized description) are bound by provincial laws of general application but are not bound by provincial laws otherwise valid which are directed against such companies so as to interfere with their powers and status as such. In essence the time honoured test of ascertaining the true nature and character — the real pith and substance — of the legislation remains the reliable test. The relevant authorities are reviewed and analysed by McGillivray, J.A., delivering the judgment of the Supreme Court of Alberta, Appellate Division, in R. v. Arcadia Coal Co. Ltd., [1932] 2 D.L.R. 475, 58 C.C.C. 17, 26 A.L.R. 348 [1932] 1 W.W.R. 771. The Municipal Act and the by-law in question are laws of general application in the sense indicated. Further they are clearly and rightly admitted to be legislation in relation to subject matters assigned exclusively to provincial legislative jurisdiction by s. 92 of the B.N.A. Act."

This case may be of doubtful authority in its failure to distinguish between a federally incorporated company, and a company subject to exclusive federal control under the general power and s. 92(1)(a) of the B.N.A. Act: See R. Show, The Cities Cablevision and the Constitution (1971) 29 U.T. Fac. L.R. 28 at 40. It also conflicts with two decisions which upheld federal jurisdiction over cable television: Re Public Utilities Commission and Victoria Cablevision Ltd. (1965), 51 D.L.R. (2d) 716 (B.C.C.A.); Re Oshawa Cable T.V. Ltd. and Town of Whitby, [1969] 2 O.R. 18, 4 D.L.R. (2d) 224 (Ont. H.C.). In the latter case, Stark, J. held that the municipal by-law purporting to regulate and license cable T.V. exceeded the powers given to the municipality by s. 379(1) para. 99 of the Municipal Act, R.S.O. 1960, c. 249 (now R.S.O. 1970, c. 284, s. 354(1) para. 101). A recent Ontario Court of Appeal Decision further confuses the issue. In Re coaxial Colourview Ltd. and Borough of Scarborough (1975), 5 O.R. (2d) 463, the Court held that a special provincial Act had the effect of enabling the municipality to pass bylaws concerning cable television which were not subject to the deficiencies found by Stark, J. in Oshawa Cable. No question of the constitutionality of the legislation was raised during the case, but leave to appeal to the Supreme Court of Canada was granted Dec. 16, 1974.

The Commission, in sum, only has such power as it derives from the Broadcasting Act. The licensing of cablesystems only affords the right to operate a broadcast undertaking. There is nothing in the Broadcasting Act, in the context of licensing, specifically designed to abrogate the valid exercise of other provincial powers or the common law.

This is not to say that the Parliament is unable to affect property and civil rights, for indeed, it can. In the pursuit of valid federal objectives control over property and civil rights — if necessary to the achievement of those objectives — may be imposed. See, e.g. the comments on the "peace, order, and good government" power of Parliament by P. W. Hogg, "The Constitutionality of Federal Regulation of Mutual Funds" in J. C. Baillie, W. H. Grover, Proposals for a Canada Mutual Funds Law, Vol. 1 (Ottawa: Dept. of Consumer and Corporate Affairs, 1974) 75 at 79-81.
accordingly determined not to issue new licenses to those proposing their use to import U.S. signals. This policy remained in effect until July 1964 when licenses were again issued to systems designed to import U.S. signals.\footnote{83}

The CRTC entered with a new technology intact and growing. And, it must be emphasized, CATV was permitted to grow in no small measure because the federal government allowed the industry to do so. That permission was quite clear; it was conveyed by grant of license from a department of the government. Moreover, soon after the CRTC was founded, the Minister of Communications set up a Telecommission to study the present and future of telecommunications in Canada. That Commission produced in-depth background papers on such subjects as \textit{The Wired City}\footnote{83} and \textit{The Relationship of Common Carriers to Broadcasters}.\footnote{84} Seminars were also sponsored by the Commission at Canadian universities. At the same time, the Special Senate Committee on the Mass Media carried forward a massive investigation comparable to that performed by a Royal Commission. Its report came down in the autumn of 1970.\footnote{85} In January 1971 the Economic Council of Canada issued a report dealing, \textit{inter alia}, with cable and copyright.\footnote{86}

It is fair to say that the CRTC was given no guidelines as to how it should regulate CATV, for the federal government seemed to be speaking with several voices — all evidencing concern, but, at the same time, unwilling to take specific statutory action. Yet, the CRTC clearly was in a position where it had to act; licenses were coming before it for renewal. If the Commission did nothing, it would have abrogated its duties. If it evaluated CATV and set forth specific criteria for continued operation, the Commission just as clearly would be legislating.

There were a range of options open to the CRTC. It could have allowed the cable industry to evolve, and justified such action on grounds of “free enterprise.” In the final analysis, so the argument might run, broadcasting is concerned with programming, and good programming should be determined by consumer choice. If there is validity in the Canadian broadcasting system, it would survive the attack of cable and the variety of signals offered viewers. The Commission could have imposed an absolute ban on cable. Charged with helping to enhance a Canadian broadcasting system, the Commission with some ease might have made an argument for an absolute ban on cable, until such time as the Canadian broadcasting industry was sufficiently vigorous to withstand the programming and the commercial advertising supported by a 200 million market. The Commission could at-

\footnote{83} Supra, note 77 at 8-10.

\footnote{83} Canada. Department of Communications, \textit{Multi-Service Cable Telecommunications Systems — the Wired City}, (Ottawa: Information Canada, 1971).

\footnote{84} Canada. Department of Communications, \textit{Analysis of Relationship Between the Functions of the Common Carriers and those Engaged in Broadcasting} (Ottawa: Information Canada, 1971).

\footnote{85} \textit{Report of the Special Senate Committee on Mass Media} (Ottawa: Queen’s Printer, 1970).

tempt to integrate the cable industry, with its evolving technology, into the existing Canadian broadcasting system. There were persuasive grounds for doing this. After all, the Broadcasting Act charges the Commission, in its objects provision, with adapting new technology to the broadcasting system. Additionally, and not the least important, this final option would permit Commission accommodation with political reality: millions of Canadians had acquired an interest in cable, and they would not lightly accept any absolute ban.

Whatever course the Commission might decide upon involved costs to itself in the sense of a political backlash. Permitting uncontrolled cable development surely would bring criticism from those who see the CRTC and the Broadcasting Act as a means of ensuring and enhancing national identity and unity. Just as surely, an absolute ban would bring rather strong reaction from those who had acquired a viewing interest in cable. So, too, while the principle of integration of cable through its incorporation into the broadcasting system might have seemed an acceptable compromise, it lacked specificity.

The problem that the Commission faced required political support for what was to be a political judgment. That support was not forthcoming from the Government, which had not been able to come to grips with the issue. The Commission chose to find political support from the people. Having defined the cable problem in its own terms, and in a manner that permitted only one response, the Commission went to the people for their comment. The Commission stated the issue in these terms:

The problem facing the Commission is not whether the technology of microwave should be used to help the development of cable television. It is to decide whether the use of additional techniques should be authorized to enlarge the coverage area of U.S. networks and U.S. stations and therefore their advertising markets in Canada.

The danger flowing from the problem stated was real. In its disclosure to the public, the Commission reported cable as "the most serious threat to Canadian broadcasting since 1932 before Parliament decided to enact the first Broadcasting Act. In the opinion of the Commission, it (cable) could

87 R.S.C. 1970, c. B-11, s. 3(j). When questioned before the House Standing Committee on Broadcasting on how to reconcile the decision with s. 3(j) of the Broadcasting Act, which stipulates that the regulation of the broadcasting system should adapt itself to technical advances, CRTC Chairman Juneau replied:

. . . we have said that to use a technology just because it is available without taking into consideration any other factor would lead to the destruction of the Canadian broadcasting system. Now if we did not have the mandate to develop the system as it has been conceived by Parliament over the years, it would be different. But we do have that mandate.

Mr. Roy: So you think that this section of the Act is superfluous really.

Mr. Juneau: No. . . . If the Act says that whenever microwave is available it should be used indiscriminately, that is fine, but that is not what the Act says. The technologies have to be used to achieve a policy. (Can. H. of C., Standing Committee on Broadcasting, Films, and Assistance to the Arts, Proceedings, No. 17 (Jan. 15, 1970) at 37).

88 Supra, note 78 at 1.
disrupt the Canadian broadcasting system within a few years.\textsuperscript{88} Not one, but four public hearings were convened by the CRTC in locations throughout Canada. Briefs, memoranda and views were elicited. The Commission listened to what was said, and perhaps just as important, the press and the broadcasting media gave substantial coverage to the proceedings. The public hearings, held over a two-year period beginning in 1968, resulted in three public statements on cable television policy. These did not constitute regulations; rather, they were proposals intended to guide the cable television operators while a more detailed policy was being worked out.\textsuperscript{89}

The "policy" evolved by the Commission was one that favoured cable integration with the broadcasting system. Existing cable systems were permitted to remain, and new systems primarily dependent on the importing of U.S. signals through microwave relay were denied licenses. Those with cable licenses were given an order of priorities in terms of the stations they might carry. First preference was to be given Canadian signals, last preference to U.S. commercial signals. A sophisticated attack on U.S. advertising was allowed; cable licensees were "encouraged" to substitute Canadian ads for those of the U.S. — and were to be compensated for so doing. Finally, and not least important from the view of the CRTC, cable licensees were to open a channel and provide broadcasting facilities for community programming.

It is not our intent to detail the Commission's cable policy. It will suffice to note and emphasize that that policy has had a major impact on the broadcasting industry. Moreover, the Commission in establishing that policy underlined its own flexible capability. The Canadian broadcasting industry, both public and private, has been shielded by the Commission. That shield might be withdrawn if the Commission finds that the industry does not meet the challenge and develop a uniquely Canadian broadcasting system. The Commission spoke to this point quite forcefully in its public announcement of December 3, 1969:

\begin{quote}
... [T]he Commission feels strongly that no part of the Canadian population should be penalized in order to preserve a theory or to protect vested interests: either financial interests of investors in private broadcasting or privileges accumulated by particular groups in public broadcasting. The Canadian broadcasting system is worth safeguarding only if it provides the Canadian population with essential services which could not be provided otherwise. It would not make sense to protect a Canadian system based essentially on the retailing of programs "using predominately non-Canadian creatives and other resources." Certainly Canadians should not be denied access to the best material available from other countries. Any broadcasting system must remain constantly open to ideas coming from other parts of the world. Nevertheless the efforts of Canadians to maintain an independent broadcasting system can be justified only if this system achieves the high expectations established by Parliament in the \textit{Broadcasting Act} of 1968.

The Commission is of the opinion that the Canadian broadcasting system, whose development the Commission must regulate and supervise, must now improve rapidly or risk disappearing as a system. To ensure its survival it is more and more apparent that it must increase the extension of services which the population requires, and improve the quality and variety of these services.\textsuperscript{90}
\end{quote}

\textsuperscript{88} Id.
\textsuperscript{89} Supra, note 77 at 9-10.
\textsuperscript{90} Supra, note 78 at 2.
The Commission had indeed acted upon the cable industry, making decisions that Parliament itself had difficulty facing. That difficulty in no small part arose from conflicting individual and regional interests. The Commission's rulings, albeit in the form of public announcements rather than regulations, gave access to U.S. signals in the urban areas of Montreal, Toronto and Vancouver which were already serviced by cable. Access was denied to the Prairie provinces, for they did not have established cable systems; these provinces wanted to use the technology of microwave relay to import distant signals. Their representatives in Parliament argued discrimination: if U.S. signals are bad for the Prairie provinces, they should be bad for Montreal, Toronto, and Vancouver.92

CRTC Chairman Juneau was called upon to answer charges and complaints before the very Parliament that had been unable to resolve the cable question. The Chairman was unhesitating in asserting that the Commission had merely done what the 1968 Broadcasting Act required, implementing the objects of that Act as was its statutory duty. He noted that

... Among all the criticism there is one which we (the CRTC) have felt was, let us say, inaccurate if not unfair. It is that there was some presumption, or even arrogance perhaps, on the part of the Commission in taking such a decision. The Commission is rather of the opinion that it has only been consistent with what it interpreted to be the will, the intention and the philosophy of Parliament when it passed the 1968 Broadcasting Act.93

E. LOCUS FOR DECISION-MAKING

In the hands of an aggressive, imaginative, indeed even a courageous CRTC, the 1968 Broadcasting Act has been used as a power base for the shaping of a broadcasting policy. There is no doubt that that Act has limitations in law and in the world of political reality. It is in such a context that the CRTC has assumed the function of a broadcasting parliament. And it is in such a context that the agency was called upon to restructure the CBC, just as it had restructured all of the broadcasting industry through cable.

If cable technology were static, if there were no other major advances in communications know-how, then the CRTC might carry forward its role as the broadcasting parliament, the sole arbiter of broadcasting policy. So, too, so long as the federal government maintains its exclusive control over broadcasting, the CRTC stands to hold its exclusivity as decision-maker. For the CRTC, the difficulty is that technology is not static, and federal control over broadcasting, in law and in fact, is not likely to remain exclusive. For the nation, the problem and the challenge in broadcasting is to set the locus for decision-making.

There will be a new communications system in the future. And that future is in the process of being shaped. Concepts will be broadened; broad-

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92 See the comments in the House of Commons of Members P. Nowlan, S. Paproski, and P. Mahoney. Can. H. of C. Debates (Dec. 4, 1969) at 1587.
casting and broadcasting regulation are too limited to embrace the communications format of tomorrow. Nor must they be allowed to stultify what tomorrow might bring. The CRTC is an agency whose terms of reference cannot fully cover either a rapidly developing technology or the more diversified kinds of broadcasters. The result is that the Commission will tend to lose control over the subject matter of communications. It will no longer be able to act as the parliament for broadcasting. The challenge is to create a parliament for communications.

The points made can be illustrated in any number of ways. We have chosen to make the demonstration by referring to the British Parliamentary Committee Report of 1972 on the Independent Broadcasting Authority (IBA), Telecast Canada, and the recent meetings of the Canadian Federal-Provincial Conference of Ministers Responsible for Communications.

The terms of reference for the Parliamentary inquiry into the IBA were broad, but not broad enough for the House committee, who felt compelled to include a section in their report touching upon "New Communications Technologies". Cable television was ranked as the most important development for the immediate future. Yet, the Committee report stressed that the development goes far beyond traditional broadcasting, with a multiplicity of channel availability:

One important feature of a cable broadcasting system is its ability to provide a response from viewers by means of voice bandwidth lines. The additional cost of installing a two way system is low providing the reply bandwidth is furnished in the original installation. Such a two way system makes it possible for a lecturer and his students working at home to talk to each other. It can also be used for shopping, meter reading or other transactions and for voting on local or national issues. The speed and ease of asking for such votes and collating replies will undoubtedly have an impact on the frequency with which public opinion is sought. Above all the viewer will no longer be dependent on the output of broadcasting stations but will be able to draw on additional material. Cable television used in this way might offer the same sort of services that a well stocked library provides.

Keyed to cable and satellite is long range facsimile. It is possible to transmit newspapers on pages 12 by 18 inches on both sides of a sheet of electrostatic recording paper. The process, currently being used experimentally in Japan, takes about six minutes per page. Not only could newspapers be transmitted nearly instantaneously over long distances, but the same could be done with high priority mail. The family communication centre could also become the mail centre.

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96 We refer specifically to the papers of formal position presented to the First Federal-Provincial Conference on Communications, Nov. 29-30, 1973, Ottawa. While the papers are marked as documents, they have not, as such, been published; they appear in mimeograph form. See also reports of the proceedings of the recent Federal Provincial Conference on Communications held in Ottawa, July 16-17, 1975.
97 Supra, note 94 at lvi-ix.
98 Id. at 1vii.
99 Id.
Satellites, too, can and do play both a world and regional communications role. They have the capacity to transmit relatively clear pictures from one end of the world to another. With properly constructed earth stations, satellite capability could be a means of linking the remote North of Canada to the populous South . . . all these things are possible. But, said the British House Committee, there is a danger of the old system of broadcasting capturing the news:

In nearly all countries which had radio first and then television the way in which the television is organised has followed closely on the pattern the country adopted for radio. In the United States the relatively unregulated radio industry bought itself into the television industry and required as much freedom for operation in television in terms of content and sale of advertising time as the F.C.C. (U.S. Federal Communications Commission) had previously granted them for radio. The pattern of American television is therefore not only a reflection of the American wish for minimum regulation of free enterprise, but also the result of treating television as an extension of radio. The same was true for this country; to the B.B.C. with its monopoly of radio broadcasting was added a monopoly of television broadcasting. The recent decision by Parliament provides a mirror image of the same trend, namely, because there is already an organisation to transmit and supervise commercial television (e.g. IBA), it seemed appropriate that the transmission and control of commercial radio should come under its aegis despite the fact that there would be no technical difficulties and perhaps much to be said for finding a novel system of regulating local commercial radio.1

The Committee recommended a system of ongoing review (both periodic and systematic), the purpose of which should be to ascertain whether the existing system of regulation is serving the purpose for which it was intended.101

In Canada there is no systematic review of communications. There are, nevertheless, technical developments taking place that directly affect broadcasting. And those developments are taking place without the CRTC as the primary determiner. Specific reference can be made to Telesat Canada, a Crown corporation established in June 1969 to bring satellite communications systems between locations in Canada.102 The corporation provides only a portion of the hardware. The Minister of Communications must approve earth station construction contracts as well as agreements between foreign states.103 Canada's first satellite system has been designed and launched. Neither the CRTC nor the CBC had any determinative role to play in the decision to go forward with the satellite system, nor as to its broadcasting use. Nevertheless, the CBC was instructed by the Government to programme and broadcast, using the satellite named ANIK. The CBC is to direct programming from the South to the North of Canada where, for the first time, many Canadians are to receive television. This is not a decision that the CBC favours, for the broadcasting effort will drain CBC funds. Yet, it is a decision with which the CBC, and for that matter, the CRTC must comply.104

100 Id. at 1vii-1x.
101 Id. at 1ix.
102 Brief presented by Telesat Canada to the Special Senate Committee on Mass Media, April, 1970 (mimeo.) at p. 2; see also, R.S.C. 1970, c. T-4, s. 5(1).
104 See text at note 110, infra.
Canadians often speak of the North as the heart of Canada, and from it derive a sense of nationhood. If this is so, then does it not follow that the North should have been treated as a very special area for communications planning? Where does the CRTC, the broadcasting parliament, fit into the scheme of things? The decision to loft ANIK was that of Government. From that decision came others: there was to be television programming for the North. The CBC was given the assignment, but it was not given substantial funds for the job. The result is that relatively cheap programming materials will be used for transmission. This, more often than not, will mean canned American or Canadian reruns, or shows that appeal to large audiences. It will not mean quality programming emanating from the North for the North. Nor will it mean programming from the North to the South.\footnote{See, Space Communications (undated CBC publication) at 2: “The full television network schedule of the French and English Services Divisions will be distributed to the CBC’s regional centres by satellite, . . . the second audio for use by radio will act as a distribution circuit for national news and programmes from Montreal and Toronto to regional and remote centres.”}

Only after the CBC, the CRTC, and the people of the North were faced with a \textit{fait accompli}, only after Telesat Canada was operative, was a conference called of relevant interest groups, including native peoples, to inquire into the use of ANIK. The then Minister of Communications, Eric Kierans, who had the “honor of proposing” Telesat Canada, spoke of the social good that would come from ANIK. It would serve to integrate, rather than isolate the people of the North. There was even the possibility of two-way communication — in the future.\footnote{E. Kierans, “The Age of Anik”, prepared for the Northern Communications Conference, Sept. 9-11, Yellowknife, N.W.T. The paper was not delivered by the Minister, but by the Deputy Minister. See, Record of Conference, at 78, 79.} The Minister said:

\begin{quote}
Good can only spring from this type of communication. And I would like to add that the Department of Communications has taken the necessary measures to assure itself that this increased social awareness will remain alive and grow by creating a new directorate of social and economic planning. But having a social conscience does not mean that we can accept the proposition that some remote and paternalistic elite knows what is best for any part of Canada. Specifically, I believe people in the North must have a major part in determining their priorities.\footnote{\textit{Id.} at 79.}
\end{quote}

It was not some remote and paternalistic elite from the South alone who criticised ANIK for lack of planning. There were native people and their representatives who, nearly without exception, pleaded for something other than “canned” programmes from the South. They made their pleas at the conference called by Minister Kierans himself. They asked for consultation before construction. They asked for local media control. They asked for live programming. From a conference workshop chaired by an employee of the Department of Communications came this summary:

\begin{quote}
Native people are not ready for commercial TV — it could destroy their self-sufficiency by distracting them from work and school and destroy their culture
\end{quote}
by bringing southern culture too fast and increase the generation gap between older traditional culture and young southern exposed people.108

The conference called by the Minister of Communications was held in Yellowknife from September 9-11, 1970. Two years later a meeting in Ottawa was convened between CBC officials and native leaders. Its purpose again was to discuss native involvement in ANIK. The Director of CBC Northern Services was a leading spokesman for the CBC at this meeting, and he had been present at the Yellowknife conference. At the earlier conference the Director of CBC Northern Services was emphatic in the role ANIK was to play:

If the satellite is merely to be used to bring to the North the programmes designed and produced for southern Canadians, then it will not only be a loss but a disadvantage to the northern people. Unless the satellite is going to provide a service for all people of the North, it might as well not be put up. . . . The request, if not the demand, has been made that one channel (of ANIK) at least should be devoted to programs from the North, about the North, produced by the people of the North, in the North.109

These were strong words that indicated commitment. Yet, two years later the same Director of Northern Services, at a meeting attended by the CBC President, said to native leaders:

I think the CBC did not take the initiative in launching the satellite. We take the satellite as given: the government decided they were going to put up a satellite; they said it was to take television into the North; it was to provide a telephone service, a national French television network; and it was to be used as a back-up system to the existing east-west microwave. There's nothing that the satellite can do outside the North than can't be done already; only in the North can the satellite do things that couldn't previously be done at all. In a sense we weren't in on the planning of that. The government didn't come out and talk to us, as far as I know. I think there is lots of cynicism in the North, and quite well founded. (Emphasis added)110

At this point it may be useful to restate and stress our purpose in discussing Telesat Canada and ANIK. It is not our intent to criticise any one agency of government or the CBC. In a sense, each agency and the CBC has been cast into a situation from which there was no retreat. Matters were handled as one was able to deal with them. It is this absence of total communications planning capacity that is our concern. In Canada there is no locus for communications policy. The CRTC may have broad jurisdiction, but that jurisdiction is far from complete. The CRTC will stretch, and sometimes go beyond, the limits of its jurisdiction to achieve what it conceives to

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108 Id. Workshop at 1-2. See also, the Opening Statement of Hon. Ian Turnbull, Minister Responsible for Communications, Government of Manitoba, to the Federal-Provincial Conference on Communications, Nov. 29-30, 1973, Ottawa, Document No. Com.-26, at 9-10: “Caandians have been led to believe that Anik would work to alleviate the communications problems of isolated areas, and the federal government has expended large sums of money in this endeavour. While the future developments of satellite technology may prove effective in meeting the communications needs of isolated communities, we are extremely unimpressed with Anik's ability to do so.”

109 Record of Conference, supra, note 106 at 59.

110 Transcript of Meeting between CBC Officials and Native Leaders, Ottawa, Nov. 22, 1972, at 8.
be the policy objectives of the *Broadcasting Act*. Inevitably, however, the Commission must fall short of its objectives. This result is compelled, not only by the limiting words of the Commission’s only source of power, the *Broadcasting Act*, but also by other actions of government that very directly touch broadcasting. Telesat Canada and ANIK are only one example.

The CBC was ordered by the Government to use ANIK, to broadcast to the North, but the Government did not supply adequate funds for the job.\(^{111}\) If any kind of job is to be done, the CBC will be required to siphon monies from one segment of its revenue and use them for another function. This, in turn, cannot but affect CBC’s capacity to perform as a broadcaster. It surely limits CBC flexibility. The Government’s own action tends to weaken precisely the policy that the CRTC intends for the CBC, namely, flexibility. Indeed, as the CBC is affected and limited by Government, so is the CRTC. To the extent the CRTC is limited it loses its claim as the broadcasting parliament — at least in the sense of being able to make wide-ranging policy decisions having the force of law.

There are other examples of Government action that directly bear upon the CRTC and the CBC. We propose now to state the actual and potential role of the provinces in determining broadcast policy. In March, 1973 the federal government issued a Green Paper titled, *Proposals for a Communications Policy for Canada.*\(^{112}\) The Paper stated the federal government’s intent to “safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada . . . and to reflect Canadian identity and the diversity of Canadian cultural and social values”\(^{113}\). This was supplemented by another set of proposals from Ottawa in April, 1975.\(^{114}\) These proposals can be viewed as the beginning point in the bargaining or negotiation process between the federal and provincial governments as to their respective communications roles.

Lawyers might argue that the power to set communications, or at least broadcasting policy, resides with the federal government. There is, no doubt, an element of truth in such a proposition — at least as it applies to over-the-air broadcasters.\(^{115}\) Once, however, we move from over-the-air broadcasters to varied use of cable, exclusive federal power is placed in a position of some

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\(^{111}\) Id. at 12. Laurent Picard, President of CBC, said: “. . . we’re just waiting for a national policy of development of the North to be developed. The indication we get from the Treasury Board is that no new money will be let into the North.” Clive Linklater of the National Indian Brotherhood, said of this: “. . . you [Mr. Picard] said CBC is low man on the totem pole. As far as the structure of communications in the North is concerned, I guess the point we’re [native leaders] making is that native people aren’t even on the totem pole.” Id. at 21.

\(^{112}\) (Ottawa: Information Canada, 1973). The Paper was published under the authority of the then Minister of Communications, Gerard Pelletier. It was intended as a basis for discussion.

\(^{113}\) Id. at 3.


\(^{115}\) See *supra*, note 16.
doubt. But, more important, power over communications is not defined solely in juristic terms. There are other considerations that have impelled the federal government to seek a political answer to the sharing of communications policy. Not the least of these considerations is that a political solution is arrived at by political leaders. The elements that go into that solution can be stated and they will have a relationship to the problem. The same cannot be said of a judicial solution. The *B.N.A. Act* is more than a century old, and it is far from specific. Judicial interpretation involving past decisions will be required for analysis and resolution. The answers given by the Court may suit neither the federal nor the provincial governments. That is perhaps why the federal Minister of Communications Gerard Pelletier said to his provincial colleagues in 1973:

... [W]e [the federal government] agree with the proposition that problems of jurisdiction should preferably be resolved through a process of discussion and agreement rather than by action in the Courts. We have repeatedly expressed our willingness to pursue this course, and our sincerity in this regard is demonstrated by the very fact that we are meeting here today. But we have also emphasized our view that constructive discussion is possible only if there is recognition of the proper interest of all parties to the discussion. That is to say, we favour negotiation, but we cannot agree that unilateral action is consistent with a genuine negotiating process. We must therefore recognize that unilateral action, if persisted in, may make recourse to the Courts unavoidable.

It is not Quebec or Ontario or British Columbia alone that the federal government faces. There has come a unified position from all the provinces: they want to share in communications policy, and this subject embraces broadcasting, and the CBC. In August, 1972, communications became an agenda subject at the Halifax Conference of Prime Ministers and Premiers. Provincial ministers responsible for communications were requested by the Conference to prepare "common positions" with a view to the attainment of national and regional communications objectives. In a period of less than two years after the Halifax Conference, there were three interprovincial conferences of Ministers of Communications.

A common position paper was presented in November, 1973 by the provinces at the First Federal-Provincial Conference of Ministers Responsible for Communications. In that paper, the provinces staked a major claim to communications regulation. "The provinces' historic responsibilities in communications have in recent years taken on new dimensions and importance by reason of the social, economic and cultural impact of rapidly advancing

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116 See supra, note 78.
117 Response by Hon. G. Pelletier, Federal-Provincial Conference on Communications, Nov. 29-30, 1973, Ottawa, Document No. Com.-33, 1-2. See also his *Statement to the Second Federal-Provincial Conference of Ministers Responsible for Communications* (Ottawa: Communications Canada, July, 1975) at 4: "In any event to those who would question the Federal Government's understanding of the existing constitutional division of responsibilities in the field of telecommunications, I would suggest that another method of resolving such questions is through recourse to the courts . . .".
118 The three conferences were held in Quebec City, on Nov. 21, 1972; Calgary on May 31 - June 1, 1973; and Moncton, October 2-3, 1973. See Quebec, *Master Craftsman of Its Own Communications Policy* (Quebec: Official Printer, 1973) at 20.
Because of this, the provinces have established mechanisms for continued interprovincial co-operation. In no small measure interprovincial co-operation is rooted in provincial differences. That is, each province of Canada has its own special communications needs, and the provinces have joined together to incorporate these regional differences into the national broadcasting policy. Their joint statement declared:

The provinces have agreed to recognize and respect these differences (regional differences) and to protect the right of each region or province to exercise its ultimate responsibilities as circumstances dictate. The provincial Ministers responsible for communications are convinced that, to be effective, communications policies must be flexible enough to meet the particular needs, priorities and responsibilities of each province.\footnote{Joint Provincial Statement Presented at the First Federal-Provincial Conference on Communications, Nov. 29-30, 1973, Ottawa, Document No. Com.-21, at 1.}

However, the recent Federal-Provincial Conference of Communications Ministers held in Ottawa on July 15-16, 1975, indicates a weakening in the common front of the provinces. Mr. Pelletier strongly asserted federal jurisdiction over broadcasting and most aspects of cable television, and offered instead a promise to delegate a share of federal authority over the regulation of cable transmission companies to the provinces, in return for their agreement to join the Federal Minister on a Council of Communications Ministers, which would assist in the formulation of federal communications policies.

Only Quebec opted to reject this proposal, and in doing so, it put the federal government in a position where it need not be as responsible to the provinces as if there had been a unified opposition. While the new Council of Communications Ministers may provide provincial input into federal cabinet policy there is no real sharing of contact with the provinces by a surrender of any of Ottawa’s jurisdiction.

Finally, like federal Minister Pelletier, the provincial ministers prefer not to use the courts to resolve their differences. They, too, want a political solution. But, in saying this, they want answers that will respect provincial interests. And, it must be emphasized, those interests are varied. They include, but go far beyond what might be classified as a French-English concern and the concerns of Quebec.

Consider, by way of illustration, Saskatchewan. It has no major population centres and its total population is less than half that of Toronto. Forty-seven per cent of Saskatchewan’s population live in rural areas compared to 17.6 per cent in Ontario. Accordingly, to meet the communications needs of its people Saskatchewan established its own publicly-owned utility, Saskatchewan Telecommunications. It has been the province, not a federally chartered company, that has paid for and constructed telecommunications services into the Saskatchewan north. The capital commitments for such

\footnote{\textit{Id.} at 3.}
efforts have been heavy, but the province nevertheless maintains telephone rates which are among the lowest in the nation and the world.\textsuperscript{121}

Against a rather well developed telecommunications service, the province contrasts the broadcast services which its inhabitants receive. Most of the province has only one television service available and many residents receive none. For the northern half of the province there is not even reliable radio service. While the province recognizes the costs involved in providing broadcast facilities, it also points to a "failure of national broadcast policy."\textsuperscript{122}

The province is quite specific in its bill of particulars. Effective broadcast services can only come to Saskatchewan as a form of subsidy, either directly from government, or indirectly by CRTC encouragement of surplus commercial revenue use. Yet, the CRTC licensed a third television network in Ontario (Global). Because potential revenues from the sale of advertising time are limited, this decision will affect the ability of the CTV network to maintain a surplus position sufficient to permit network extension to areas such as Saskatchewan:\textsuperscript{123} Recognizing the inability of the CTV to cover the costs of any further extension of service, the CRTC has been actively encouraging a practice known as 'twin-sticking'. Under this arrangement, the existing local affiliate of CBC (such as that which serves Saskatchewan) assumes the full cost of transmitting the CTV network service from the nearest network point at which it is available, and the full cost of additions to existing facilities required to broadcast a second signal. While Saskatchewan can only welcome the economies realized by this practice, it is in effect, relieving CTV of any responsibility to provide a truly national and independent alternative to the CBC. Furthermore, this practice does not solve the fundamental problem of inadequate commercial revenues, and recognizes that national networks are under no obligation to effect one of the possible solutions — subsidies from more profitable areas.\textsuperscript{124}

Ontario has at least four over-the-air broadcast services. If the educational and French channels are added, the total comes to six. Saskatchewan does not even have a complete single service. Not only do the policies of the CRTC tend to inhibit commercial TV expansion into provinces such as Saskatchewan, but the express regulations of the Commission forbid the provincial governments from providing public funds in support of broadcast licensees — except for educational purposes.\textsuperscript{125} Thus, Saskatchewan argues,


\textsuperscript{122} Id. at 5.

\textsuperscript{123} Id.

\textsuperscript{124} Id. at 5-6.

\textsuperscript{125} Federal licensing of provincial educational broadcasting undertaking is the subject of two Orders-in-Council: P.C. 1970-12/199 (Feb. 3, 1970), and P.C. 1972-1969 (July 13, 1972). Allowing for a broad definition of education, the Orders permit direct licensing by the CRTC of "independent" agencies funded by provincial governments.
the federal government, through the CRTC, has cut off the only possibilities for extension of broadcasting facilities to the sparsely populated provinces.\footnote{126}

For its part, Saskatchewan does not intend to allow that federal policy to continue. The province has seized upon the new technology of cable to question federal jurisdiction, and in doing so, to assert provincial power over broadcasting. It is the province alone which controls through ownership of its telecommunications facility the means for cable broadcasting. There can be no cable in Saskatchewan without the use of the province’s facility. This is no small lever of power, and it is one that is being used. Saskatchewan announced (1) that its telecommunications facility was developing a cable network (i.e. the means for cable broadcasting that would be available to all of the province’s residents), and (2) that for purposes of providing a cable service, only non-profit community-controlled organizations would receive permission to connect to the system.\footnote{127}

The province will thereby control the hardware of broadcasting, and it will condition the use of that hardware. Yet, in doing this the province will require that the qualifying non-profit, community-controlled organisations obtain a license from the CRTC to carry on those aspects of its activities which come under federal jurisdiction. The province, however, is fully aware of a potential clash with the Commission. Historically, the federal government used its jurisdiction over the allocation of the radio spectrum to justify the extension of regulatory control into the content of broadcasting and regulation of cable television. The first extension of federal authority was based on the fact that broadcast waves are limited, and as a natural resource must be used to serve the public interest. The second extension of federal control is based on the argument that cable television can have an impact on the economic viability of over-the-air broadcasters.

As a natural development from this historical extension of regulatory control, the CRTC interprets its mandate as requiring the development of broadcast services on a viable, economic, that is, commercial basis. The licensing of cable operations is considered as an additional service where it is economically feasible and where the present broadcasters are protected from economic harm. This interpretation is not appropriate to the Saskatchewan context where cable television can con-

\footnote{126}{It is not only the failure to extend existing broadcasting channels to Saskatchewan that brought critique from Mr. Brockelbank. There is the failure to develop programming in the province. See \textit{supra}, note 121 at 7: “Even when subsidies of either type have enabled the broadcasting system to extend its distribution system in our Province, there has been no corresponding development of local or provincial production capacity. The complaint that the national networks have not adequately reflected a Western perspective is a familiar one. For these reasons it is essential that we recognize the broadcasting system as being more than exclusively national and that local and provincial needs have not been adequately realized by national institutions or agencies. It is essential that the Provinces be in a position to direct and influence the development of broadcast services in their areas in a way which is most appropriate to local circumstances and objectives. The realization of local needs has traditionally been the responsibility of the Provinces. While we must recognize a national need to allocate broadcast frequencies in an efficient and internationally co-ordinated fashion, the clear local and provincial aspects of the broadcasting system make it essential that this power be administered so as to permit a provincial role in the realization of local needs and objectives.”}

\footnote{127}{\textit{Id.} at 13; see also, \textit{supra}, note 81.}
tribute to the development of basic communication services, productive capacity for Canadian programming and a broadband network utility. Given the current state of thinking on the part of Federal regulatory bodies in the communications field, the Saskatchewan policy of developing a broadband network utility within Saskatchewan Telecommunications and the connection of non-profit, community-controlled organizations, may come into conflict with Ottawa's interpretation of its jurisdictional responsibilities.128

In rather clear terms, Saskatchewan is saying to the federal government that one-channel television service for a portion of the province will not suffice. Accordingly, the provincial government, fully utilizing the technology of cable, has intervened, or perhaps more accurately stated, extended itself still further into the communications field. There can be little question that an effect of its action may well be to limit the profitability of existing licensees in the province. Cable, however, can give to the province a wide variety of over-the-air broadcasters from distant points and open channels for community programming. Given the option between an inadequate single channel service and multi-channel flexibility, Saskatchewan has made the obvious choice. And, there can be no doubt that that choice constrains CRTC decision-making power. Indeed, it would seem that resolution of the conflict must involve the Federal Cabinet, and so far as it does, then to that extent the Commission loses its capacity to determine broadcasting policy.129

F. SUMMARY

The Committee on Television and Mr. Neville came before the CRTC asking for the severance of the CBC. They termed the Commission Canada's "broadcasting parliament". For many purposes this is an accurate characterisation of the Commission. Often not questioned, and left unchecked, the agency has asserted jurisdiction as to subjects (i.e. children's advertising) in a manner (i.e. conditions of license) that presents serious problems of ultra vires action. In a sense, the Commission cannot be faulted for what it has done. At times it has been goaded into an ultra vires course of action by Parliamentary criticism that falls short of mandatory legislation (i.e. again, children's advertising). At other times, the Commission simply felt that it was the only instrument for the achievement of broadly stated national broadcast objectives (i.e. the 1974 CBC license renewal).

The fact is, however, that events are overtaking the CRTC. The agency at the present time may be the only federal regulatory body over broadcasting as such. But it is not the only federal body able to influence, and influence substantially, the nature of broadcasting. The Government demonstrates this with Telesat Canada. The satellite ANIK will be used by the CBC not because the CBC or the CRTC thinks it makes good broadcasting sense, but because

128 Id. at 14-15.
129 The recent federal proposals indicate a move in this direction. Proposed legislation, which is expected to be introduced in 1976 would authorize the Governor-in-Council to give formal direction to the CRTC on the interpretation of statutory objectives and the names of their implementation, for the purpose of ensuring "that the development of policy would be, and would be clearly seen to be, under the control of elected representatives of the people." Supra, note 114 at 11.
the federal government, for reasons that probably extend beyond broadcast policy, so ordered.

Moreover, the CRTC, even if it were thought the embodiment of full federal power, is limited in its capacity to shape policy by a rapidly developing technology that goes beyond traditional, and legal concepts of broadcasting. This is best demonstrated by the evolution of cable. There is no doubt that the provinces (as demonstrated by Saskatchewan) have a role to play in determining broadcast policy. And there is no doubt that the provinces will assert their power.

The days of the CRTC as a broadcasting parliament are numbered. Yet, if this is so, then where will Canadians look for a policy maker? Today decision-making is becoming a fragmented matter. There are several federal and provincial bodies that rather directly influence the nature of broadcasting. The future may find this diversity codified. That is, the national policy may be one that encourages regionalism as a key characteristic of Canadian identity. Should this be so, then the federal regulatory body of the future may have more limited concerns than the CRTC of the present. The federal regulatory body of the future may be directed to ensure an adequate delivery system (broadcast hardware) and the continuation of a national broadcast service that will have access to that delivery system. Subject to broad guidelines, remaining broadcast regulation, including the control over cable, may be left to the provinces.