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THE RADIO REFERENCE AND ONWARD: EXCLUSIVE FEDERAL JURISDICTION OVER GENERAL CONTENT IN BROADCASTING?

By J. SCOTT WILKIE*

I. INTRODUCTION

The constitutional position regarding control over general content in broadcasting programming is based on a surprisingly small number of cases that wholly omit to consider the possible bases of a sharing of provincial and federal jurisdiction in this area. As the law is now interpreted, the provinces are excluded from any legislative role in the general broadcasting content area.

The purpose of this paper is to examine critically some aspects of the accepted constitutional position as it has developed and, from the conclusions derived from this analysis, to posit theoretical, practical, constitutional, doctrinal, and legal process reasons why the provinces should and can have a legislative involvement in the regulation of broadcasting content. Moreover, the analysis will demonstrate why the courts' approach has been couched in terms too simplistic to satisfy the legal and practical complexities of the subject.

By doctrinal extension and interpretation, the jurisdiction under *The British North America Act, 1867*, with respect to general broadcasting content, appears to be solidly entrenched in the federal sphere of authority. However, the legitimacy of this result, which may have considerable doctrinal force, if the commentary of some constitutional scholars is to be accepted,¹ has rested virtually unexplored and uncontested in any functional way. In communications law in general, there is a "dearth"² of scholarly research. This is particularly true of the constitutional issues posed by the content question, which, in the modern federal structure, is a very real matter of contention.

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¹ See Atkey, *The Provincial Interest In Broadcasting Under the Canadian Constitution* (1969), 1 Can. Comm. L.R. 212; Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 336-44; Mullan and Beaman, *The Constitutional Implications of the Regulation of Telecommunications* (1973), 2 Queen's L.J. 67; Shaw, *The Cities, Cablevision and the Constitution: A Case Study in Vaughan Township* (1971), 29 Fac. L. Rev. U. of T. 28; and Ont., *7 Report of the Royal Commission on Violence in the Communications Industry* (Toronto: Queen's Printer, 1977) at 299 ff.

² McNairn, *Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction* (1969), 47 Can. B. Rev. 355 at 355.

Since the 1932 *Radio Reference*,³ which is regarded as the cornerstone of constitutional doctrine as it applies to broadcasting, control over general broadcasting and its content has been assumed to be vested in the federal Parliament. As will be shown, however, this case did *not* address the content question directly as a substantive issue and there is reasonable doubt concerning whether it is a necessary implication of the case that its purview was meant to encompass content concerns.⁴ Subsequent cases have either assumed, or tried to rationalize, a contrary result in a manner that is wholly unconvincing in light of careful analysis of the *Radio Reference*.

In large measure, this situation has resulted from an omission by courts and academic analysts to address the basic question, which applies to broadcasting as to any other area of constitutional interest: "What is the matter of broadcasting"? A concomitant issue which has also been neglected relates to whether broadcasting is a uniform concept incapable of logical disaggregation for jurisdictional purposes.

Until relatively recently, the absolute and uncompromising decisions and *dicta* of the few cases that have addressed the question of constitutional jurisdiction over broadcasting content would have foreclosed the issue to further serious analysis, although apparent in these cases is a conception of the character of broadcasting, reflected also in learned commentaries,⁵ that betrays a misunderstanding of the substantive and functional issues involved. This misunderstanding has manifested itself not only in an oversimplification of the essential character of broadcasting as a complex communications exercise; more important, there has been a misperception of how the Constitution, directly silent on the matter of modern broadcasting and broadcasting content, can or should be interpreted to resolve the jurisdictional complexities that arise from the modern social and economic context which has become increasingly reliant on broadcasting as a tool of human interaction.

The decisions of the Supreme Court of Canada in three recent cases, *Capital Cities Communications Inc. v. Canadian Radio-Television Comm'n*,⁶ *Re Public Service Board, Dionne and A.G. Can.*,⁷ and *A.G. Que. v. Kellogg's Co. of Canada*,⁸ instill new vigour into the practical and theoretical utility of jurisdictional analysis in the area of broadcasting content. These cases do not approach the issue of general broadcasting content in a direct or introspective way, and this, in itself, creates the basis for an inference of doubt about the force with which these decisions can or should be invoked to support exclusive federal jurisdiction over the plausibly independent matter of general

³ *Re Regulation and Control of Radio Communication*, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.) [hereinafter *Radio Reference*].

⁴ *Report*, *supra* note 1.

⁵ See *supra* note 1.

⁶ (1977), 81 D.L.R. (3d) 609 (S.C.C.).

⁷ [1978] 2 S.C.R. 191, 83 D.L.R. (3d) 178.

⁸ [1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314.

broadcasting content. However, these decisions will probably be viewed as having a substantial impact in validating the accepted jurisdictional position, and in setting the foundation upon which negotiations about constitutional change in this area will take place. Accordingly, it is important to assess critically the validity of the conclusions and implications of these cases as they may apply to the content question, in order to determine if, in fact, true constitutional jurisdictional imperatives flow from them and their predecessors in adjudication. As the discussion will show, if these recent cases are accepted at face value, Parliament has been entrusted with jurisdiction over anything, no matter how peripheral, to which the rubric "broadcasting" may be attached, subject to potentially successful attempts to avoid this result.⁹

The essential focus of this paper is on the potential legitimacy of provincial involvement in the legislative process with respect to general broadcasting content. It is submitted that a useful and doctrinally acceptable provincial role exists on the basis of a functional interpretation of the constitutional division of powers as applied to broadcasting. Given that such a legitimate role can be shown to exist, the further concern of this analysis is to determine how to effectuate this involvement by means of existing and accepted constitutional doctrine. Furthermore, whatever the view that may be taken of the proposed solution to the perhaps misconceived exclusivity of federal jurisdiction, at the very least this paper will demonstrate that the accepted division of broadcasting content powers is unsatisfactory from an analytical point of view, and is justifiably unacceptable in a practical sense to some or all of the provinces.¹⁰

On any constitutional question, it is conceivable that the entire body of constitutional jurisprudence could be brought to bear directly, indirectly, or by analogy. However, since the purpose of this analysis is to demonstrate how existing constitutional principles in general, and with respect to broadcasting in particular, can accommodate a provincial legislative role in setting content standards, this paper will confine itself to a critical extrapolation of "accepted" doctrine to re-evaluate the unquestioned allocation of power over general broadcasting content to Parliament. Adopting Weiler's analysis of constitutional decisions as "marching in pairs,"¹¹ a line of analysis that will be pursued in the course of this paper, the availability of constitutional precedent to support almost any reasoned conclusion sought to be reached militates in favour of seeking positively to find ways of effecting provincial legislative involvement.

Within a framework of existing doctrinal conceptions, the structure of this paper has a threefold orientation. Fundamental to the arguments in this

⁹ *Id.*; see discussion in the text accompanying notes 64-70, *infra*.

¹⁰ Quebec is probably the most vociferous of the provinces in seeking legislative autonomy in broadcasting. This was clear at the most recent Federal-Provincial Constitutional Conference in February, 1979. See Trueman, "Levesque Blocks Agreement On Sharing of Cable Jurisdiction," *The Globe and Mail*, 7 Feb. 1979 at 9.

¹¹ See note 125, *infra*.

paper is an examination of the current constitutional position with respect to general broadcasting content through an historical analysis of its supporting case law, including the *Capital Cities*, *Dionne*, and *Kellogg's* cases. A critique of the result of this development will be undertaken from several perspectives. In the course of this analysis it will become apparent that the ways in which the content issue has been presented to the courts have diverted them from the essential underlying jurisdictional concerns that the broadcasting cases raise. The impression that the cases convey is one of *ipse dixit* "reasoning" which is not only alarming and unnecessary, given the fertile scope for creative constitutional analysis in this area, but is also responsible for the obfuscation of jurisdictional needs in the broadcasting field.

After criticizing the existing constitutional position, the theoretical, practical, and constitutional legitimacy of a provincial role in broadcasting content regulation will be explored in depth, and a mechanism for making such a role operational will be suggested. In large measure, the suggested approach is dependent on the adoption by the courts of a functional view of any provincial legislation that might be enacted.¹²

In exploring the rationale for the functional constitutional adjudication essential to achieve the provincial role in affecting broadcasting content that this paper envisages, it is necessary to evaluate and criticize the judicial perception of the role of courts as constitutional decision makers and adjudicators. In fact, the courts' attitude toward the division of powers and how that division applies to broadcasting content regulation is at least as important as the courts' perception of the substantive law in the field, which, as a result of the judicial approach, has been cast in a mold of constitutional imperatives.

¹² Already, the developing approach of the courts to the federal "Trade and Commerce" power under s. 91(2) of *The British North America Act, 1867*, 30 & 31 Vict., c. 3, has demonstrated that Canadian courts are not precluded from accepting an appealingly constituted and well understood functional approach to constitutional decision making. A number of cases are relevant in showing the "Trade and Commerce" power as a "flow of commerce" concept, or perhaps even encompassing the "general regulation of trade": *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1; *Re Natural Products Marketing Act*, [1936] S.C.R. 398, [1936] 3 D.L.R. 622; *Re The Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 257; *Murphy v. C.P.R.*, [1958] S.C.R. 626, 15 D.L.R. (2d) 145; *R. v. Klassen* (1960), 20 D.L.R. (2d) 406, 29 W.W.R. 369 (Man. C.A.); *Caloil Inc. v. A.G. Can.*, [1971] S.C.R. 543; *A.G. Man. v. Man. Egg and Poultry Ass'n*, [1971] S.C.R. 689, 19 D.L.R. (3d) 169; *MacDonald v. Vapour Canada Ltd.* (1976), 66 D.L.R. (3d) 1, 7 N.R. 477 (S.C.C.); (the above are excerpted in Whyte and Lederman, *Canadian Constitutional Law* (2d ed. Toronto: Butterworths, 1977) at 8-5 to 8-76); *Canadian Industrial Gas and Oil Ltd. v. Gov't of Sask.*, [1978] S.C.R. 545, 80 D.L.R. (3d) 449, [1977] 6 W.W.R. 607; and *Re Agricultural Products Marketing Act* (1978), 19 N.R. 361 (S.C.C.).

However, the functional approach of the Court in this regard is not only concerned with expanding the federal jurisdiction. Where appropriate, notwithstanding the existence of "flow of commerce" considerations, the Court has protected provincial interest under s. 92(13) of *The British North America Act, 1867*. See *Carnation Co. v. Quebec Agricultural Marketing Bd.*, [1968] S.C.R. 238 (also in Whyte and Lederman, *op. cit.*, at 8-40). See also *R. v. Dominion Stores Ltd.* (1977), 37 C.C.C. (2d) 20 (Ont. H.C.), *rev'd* (1978), 18 O.R. (2d) 496, 39 C.C.C. (2d) 127 (C.A.).

Instead of using the Constitution as a positive document flexible enough to facilitate a provincial involvement in broadcasting that is justifiable on a practical basis, the courts have adopted a negative approach, which seems to be more concerned with identifying ways in which provincial initiatives might be regarded as impinging on the perceived exclusivity of the conventional federal sphere of power.¹³

In its theoretical aspects, this argument for judicial functionalism is not new,¹⁴ nor has it been fully developed or exhaustively explored in the real contexts in which it might be made operational. The theory acquires cogency only when demonstrated to be efficacious in particular situations without doing damage to established constitutional doctrine or to the precepts of principled decision making that are intrinsic both to the adjudicatory model in which Canadian constitutional decisions are primarily made, and to the general conception of responsible judicial decision making. It will be demonstrated that a court that is capable of reasoning the substantive validity of provincial involvement in general broadcasting regulation need not be restrained by legal process concerns about the constitutional role of the courts in giving effect to that provincial involvement.

At the outset, some comment should be addressed to the utility of any conclusions that might flow from this analysis. In view of the current political process of constitutional change, which includes a re-evaluation of the jurisdiction of powers over broadcasting,¹⁵ it might be argued that the inadequacy of judicial analysis of general content concerns in broadcasting will be resolved by fundamental constitutional change outside the judicial process. However, in view of the volatile state of Canadian federalism, this may be a false hope. As was remarked in a report of the latest constitutional conference:

Irony feeds on paradox, and nothing is more paradoxical in contemporary Canadian politics than constitutional reform.

Politicians talk incessantly about it, knowing perfectly well that the subject scarcely stirs ordinary voters. This public apathy, particularly acute in English Canada, gives politicians room to manoeuvre while allowing them the luxury of not moving at all.¹⁶ [Emphasis added.]

Realizing the practical impediments to fundamental constitutional change, and acknowledging that there is a valid role for the provinces to play in participating in the regulation of general broadcasting content, it is crucial to provide a means by which, through accepted constitutional principles, a functional sharing of control over general broadcasting content can be effected.

¹³ The more appropriate response of the courts, and one that has doctrinal support, is to seek to uphold valid provincial legislation. See *Scott v. Scott* (1891), 4 B.C.R. 316 (Full Ct.); *Montreal Trust v. Abitibi*, [1943] 3 D.L.R. 1 (P.C., Alta.); and *N.S. Bd. of Censors v. McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1.

¹⁴ See note 125, *infra*, for citations and discussion.

¹⁵ See The Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Montreal: The Canadian Bar Foundation, 1978) at 117-24. See also Trueman, *supra* note 10; and Simpson, "Mask Slips, And Truth on Provinces Is Revealed," *The Globe and Mail*, 8 Feb. 1979 at 7.

¹⁶ Simpson, *id.*

II. THE ACCEPTED CONSTITUTIONAL POSITION AND ITS ORIGIN: FROM THE *RADIO REFERENCE* TO THE *CFRB* CASE

As Hogg has noted¹⁷ in reference to an analysis by Mullan and Beaman,¹⁸ "The regulation of programme content is a politically controversial issue." However, the political contentiousness of the matter arises only because the legal system has not dealt with the content question in practical terms. In part, as noted earlier, this is because *The British North America Act, 1867*, does not address directly the concept of broadcasting. In larger measure, however, the inadequacy of the legal analysis is due to the courts' failure to infuse the Constitution with sufficient validity and vitality with respect to broadcasting to allow it to meet the demands of the matter.

Federal jurisdiction with respect to broadcasting exists primarily by virtue of the combination of section 92(10)(a) and section 91(29) of *The British North America Act, 1867*, and the residual "Peace, Order and Good Government" ("POGG") power of section 91. Section 92(10)(a) reads as follows:

- 92 In each Province the Legislature may exclusively make Laws in relation to ...
 - (10) Local Works and Undertakings other than such as are of the following classes:
 - (a) Lines of ... Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

and, when read in conjunction with section 91(29), has been determined to encompass radio and television broadcasting by an *ejusdem generis* classification.¹⁹

What is not clear, however, despite analyses in some of the relevant cases that assert the contrary, is the comprehensiveness of the word "undertaking" in section 92(10). In the *Radio Reference*,²⁰ Viscount Dunedin attempted to analyze this problem. His words have created substantial confusion about the capacity of this case to support federal jurisdiction with respect to broadcasting content. In summarizing the basis of federal jurisdiction set out in section 92(10)(a), he said:

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

"Undertaking" is not a physical thing but is an *arrangement* under which of course physical things are used.²¹ [Emphasis added.]

¹⁷ *Supra* note 1, at 336, 339. Note: reference to *Report*, *supra* note 1.

¹⁸ *Supra* note 1.

¹⁹ Hogg, *supra* note 1, at 338-39; Shaw, *supra* note 1, at 29-30; McNairn, *supra* note 2, at 358-59; *Report*, *supra* note 1, at 302.

²⁰ *Supra* note 3.

²¹ *Id.* at 315 (A.C.), 92 (D.L.R.). This is the only ground upon which the *Radio Reference* supports federal jurisdiction in this area, because its reliance on POGG to support a federal treaty-making power, with which the case was significantly concerned, was "repudiated" five years later in *A.G. Can. v. A.G. Ont.*, [1937] A.C. 326 (P.C.) [herein-

Later cases have attributed wide significance to the meaning of "undertaking" defined to be an arrangement comprehending more than physical things,²² and have specifically included the substance of what is broadcast. However, to accept this proposition is to ignore both the plain meaning of Viscount Dunedin's words, and the context in which the case was argued. At issue was Canada's capacity to undertake international obligations with respect to the trans-international border use of the radio frequency spectrum, the international aspect of which may itself have coloured the Privy Council's approach to the problem. More important, however, is the fact that the Privy Council was not requested to, and did not purport to, address the issue of broadcasting content. The question referred to the judicial body read:

Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use, and location of the apparatus employed?²³

When Viscount Dunedin's statement is read in the context of the question before the Court and the analysis undertaken in the course of the reasons, it becomes more plausible to regard his use of the word "arrangement" as inclusive of all facets of the medium and process of the distribution, including physical and non-physical aspects, but *not* including the quality or substance of that distributed. His reference to "transmission" and "reception" connotes the extent to which non-physical components of broadcasting are included in the federal power. However, these terms reflect technical, non-physical distribution aspects of broadcasting signal propagation which are released from and received by physical "apparatuses" that are more easily conceived to be within the federal jurisdiction. Nevertheless, in the context in which these terms are used, it is neither reasonable nor necessary to attach any qualitative or content-oriented meaning to these words. The reference to "signs" and "signals" in the question considered by the Privy Council does not relate to the substance of that which is decided to be within federal jurisdiction. Rather, these words, which *prima facie* have a qualitative aspect, are merely descriptive of the scope or types of radio communication distribution that the federal jurisdiction includes.

It is submitted that the *Radio Reference* should be recognized only as supporting the proposition that the Parliament of Canada has jurisdiction to regulate the physical and non-physical components of the process by which radio and television communication is distributed. However, academic commentators and courts have not read the case in this way.

For example, McNairn has analyzed the meaning of "undertaking" in determining the extent of an intra-provincial undertaking.²⁴ In the course of his discussion, he reasons:

after *Labour Conventions* case]. See also *Report*, *supra* note 1, at 303–04; and Hogg, *supra* note 1, at 336.

²² *Re CFRB and A.G. Can.*, [1973] 3 O.R. 819, 38 D.L.R. (3d) 335 (C.A.). For a discussion of "works" and "undertakings," see Hanssen, *The Federal Declaratory Power Under the BNA Act* (1968), 3 Man. L.J. 87.

²³ *Radio Reference*, *supra* note 3, at 310 (A.C.), 87 (D.L.R.).

²⁴ *Supra* note 2.

[A]n undertaking cannot be broken down, so as to subject it to different legislative jurisdictions, into separate local and long distance *businesses* when in fact the two types of *operations* are carried on as an integrated undertaking.²⁵ [Emphasis added.]

In examining the words emphasized in this sentence, and the example of trucking used in the text to support it, it is evident that the author conceives of an "undertaking" as a "distributional" or "medium of connection" concept. Furthermore, his understanding of "undertaking" as a business entity or enterprise operation, which again is a facet of the medium of distribution, is typical of the interpretations that have been attached to "undertaking" since the *Radio Reference*, as is apparent in the *Victoria Cablevision* case.²⁶

If the foregoing analysis is applied to broadcasting, it is arguable that broadcasting content can be separated from the system that conveys it, at least for the purpose of jurisdictional analysis. Even if it could be argued that shipments of transport companies that engage in interprovincial operations are amenable to federal jurisdiction, unlike broadcasting content, there is nothing intrinsically provincial about such shipments aside from the geographical extent of their progress through the distribution system. However, that which is broadcast is of a character that is qualitatively separate from the process that carries it, and may as a result have a separate jurisdictional nature.

The other basis of federal jurisdiction in broadcasting is asserted to be the residual POGG power, vesting in Parliament control over broadcasting by section 91 of *The British North America Act, 1867*.²⁷ In the *Victoria Cablevision* case, although McLean J.A. was prepared to rely on the 92(10)(a) argument in the *Radio Reference*, he reasoned that the *Radio Reference* established federal jurisdiction over broadcasting on the basis of section 91. However, because McLean J.A. failed to acknowledge the context of the section 91 argument in the *Radio Reference*, which related to the capacity of the POGG power to support a federal treaty making power, and which was overruled in the *Labour Conventions* case,²⁸ his conclusions about the POGG power in broadcasting are not useful except to show that the POGG power is invoked in this area.

The most important case—in fact the only case—basing federal jurisdiction with respect to broadcasting content on the POGG power is the decision of the Ontario Court of Appeal in *Re CFRB and A.G. Can.*²⁹ In the case, radio station CFRB was prosecuted under section 28 of the *Broadcasting Act*³⁰ for broadcasting partisan political comment on the date of an election. Section 28 is one of what may be referred to as general, non-province-specific content standards intended to achieve general content objectives such as

²⁵ *Id.* at 374.

²⁶ *Re Public Utilities Comm'n and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716, 52 W.W.R. 286 (B.C.C.A.).

²⁷ See Hogg, *supra* note 1, at 336; Report, *supra* note 1, at 362; and Mullan and Beaman, *supra* note 1, at 71, 74.

²⁸ *Supra* note 21.

²⁹ *Supra* note 22.

³⁰ R.S.C. 1970, c. B-11.

Canadian content programming and broadcasting decorum, but which is not directed particularly at matters of local or regional concern. Because of the nature of the offence, in arguing the case, counsel was compelled to contest the constitutionality of general content standards contained in the *Broadcasting Act*.

In responding to the constitutional argument in the case, Kelly J.A. chose not to examine the meanings of the content provisions in the *Broadcasting Act*. Analogizing instead the cases decided with respect to aeronautics, he asserted that on a "national dimensions" test of POGG;

Radio communication has attained such dimensions as to affect the body politic of Canada and so under the heading of "making laws for the Peace, Order and Good Government of Canada" Parliament is exclusively empowered to legislate as to the control of radio communication undertakings.³¹

It is submitted that Kelly J.A.'s analysis in the case is both insubstantial and cryptic. What are the attributes of the "dimensions" that "radio communication" is perceived to have attained? Is the "body politic" a monolithic concept, or are particular aspects of it acutely sensitive to the impact of "radio communication"? For that matter, is "radio communication" itself an amorphous concept? These and other issues relevant either directly or by necessary implication to the content question in a constitutional context were not evaluated in the case. Nevertheless, Kelly J.A.'s reasons call for close scrutiny, since the case has been interpreted as standing unequivocally for the proposition that federal jurisdiction extends to broadcasting content.

In the first instance, the aeronautics analogy invoked to support the POGG justification for federal control of broadcasting pays no heed to the practical imperatives present in a case like *Johannesson v. West St. Paul*³² that are not present in broadcasting. As the aeronautics cases demonstrate, the location of airports is an essential part of the distribution network within which air travel functions. In the American context, McNairn has pointed out³³ that federal control over aeronautics is in substance predicated on federal control over the instrumentalities of flight, which have no special provincial character apart from geographical placement.³⁴ Because the sizes of airports are directly correlated with the sizes of airplanes that use them, and because of necessary safety measures to protect areas surrounding airports in respect of matters ancillary to, but of the same character as, the distributional process of air travel, exclusive federal control over aeronautics can be justified on the basis of the "national dimensions" test of POGG.

The same concerns that make the "national dimensions" test of POGG acceptable in justifying federal control over aeronautics are not necessarily present in the broadcasting context. Independently of the process of distri-

³¹ *Re CFRB and A.G. Can.*, *supra* note 22, at 823 (O.R.), 339 (D.L.R.).

³² [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609. See *infra* note 78, at 30, for comments on the vagueness of Kelly J.A.'s discussion of POGG.

³³ McNairn, *Aeronautics and the Constitution* (1971), 49 Can. B. Rev. 411 at 425.

³⁴ In view of the s. 92(16) argument made later in this paper, it is appropriate to note that "local" in that section requires more than one territorial confinement to one province.

bution and matters ancillary to it, broadcasting programming may be directed specifically toward particular interests and aspirations that are exclusively local in character. Moreover, accepting that the process of broadcasting distribution falls within federal competence, the regulation of some facets of programming content under colour of provincial legislation need in no way impair or interfere with the allocation of frequencies, the operation of the frequency spectrum, the operation of transmitters or receivers, or the general content standards ostensibly with respect to programming integrity, which are set out in section 3 of the *Broadcasting Act*.

The second basis of Kelly J.A.'s conclusion was the case of *A.G. Ont. v. Winner*.³⁵ At issue in that case was an attempt by the New Brunswick government to prohibit the operation of "an interprovincial or international highway bus undertaking."³⁶ Paraphrasing the *Winner* decision, Kelly J.A. said:

[W]hen the undertaking was a *bona fide* interprovincial undertaking, the carriage of passengers from points within the Province to points outside and between two points within the Province was beyond the control of the Province [T]he qualifying condition to exclude provincial law-making authority and to attract the exclusive power of Parliament was the presence of either works or undertakings connecting one province with another or extending beyond the limits of the Province.³⁷

As Kelly J.A. seems to have realized, the *Winner* case stands for the proposition that an undertaking, in the sense of a business enterprise, attracts federal jurisdiction when some part of its operation, no matter how proportionally small, is interprovincial, notwithstanding that the specific activity of concern takes place entirely within the Province.

Even though the "undertaking" analysis took place in the course of a discussion of the "national dimensions" test of POGG, the fact that the analysis, predicated on a highway transportation analogy, was even employed is curious. In the *Winner* case, "undertaking" was interpreted to mean "business enterprise," and, as noted, the case is accepted as authority for the proposition that even a small proportion of interprovincial operation will result in an otherwise intra-provincial undertaking being amenable to federal jurisdiction. If the *Winner* analogy is applied consistently, it would seem that an entirely intra-provincial broadcasting undertaking should be outside federal control.

In order to reach the conclusions with respect to jurisdiction over broadcasting content reached by Kelly J.A. in the *CFRB* case, it is necessary to interpret the *Winner* case to mean that mere use of an interprovincial medium of distribution, in that case highways connecting provinces, results in users of that medium being amenable to federal jurisdiction, notwithstanding that their entire undertaking might be intra-provincial or locally conceived and oriented. This is not a proposition that flows from *Winner*. However, applying Kelly J.A.'s "logic" to broadcasting content, he in effect reasoned that the constitutional jurisdiction over broadcasting content is not determinable by

³⁵ [1954] A.C. 541, [1954] 4 D.L.R. 657 (P.C.).

³⁶ *Re CFRB and A.G. Can.*, *supra* note 22, at 823 (O.R.), 339 (D.L.R.).

³⁷ *Id.* at 824 (O.R.), 340 (D.L.R.).

the substance of that content (the nature of the enterprise or operation, as in *Winner*) but by the mere use of the radio frequency spectrum, control over which does reside in the Parliament of Canada. This conclusion is both too simple, insensitive to the disaggregation of matters of programme distribution and programme substance, and is based on a legal *non sequitur* if it purports to rest on the *Winner* analysis.³⁸

Indicative of the deficiency of analysis that pervades the broadcasting decisions are comments made in the course of the *CFRB* case that suggest that certainty about federal jurisdiction over broadcasting content is illusory. Sensitive to the possibility that the *Radio Reference*, the foundation of all cases discussed in this paper, may indeed be as narrow as this analysis suggests, Kelly J.A. asserted that an absence of precedent was no bar to the conclusions about jurisdiction over content that he was determined to reach. He said:

Even if it be assumed that the decision in the *Radio Reference* case was intended to declare only the carrier system to be exclusively a subject for the legislative jurisdiction of Parliament, then the decision in that case at best is silent as to the right of Parliament to control and regulate the intellectual content of the material disseminated by the operation of the carrier system. Since there is no binding precedent holding that the control and regulation of the intellectual content is beyond the competence of Parliament, it would be flying in the face of all practical considerations and logic to charge Parliament with the responsibility for the regulation and control of the carrier system and to deny it the right to exercise legislative control over what is the only reason for the existence of the carrier system, i.e., the transmission and reception of intellectual material.³⁹

It is not clear how Kelly J.A. determined that practical imperatives necessitate the allocation of intellectual content exclusively to the federal sphere of jurisdiction. Furthermore, it is not acceptable that an unreasoned "common sense" type of approach be a surrogate either for the perceived legal position or for an inquiry into countervailing considerations of broadcasting practice that consciously or unconsciously have been ignored. What is clear, however, is that the line of analysis predicated on the *Radio Reference* may be ill-conceived in attempting *a priori* to allocate content control to the federal authority.

From a consideration of the constitutional position preceding the most recent attempts to attribute the regulation of broadcasting content to the federal jurisdiction, it appears that reliance on the perceived doctrinal position may be tenuous. Not only has it been shown that the *Radio Reference* is inadequate authority upon which to base federal jurisdiction over the intellectual matter of broadcasting, but also it has been demonstrated that cases built upon the *Radio Reference* have added little substance to the federal claim over content apparently codified in the *Broadcasting Act*. The crucial question now is: Do the *Capital Cities*, *Dionne*, and *Kellogg's* cases merely

³⁸ The *Capital Cities* case, *supra* note 6, at 619, seems to accept the *Winner* analogy insofar as it relates to the trans-border carriage of goods. However, it would seem, on this paper's analysis, that this analogy has only limited application, confined to the "process of distribution" context.

³⁹ *Re CFRB and A.G. Can.*, *supra* note 22, at 824 (O.R.), 340 (D.L.R.).

adopt the insubstantial doctrinal foundation described above, or do they in fact create a more cogent explanation and justification for federal jurisdiction with respect to broadcasting content?

III. RENAISSANCE OF CONTENTION: THE RECENT CASES

As noted in the introduction to this paper, three recent Supreme Court of Canada decisions reinvigorate the utility of exploring the constitutional justification of exclusive federal control over broadcasting content, as it has been so baldly asserted in the *CFRB* decision and perhaps in section 3 of the *Broadcasting Act*.⁴⁰

In November, 1977, the Supreme Court of Canada rendered its decision in the case of *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*.⁴¹ Among other things, at issue in the case was the jurisdiction of the Canadian Radio-Television Commission (CRTC) under the *Broadcasting Act*⁴² to regulate cable distribution systems that receive and distribute television signals.⁴³ Briefly stated, the issue was whether the *Broadcasting Act* was *intra vires* the Parliament of Canada in conferring such jurisdiction on the Commission.

Pursuant to one of its policy statements, the CRTC had amended the licenses of several cable television companies to permit these companies to delete at random commercial messages contained in U.S. programming received from Buffalo, and to substitute therefor public service announcements. The aim of the policy was to encourage the cable companies to enter contracts with Canadian television stations to insert such replacement signals.

The Supreme Court found that the CRTC does have the jurisdiction to enforce this kind of policy and that the conferring of this jurisdiction was *intra vires* the Parliament of Canada.

In constitutional terms, the case was concerned with whether section 92(10)(a) and section 91(29) of *The British North America Act, 1867*, remove from provincial competence the regulation of cable distribution systems. In practical terms, the point of contention was whether the interposition of an intermediate receiver by the cable companies for the interception and re-transmission of signals resulted in a bifurcation of jurisdiction pursuant to the constitutional division of powers. Essentially, as in the *Victoria Cablevision*⁴⁴ and *Dionne*⁴⁵ cases, the Court determined that the broadcasting

⁴⁰ This will be explored *infra*. In capsule form, the argument is that the content requirements of s. 3 of the *Broadcasting Act*, R.S.C. 1970, c. B-11, are so vague in scope and potential application as to be no more than general standards aimed at decency (broadly defined), integrity, and nationalistic requirements in programme content. Accordingly, provincial jurisdiction with respect to specific content matters of intrinsic provincial significance would not necessarily be inconsistent with the s. 3 objectives.

⁴¹ *Supra* note 6.

⁴² R.S.C. 1970, c. B-11.

⁴³ *Supra* note 6, at 615.

⁴⁴ *Supra* note 26.

⁴⁵ *Supra* note 7.

and distribution of television signals comprised a single, integrated undertaking however it might be technologically constructed⁴⁶ and that extra-provincial signals intercepted for re-transmission within the geographical confines of one province did not tend to "divided constitutional jurisdiction over the undertaking of such systems."⁴⁷

Although *prima facie* the case appeared to be one directly concerning the jurisdictional implications for the intra-provincial manipulation of certain aspects of broadcasting content, the case was neither argued nor adjudicated in this context. In the judgment, substantial reliance was placed on the *Radio Reference* in order to assert federal jurisdiction over the transmission and reception of radio and television signals as elements of a network of distribution by means of which such communication takes place. Indeed, the entire substance of the *Capital Cities* case on the constitutional question before the Court was distributional in focus, and directed toward ascertaining an *absolute division* of legislative responsibility over broadcasting.

However, in concluding his constitutional analysis, Laskin C.J.C. seemed prepared to view control over content as being subsumed in a general federal control over anything to which the label "broadcasting" might be attached. He said:

I am therefore in no doubt that federal legislative authority extends to the regulation of the reception of television signals emanating from a source outside of Canada and to the regulation of the transmission of such signals within Canada. Those signals carry the programmes which are ultimately viewed on home television sets; and it would be incongruous, indeed, to admit federal legislative jurisdiction to the extent conceded but to deny the continuation of regulatory authority because the signals are intercepted and sent on to ultimate viewers through a different technology. Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise.⁴⁸

Unfortunately, the conclusions of the Chief Justice on this issue are no more than that and, being devoid of introspective analysis, they betray a misunderstanding of the complexities inherent in modern broadcasting, and indicate an unnecessary and poorly reasoned extrapolation of the substantive manner in which the case was presented to the Court.⁴⁹ Counsel argued the constitutional issues in terms of an absolute division of control over the medium, or means, of distribution of broadcasting signals, an approach too stark to appreciate the subtleties of potential sharing of jurisdiction with respect to some forms of programme content. However, instead of restricting his reasons to the distributional issue, the Chief Justice attempted to find within the process of distribution sufficient justification to warrant a virtually unquestioned

⁴⁶ This is consistent with the "enterprise" view of "undertaking."

⁴⁷ *Capital Cities*, *supra* note 6, at 610.

⁴⁸ *Id.* at 623.

⁴⁹ As might be expected, the tactics of argument adopted by counsel have influenced these broadcasting decisions. However, the courts seem not to have kept this in mind in so easily extending general and distributional arguments to encompass broadcasting content jurisdiction.

allocation of content control to the federal Parliament. In referring to the *Radio Reference*, he stated:

[I]t is difficult to understand how there can be a constitutional basis for federal licensing of receiving sets in a Province, or even of transmitting apparatus which sends signals by way of international and interprovincial transmission. To put the matter in another perspective, it would be as if an interprovincial or international carrier of goods could be licensed for such carriage but without federal control of what may be carried or of the conditions of carriage.

This submission amounts to a denial of any effective federal legislative jurisdiction of what passes in interprovincial or international communication, whether by radio or television, and is in truth an invitation to this Court to recant from the *Radio* case. It would, presumably, leave federal authority in relation to "tele-graphs" intact, although reducing the meaning of that head of power from the meaning attributed to it by the Privy Council in the *Radio* case.⁵⁰

With respect to this line of reasoning two things may be said. In the first instance, the reference to the transportation of goods is an incomplete and unclear analogy. As noted by Hogg⁵¹ and McNairn,⁵² the jurisdiction over the transportation of goods is divided between the provincial and federal levels of government, although the cases of *Coughlin v. Ontario Highway Transport Bd.*⁵³ and *R. v. Smith*⁵⁴ effectively confer on the provinces legislative jurisdiction with respect to interprovincial and intra-provincial carriage of goods by highway transport, through a mechanism of administrative interdelegation and anticipatory referential incorporation. Moreover, the federal jurisdiction with respect to interprovincial carriage of goods is dependent on the carrier's being an "interprovincial undertaking." If the analogy employed by the Chief Justice is pursued, it might be argued that broadcasting undertakings confined to a province on a territorial basis should be amenable to provincial regulation, for, as the examination of the *Winner* analogy has suggested,⁵⁵ the federal authority with respect to interprovincial undertakings cannot be dependent on the nature of the medium or process by which distribution takes place, even accepting that federal control will extend to at least some matters of the substance of distribution in appropriate cases. Rather, the allocation of jurisdiction must depend on the character of the undertaking itself. Accordingly, if a broadcasting undertaking operating in a province does not direct its activity to or have as its object the interprovincial carriage of signals, and if programme content is intrinsically local for reasons other than the territorial extent of its propagation, then there would appear to be a supportable case for provincial legislative involvement.

Ancillary to the foregoing argument, and apparent in the remarks of the Chief Justice, is the international orientation of the *Capital Cities* case which may have coloured the approach of the Court to the jurisdictional question.

⁵⁰ *Capital Cities*, *supra* note 6, at 622.

⁵¹ *Supra* note 1, at 338.

⁵² *Supra* note 2. The entire article is helpful in assessing the limits of federal power under the exception of s. 92 (10)(a) of *The British North America Act, 1867*.

⁵³ [1968] S.C.R. 569, 68 D.L.R. (2d) 384.

⁵⁴ [1972] S.C.R. 359.

⁵⁵ See notes 35-37, *supra*, and accompanying text.

Indeed, it may have been easier for the Court to reach the conclusions that it reached with respect to broadcasting content because the subject of concern was the international transmission and reception of foreign radio-television signals. The arguable necessity of federal jurisdiction in international matters of broadcasting content is implicit in the judgment.

The other point worthy of comment with respect to the reasons of the Chief Justice is his contention that to assert other than federal control over content regulation would be to "recant from the *Radio* case." As this paper has attempted to show, neither by necessary contextual implication nor by express reference did Viscount Dunedin direct his mind to the issue of content. In fact, an interpretation of the *Radio Reference* consistent with its facts and the state of development of radio technology in 1932 attributes to federal control only the process of distribution of broadcasting signals, leaving the content question open.⁵⁶

Swinton has had similar misgivings about the logical implications of the *Capital Cities* case for programme content regulation, remarking:

Laskin C.J.C. had no doubts as to federal competence to regulate *content*, at least when *foreign* television signals are distributed.... The reasoning underlying this conclusion is not too clear, for it rests, in part, on traditional federal authority to license radio receivers, a basis which does not appear to lead to a conclusion that Parliament can regulate the content of material received. The conclusion would be more convincing had His Lordship looked to a rationale for content control by the federal Parliament, based on the scarcity of broadcast frequencies. Frequencies available for broadcasting are limited, and the federal Parliament must decide on a way to allocate them between competing users.⁵⁷

However, even Professor Swinton seems not to have appreciated the possible independence of the content concept, notwithstanding her identification of the

⁵⁶ In *Dionne*, *supra* note 7, at 198 (S.C.R.), 185 (D.L.R.), Pigeon J. in dissent recorded the remarks of Anglin C.J.C. made during the Supreme Court of Canada's consideration of the *Radio Reference*. These remarks suggest that the *Radio Reference*, notwithstanding its subsequent adjudication by the Privy Council, should be read in its context. Furthermore, Anglin C.J.C.'s conception of the issue before the Court was that of a "process of distribution" nature, as the following quotation, cited by Pigeon J., demonstrates:

In dealing with this reference, however, I desire it to be clearly understood that I do so solely in the light of the present knowledge of Hertzian waves and radio and upon the facts disclosed in the record. I fully accept the following paragraph from the judgment of my brother Newcombe:

"I interpret the reference as meant to submit the questions for consideration in the light of the existing situation and the knowledge and use of the art, as practically understood and worked, and, having regard to what is stated in the case, assumed as the basis for the hearing. Therefore I proceed upon the assumption that radio communication in Canada is practically Dominion-wide; that the broadcasting of a message in a Province, or in a territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only within the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently, if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control." [Emphasis added.]

⁵⁷ Swinton, *Advertising and Canadian Cable Television—A Problem in International Communications Law* (1977), 15 Osgoode Hall L.J. 545 at 574-75.

inconsistency in the *Capital Cities* judgment, for she has suggested that Laskin C.J.C.'s content conclusion might be more convincing if it had been related to the allocation of radio frequencies as a scarce resource. Frequency allocation, however, is just one dimension of the regulation of the means of distributing broadcast signals. Furthermore, accepting federal jurisdiction over the distribution system, and assuming a fully allocated frequency spectrum, the constitutional contention for exclusive federal control over the substance of that which is carried does not seem to be imperative. Equally important, this contention is arguably not supportable either on the basis of the pre-*Capital Cities* doctrine or on the basis of the reasoning in the case.

Also in November, 1977, the Supreme Court of Canada decided the *Dionne* case.⁵⁸ The issue in this case was substantially the same as that in the *Capital Cities* and *Victoria Cablevision* cases. Pursuant to section 23 of the provincial *Public Service Board Act*,⁵⁹ the Quebec Public Service Board had purported to authorize certain parties to the *Reference* "to operate cable distribution enterprises in certain defined areas in the Province" and to settle "certain questions touching the carrying out of the authorizations."⁶⁰ Given its decision in the *Capital Cities* case, the Supreme Court of Canada had little difficulty in determining that section 23 of the Quebec *Public Service Board Act* was *ultra vires* the competence of the Provincial legislature insofar as it has been determined to be beyond provincial competence to regulate cable distribution of television signals. As in the *Capital Cities* case and the *Victoria Cablevision* case, the fundamental ground for the Court's decision was its perception of the process of transmission, intermediate reception, and retransmission by cable to the ultimate receivers of the transmission as essentially an integrated undertaking not amenable to divided jurisdiction under the Constitution. For this conclusion, reliance was again placed on sections 92(10)(a) and 91(29) of *The British North America Act, 1867*.

Laskin C.J.C., who delivered the reasons of the Court, stated:

The fundamental question is not whether the service involved in cable distribution is limited to intraprovincial subscribers or that it is operated by a local concern but rather what the service consists of [W]here television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system than there can be between railway tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide. In all these cases, the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on. Divided constitutional control of what is functionally an interrelated system of transmitting and receiving television signals, whether directly through air waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words.⁶¹

⁵⁸ *Supra* note 7.

⁵⁹ R.S.Q. 1964, c. 229.

⁶⁰ *Dionne, supra* note 7, at 192 (S.C.R.), 179 (D.L.R.).

⁶¹ *Id.* at 194 (S.C.R.), 181 (D.L.R.). The *Winner* analogy again is invoked to support federal jurisdiction over all broadcasting. However, as was suggested above, the

Noticeably absent from these reasons is any direct reference to content jurisdiction, which was not a specific issue in the case. However, the tenor of the Court's reasons suggests that all matters of a radio-television communications nature are subsumed under the term "broadcasting," at least for the purpose of division of powers classification. Nonetheless, for the Court to proceed in this way, as it has in other cases, is to ignore the expressly distributional context of the problems being adjudicated, and, as a direct consequence, to be insensitive to legitimate provincial concerns about content.

It is not denied that constitutional and regulatory convenience concerns militate in favour of federal jurisdiction over the process, tangible and intangible, by which broadcasting communication takes place, but these arguments, based on the section 92(10)(a) and POGG powers in *The British North America Act, 1867*, do not necessarily stretch to encompass content regulation. This proviso bears repetition as a foundation for an alternative analysis.

In a dissent⁶² considerably stronger than that in the *Capital Cities* case, at least insofar as it may be referable to jurisdictional concerns with respect to general broadcasting content, Pigeon J. seemed to recognize the functional issues confronting the Court. Perceptively, he realized that a noncontextual invocation of section 92(10)(a) cannot be the terminus of a jurisdictional analysis of the complexities that inhere in "broadcasting":

It must be stressed that by virtue of the above noted provisions [92(10)(a)] provincial jurisdiction over *all* undertakings is the rule, federal jurisdiction being the exception. With reference to undertakings of the kind with which we are presently concerned it is to be noted that telegraph lines are specially included among provincial jurisdiction *because exception is made only of those which connect the Province with another or extend beyond its limits*.⁶³ [Emphasis added.]

"railway tracks" argument is difficult in that it ignores the essential proposition in *Winnipeg*, which is that the character of the undertaking, and not the medium by which it travels, is determinative of constitutional jurisdiction. Hogg, *supra* note 1, at 322, observes that:

Legislative jurisdiction over trains, buses, trucks . . . depends primarily on whether they are operated as part of an interprovincial (or international) undertaking, in which case jurisdiction is federal under 92(10)(a), or whether they are operated as part of an intraprovincial undertaking, in which case jurisdiction is provincial under 92(10).

Although there have been cases that assert federal jurisdiction on the basis of the physical connection of a local line of communication with an interprovincial line, this result depends on the degree of "operational integration" between the connecting undertakings as enterprises of transportation or communication (Hogg, *op. cit.*, at 329). Thus, where a provincial undertaking is operated as a branch of an interprovincial undertaking, then the local undertaking is deemed to be part of the interprovincial undertaking. However, the connection must not be merely physical but must be operational (Hogg, *op. cit.*, at 343). As Hogg notes, citing as authority *Toronto v. Bell Telephone Co.*, [1905] A.C. 52 (P.C.), there are many provincially regulated telephone companies in Canada notwithstanding their participation in the national telephone distribution network.

⁶² *Dionne*, *id.* at 196 (S.C.R.), 182 (D.L.R.) ff.

⁶³ *Id.* at 199 (S.C.R.), 184 (D.L.R.). Pigeon J. notes that, with the exception of the Bell Telephone Company of Canada, the telephone companies are under provincial jurisdiction. See note 61, *supra*.

These comments can be extended to exempt certain forms of programme content from federal jurisdiction just as easily as Laskin C.J.C.'s reasons here and in the *Capital Cities* case can be extrapolated to expand federal jurisdiction in this regard. However, any inferences that may be drawn from this case's dissent, while attractive in view of the legitimate provincial interest in broadcasting content which will be examined later in this paper, are as restricted as the implications for an expansion of federal jurisdiction over content, which seems to be the law, for, notwithstanding Pigeon J.'s apparent sensitivity to an expanded provincial role in broadcasting, his reasons were couched in the same distributional context as the reasons of the majority. Until the content question is faced on its own footing, however, independent of the method by which programme content is distributed, the exclusivity of federal jurisdiction in legislating standards to be applied to general broadcasting content cannot be satisfactorily questioned.

The third recent case reflective of the law with regard to constitutional jurisdiction over general broadcasting content, and also indicative of the Supreme Court's attitude, and perhaps of its confusion, in adjudicating on this issue is the decision in *A.G. Que. v. Kellogg's Co. of Canada*.⁶⁴ In this case, provincial consumer legislation prohibiting the use by advertisers of cartoons in advertising directed at the child audience was held to be *intra vires* the province of Quebec in extending the prohibition to encompass cartoon advertising on television. Ostensibly, the legislation was found to be valid because it was directed at the advertiser-manufacturer of the product rather than at the broadcaster.

Notwithstanding the reasoning of the Court that the effect of the legislative restriction on broadcasting content was only ancillary or incidental to otherwise valid provincial consumer legislation, a close reading of the legislation and the judgment suggests that the statutory provision was more a colourable attempt to invade recognized exclusive federal jurisdiction. Moreover, the interest of the province of Quebec in attracting jurisdiction over all broadcasting matters had been a subject of constitutional litigation in the major broadcasting case immediately preceding the *Kellogg's* case⁶⁵ and in fact is a matter of express representation by that province in the current constitutional debate. Accordingly, that the Supreme Court of Canada, so clear in the *Capital Cities* and *Dionne* cases in rejecting provincial claims to expanded broadcasting jurisdiction, should be receptive to a better disguised, but nevertheless disguised, provincial initiative to acquire authority in the broadcasting area is difficult to understand.

When juxtaposed with the previous broadcasting cases, the *Kellogg's* case clearly raises the analytical tensions that constitute the subject of this paper. Effectively, the result of the case is to provide for use by the provinces a constitutional conduit by which they can successfully intrude into a legislative realm purported to be within exclusive federal competence. The headnote in the *Kellogg's* case accurately reflects the tenor and substance of the judgment:

⁶⁴ *Supra* note 8.

⁶⁵ The *Dionne* case, *supra* note 7.

The fact that broadcasting is within the exclusive federal jurisdiction does not prevent valid provincial consumer protection legislation from controlling television advertising.

Provincial legislation otherwise valid, is not invalid because, incidentally, it affects a federal power.⁶⁶ [Emphasis added.]

Apparently, the provinces can acquire not only a legislative interest in certain broadcasting matters, but also control, if the legislative mechanism is appropriately constructed. If jurisdiction over broadcasting content can be appropriated by a province this easily, the inevitable question must be: Should the jurisdictional issues raised by broadcasting programme content not be addressed directly in a way that harmonizes regulatory convenience, provincial interest, and constitutional doctrine?

The *Kellogg's* case contains a short and trenchant dissent by Laskin C.J.C. The Chief Justice recognized the patent artificiality of accepting provincial legislation as anything except legislation in relation to broadcasting and, in particular, with respect to the general content of broadcasting. Implicitly, Laskin C.J.C. relied on the "national concern" test of the POGG power vested in Parliament by virtue of section 91 of *The British North America Act, 1867*, in asserting a pervasive federal control over broadcasting. He said:

We are concerned rather with the right to resort to a particular medium which is within exclusive federal competence, and the generality of the challenged provincial legislation and Regulation does not aid the Province in extending its prohibition of advertising to a medium which is outside its legislative jurisdiction.⁶⁷ [Emphasis added.]

In incorporating the "national concern" doctrine into his analysis, the Chief Justice referred to the case of *Johannesson v. West St. Paul*, an "aeronautics" case. However, beyond identifying his reliance on the POGG power as invoked there, Laskin C.J.C. did not explore the rationale for its use in the aeronautics context—a rationale that may not be and, arguably, is not present with respect to broadcasting content.⁶⁸

Having recognized the extreme colourability of the provincial legislation before the Court, Laskin C.J.C. was content to rely on his understanding of applicable precedent, generally developed in non-broadcasting-content analyses, to affirm federal jurisdiction over programme content. This is unfortunate because the case presented a clear opportunity to consider the content issue

⁶⁶ *Supra* note 8, at 211 (S.C.R.), 314 (D.L.R.). Martland J. saw the case as one concerned not with the transmission and reception of broadcasting signals or with undertakings engaged in that business, but as one dealing with the regulation of "the conduct of a commercial enterprise in respect of its business activities within the Province. The majority of the Court of Appeal appears to hold the view that the federal power in respect of broadcasting undertakings is decisive. I do not think that it is . . ." (*Kellogg's, op. cit.*, at 221 (S.C.R.), 320 (D.L.R.)).

⁶⁷ *Id.* at 214 (S.C.R.), 316 (D.L.R.). In asserting this, Laskin C.J.C. accepts the *McKay* test of concurrency (see text accompanying notes 113-15, *infra*). However, the *McKay* case stands by itself and seems to have been superseded by the "direct conflict" approach to concurrency, or paramountcy.

⁶⁸ See text accompanying notes 32-35, *supra*, for a discussion on this point.

unencumbered with the complexities of international signal transmission,⁶⁹ cable distribution,⁷⁰ and absolute division of authority which have hampered consideration of jurisdiction over content in previous cases.

Collectively, the cases, and therefore the doctrine set out in Parts II and III of this paper, provide the apparent foundation for the allocation of control over general broadcasting content to the federal Parliament, and through Parliament to the CRTC. Upon close consideration of this very small body of precedent, however, only a limited amount of it is concerned directly with content at all. Moreover, none of the cases analyzes content in a way appreciative of the subtleties in its substantive character which may be a basis for a very real division or sharing of jurisdiction with respect to broadcasting content. Accordingly, a number of matters are remarkable.

First and foremost, the *Radio Reference* is not determinative of exclusive federal jurisdiction over broadcasting content. Accordingly, the cases that rely on it as the basic, and often sole, support for federal control over programme content do so on tenuous grounds.

Of equal importance is the fact that most of the relevant cases, including the *Radio Reference*, are directly concerned with the process by which radio or television signals are distributed rather than with the particular substance, or qualitative nature, of what is distributed. The *Broadcasting Act*, section 3, is consistent with a scope of jurisdiction no more extensive than this. Moreover, the general content standards contained in the Act⁷¹ are not inconsistent with an interpretation restricting their application to matters of broad integrity of content, in line with certain nationalistic aspirations, but not directed to content subjects that may be described as intrinsically local, or province-specific in character, and are therefore of inherent provincial legislative interest.

A reinterpretation of the main broadcasting cases demonstrates a process of analysis by the courts that is only loosely akin to the "What is the matter?" procedure of constitutional investigation. In fact, the courts' conception of broadcasting has been so monolithic that this conventional mode of analysis appears to have been ignored or to have depreciated in importance. This approach not only raises concerns about the courts' appreciation of the substantive law concerned, but also demonstrates an attitude of the courts, and of the Supreme Court of Canada in particular, that contains an implicit rejection of the appropriateness of functional analysis as an apposite basis for an imaginative investigation of the division of powers in relation to broadcasting.

An alternate, and perhaps more useful, approach originates in an acknowledgement that broadcasting, in its contemporary complexity, is unanticipated by *The British North America Act, 1867*. Accordingly, the relevant question becomes: What are the relevant functional concerns and, within existing doctrinal precepts, how can the optimal allocation of these concerns between

⁶⁹ The *Capital Cities* case, *supra* note 6.

⁷⁰ *Id.* See also *Dionne*, *supra* note 7.

⁷¹ R.S.C. 1970, c. B-11. See also *Report*, *supra* note 1, at 305; and Atkey, *supra* note 1, at 258-60.

the provincial and federal levels of government be effectuated?⁷² The Supreme Court of Canada does not appear to have considered this question.

On the assumption that precedent may be constitutionally neutral on the appropriateness of provincial involvement in the regulation of general broadcasting content, the remainder of this paper will attempt to answer the above question by examining: (a) some aspects of the "national concern" approach to POGG as may apply to broadcasting; (b) the legal, theoretical, and practical legitimacy of provincial interest in broadcasting, and how that interest may be made operational within a legislative and regulatory framework that is consistent with conventional constitutional doctrine; and (c) the attitude of the Supreme Court and how a reorientation of its perception of its role in the adjudication of broadcasting matters could facilitate a more satisfactory resolution of the issues raised in respect of general broadcasting content.

IV. DEFINING THE PROVINCIAL ROLE: A MODEL

A. "National Concern" and the POGG Power

Although it is not the intention here to re-analyze the development of the "national importance" test of the residual POGG power in section 91 of *The British North America Act, 1867*, as it has been expanded through the case law,⁷³ it is essential to address the doctrine since its increased utility as a broad basis for federal control over broadcasting⁷⁴ must be faced before provincial legislative involvement in the area can be asserted more positively. Potentially, the "national importance" test of POGG is a flexible means by which federal jurisdiction can be invoked with respect to matters not enumerated in either section 91 or 92. The precise application of this test, or at least its expression, may at the same time have been expanded and confused in the *Anti-Inflation Reference*.⁷⁵ Nevertheless, its general character has been retained insofar as broadcasting analysis is concerned.

Precisely because the test has the potential to be so easily applied, it is submitted that considerable caution and careful analysis are required before

⁷² *N.S. Bd. of Censors v. McNeil*, *supra* note 13.

⁷³ See *Russell v. The Queen* (1882), 7 App. Cas. 829, 2 Cart. B.N.A. 12 (P.C.); *A.G. Ont. v. A.G. Can.*, [1896] A.C. 348, 5 Cart. B.N.A. 295 (P.C.) [hereinafter *Local Prohibition case*]; *A.G. Ont. v. Canada Temperance Federation*, [1946] A.C. 193, [1946] 2 D.L.R. 1 (P.C.); *Johannesson v. West St. Paul*, *supra* note 32; *Munro v. National Capital Comm'n*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753; and *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541 [hereinafter *Anti-Inflation Reference*].

⁷⁴ Hogg, *supra* note 1, at 336. See *Anti-Inflation Reference*, *id.* at 455-56 (S.C.R.), 524 (D.L.R.), 616 (N.R.) *per Beetz J.*

⁷⁵ Although this confusion is not material to the argument of this paper, useful discussions of the reasons in the *Anti-Inflation Reference* may be found in McDonald, *Peace, Order and Good Government: The Laskin Court and the Anti-Inflation Reference* (1977), 23 McGill L.J. 431; and Chevrette and Marx, *Commentary* (1976), 54 Can. B. Rev. 732.

it is used.⁷⁶ In reviewing the utility of POGG as it may apply to broadcasting content, it is perhaps wise to be mindful of Laskin C.J.C.'s warning in the *Anti-Inflation Reference* in addressing the need for caution in employing the "national concern" test:

Lord Atkin said of Lord Watson's words (in the *Local Prohibition* case (1896) A.C. 348) that "They laid down no principle of constitutional law and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define . . .".

It is my [Laskin C.J.C.'s] view that a similar approach of caution is demanded even today, both against a loose and unrestricted scope of the general power and against a fixity of its scope that would preclude resort to it in circumstances now unforeseen.⁷⁷

In assessing POGG as it could apply to broadcasting, it is the contention of this paper that the Gibson "provincial inability" approach is probably most useful in determining the extent to which the residual power in section 91 should be permitted to remove from provincial competence any legislative jurisdiction with respect to broadcasting content. Gibson's thesis is most usefully explained by setting it out in his own words:

[T]he [POGG] power is merely residual in nature; it can operate only in the absence of relevant provincial jurisdiction. This, it is submitted, is the key to the puzzle: *a matter has a national dimension to the extent only that it is beyond the power of the provinces to deal with it.*⁷⁸ [Emphasis added.]

The argument proceeds:

Having regard to the residual nature of the power . . . "national dimensions" are possessed by only those aspects of legislative problems which are beyond the *ability* of the provincial legislatures to deal with because they involve either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the "national dimensions" concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk.⁷⁹

Finally:

It is important to emphasize however that the *entire* problem would not fall within federal competence in such circumstances. Only the aspect of the problem that is beyond provincial control would do so. Since the [POGG] clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial power.⁸⁰

Gibson's argument is quoted at length because its lucidly expressed contention is important in all its aspects to the position taken in this paper. Applying the above argument to broadcasting content, notwithstanding valid exclusive federal jurisdiction over the process of distribution of broadcasting

⁷⁶ See LeDain, *Sir Lyman Duff and the Constitution* (1974), 12 Osgoode Hall L.J. 261 at 279; and Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975), 53 Can. B. Rev. 597 at 604.

⁷⁷ *Supra* note 73, at 412 (S.C.R.), 487 (D.L.R.), 578 (N.R.). See also Pigeon, "The Meaning of Provincial Autonomy," in Lederman, ed., *The Courts and the Constitution* (Toronto: McClelland & Stewart, 1964) 35 at 37.

⁷⁸ Gibson, *Measuring National Dimensions* (1976), 7 Man. L.J. 15 at 33.

⁷⁹ *Id.* at 36.

⁸⁰ *Id.* at 34.

signals, the regulation of province-specific matters of general content should be within provincial competence where the subject matter is intrinsically local in character and of no particular interest to other provinces or the nation as a whole, and where provincial involvement would not interfere with either the viewer enjoyment of the citizens of other provinces, or with the process of distribution under federal control. If the provinces may accept legislative jurisdiction with respect to some matters of content regulation, then federal legislative competence based on POGG should limit that role only to the extent necessary to achieve interprovincial co-operation in appropriate areas.⁸¹

If, on the Gibson view of POGG, provincial competence with respect to certain specific subject matter of general programme content is not precluded, and if federal power under section 92(10)(a) is restricted to distribution matters, as argued earlier in the paper, it is necessary to determine the head of power in section 92 of *The British North America Act, 1867*, under which provincial broadcasting authority can reside.

B. Provincial Interest

1. Legislative Competence and Rationale

As a condition precedent to conventional constitutional analysis of the division of powers between sections 91 and 92 of *The British North America Act, 1867*, the "matter" of legislation, or proposed legislation, must be identified. Section 92 is then examined to determine if the "matter" is comprehended within that section. Next, section 91 is examined for its capacity to accommodate the "matter" under consideration, and, in the event that the "matter" may fall within some part of both sections 91 and 92, doctrines of mutual modification or paramountcy are applied to resolve any conflict.⁸²

As the analysis in Parts II and III of this paper outlines, Canadian courts have treated "broadcasting" as a single matter comprehended within the federal communications power supported either by sections 92(10)(a) and 91(29) or by the residual POGG power in section 91 of *The British North America Act, 1867*. However, as the discussion of this examination has attempted to reason, "broadcasting" is capable of disaggregation into separate matters which are "the process of distribution" and "general broadcasting content." Moreover, "general broadcasting content" comprises both the general content standards set out as objectives of the Canadian broadcasting system in section 3 of the *Broadcasting Act* and which may be regarded as intangible standards of distribution, and specific subjects or subject areas of programme content in which the provinces may be argued to have a legitimate direct interest. With respect to the latter content matters, it is submitted

⁸¹ McDonald, *supra* note 75, at 454-56, makes a "national institution" argument which includes consideration of the *Anti-Inflation Reference*, and has much the same impact and implications as Gibson's "provincial inability" test.

⁸² *Edwards v. A.G. Can.*, [1930] A.C. 124, [1930] 1 D.L.R. 98 per Lord Sankey L.C. (P.C.); and *Citizens Ins. Co. v. Parsons* (1881-1882), 7 App. Cas. 96 per Sir Montague Smith (P.C.). For a recent example of appropriate analytical method, see *R. v. Zelensky*, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179, [1978] 3 W.W.R. 693.

that section 92(16) of *The British North America Act, 1867*, provides a suitable basis for provincial legislative involvement, the exercise of which need not be in conflict with the broader federal jurisdiction over other matters of content by virtue of the *Broadcasting Act*.⁸³

Under the authority of section 92(16) of *The British North America Act, 1867*, provincial legislatures are competent to legislate with respect to "generally all matters of a merely local or private nature in the province." Essentially, this section is the provincial residual power.⁸⁴ As Lederman has noted:

Now with respect to these left-over parts, [matters which do not fit the specific heads of 91 or 92] we are down to interpretative competition between the two residuary clauses. In these circumstances, the federal general power then embraces the left-over part or parts of inherent national significance or importance. The provincial residuary power in 92(16) would likewise embrace any left-over part or parts of a merely local or private nature in the provinces.⁸⁵

However, in applying section 92(16) in conjunction with the POGG power, care must be taken to restrict the meaning of "national significance" within reasonable limits. As Gibson has remarked, there is very little in a modern federation that is not of national significance or importance and "to grant federal jurisdiction over such functions would be to make the supposedly autonomous provincial legislatures mere 'tenants at sufferance' of the federal Parliament."⁸⁶

The broad residual capacity of section 92(16) has been affirmed and explained recently in the Supreme Court of Canada decision in *Nova Scotia Bd. of Censors v. McNeil*.⁸⁷ One of the bases upon which the Court upheld provincial legislation dealing with, *inter alia*, the presentation of films in movie theatres, was the general provincial power in section 92(16). At issue in the case, functionally, was the capacity of the province to regulate the morality of public performances. In the course of his judgment, Ritchie J. explained the substance of the section 92(16) authority:

I take the view that the legislation here in question is in pith and substance directed to property and civil rights and therefore valid under section 92(13) of the *British North America Act*, but there is a further and different ground on which its validity might be sustained. In a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable for public exhibition on moral grounds may be viewed as a matter of a "local and private nature in the Province" within the meaning of s. 92(16) of the *BNA Act*, and as it is not a matter coming within any of the classes of subjects enumerated in s. 91, this is a field in which the legislature is free to act.

⁸³ R.S.C. 1970, c. B-11. On the argument of this paper, s. 92(10) of *The British North America Act, 1867* is not the most appropriate basis upon which to found a content jurisdiction position for the provinces, since the substance of s. 92(10) appears to relate to distributional matters, or at least seems to have been interpreted this way.

⁸⁴ McDonald, *supra* note 75, at 452; and Hogg, *supra* note 1, at 346.

⁸⁵ Lederman, *supra* note 76, at 612–13.

⁸⁶ *Supra* note 78, at 31.

⁸⁷ *Supra* note 13.

In the Reference as to the validity of "*An Act to amend the Supreme Court Act*," Chief Justice Duff had occasion to say, at p. 58:

....

"In s. 92, No. 16 appears ... to have the same office which the general enactment with respect to matters concerning peace, order and good government of Canada, so far as supplementary of the enumerated subject, fulfils in s. 91...."⁸⁸

Ritchie J.'s observations establish the utility of section 92(16) as a provincial residuary power, and his emphasis on the diversity of tastes and standards among provinces with respect to entertainment presentations can be directly applied and analogized to the arguable provincial interest in regulating broadcasting content. If Ritchie J.'s comments are apposite with respect to morality and standards of decency of entertainment presentation, which, in the broadcasting context, this paper concedes are within federal authority under the *Broadcasting Act*, then *a fortiori* there must be some basis on which to argue that provincial interests with regard to provincial culture and matters of community perception and inter-community interaction are within provincial legislative competence under section 92(16) of *The British North America Act, 1867*.

Having established, *prima facie*, a constitutional niche that can accommodate provincial involvement in the regulation of broadcasting content, it is necessary to determine whether broadcasting content can and *should* be characterized as a matter of local concern so as to fall legitimately within section 92(16) of *The British North America Act, 1867*. Theoretically, such a local interest or purpose would appear to be relatively easily established both from the inherent nature of broadcasting communication, and from the ends that it is capable of serving. The broadcasting system is perhaps the primary sensor of community feeling and self-perception that exists, or has existed. As a vehicle for enhancing cultural development and a focus for the identification, expression, and critical evaluation of societal values and issues of particular community sensitivity, the broadcasting mechanism is a network for community life and social interaction. All of these virtues of broadcasting communication underlie the objective of broadcasting in Canada, contained in section 3 of the *Broadcasting Act*, but well encapsulated by Henry's formulation of the public interest that contemporary communications serve: "[T]he media of communications are, in effect, the nervous system of society . . ."⁸⁹

The kind of human development to which broadcasting can contribute is inherently personal, and by implication local in character. Although the *Broadcasting Act* contemplates social, cultural and other objects, their formulation in that federal statute is inevitably vague. Interests seeking expression by the communications system are diverse—as diverse as the individuals and communities to which broadcasting services are extended, *and from which the substance of what is communicated is drawn*. Therefore, that the

⁸⁸ *Id.* at 699-700 (S.C.R.), 28 (D.L.R.).

⁸⁹ Henry, *The Combines Investigation Act and the Mass Media* (1970), 8 Osgoode Hall L.J. 147 at 147.

regulation of broadcasting content cannot, and indeed should not, be entrusted to one level of government is plausible.⁹⁰

Building on Henry's conception of the public interest, a "folk-tale" analogy employed by Swinton is most appropriate in describing the inherently local nature of many forms of broadcasting content, the expression of which might be given increased currency if provincial legislatures were allowed to exercise their representative capacities to identify such local matters. Professor Swinton's analogy is best told in her own words:

It is a recognition of the potential impact of the telecommunications (including radio and television) media and of the uses to which these media can be put that has led various groups to seek control over the media. Clearly, telecommunications are an important tool for acculturation: for introducing and emphasizing the *norms* of society and its *heritage*. In tribal societies, a story-teller — whether a nurse, mother, or village leader — would relate folktales that told of societal norms in a compelling way and within a concrete situation that illustrated the application of norms and dramatized history. Television and radio, while used for many purposes, can play to a great extent the same role as the story-teller, relating information about the society and emphasizing what are perceived by at least some elites to be the accepted forms for that society.⁹¹ [Emphasis added.]

In referring to "norms" and "heritage," Swinton does not suggest the societal extent of values implicit in these terms. However, it would seem to be a reasonable inference to draw from the village context of her example that the values that these terms are meant to encompass vary from social group to social group, and from community to community. Certainly, across a dispersion of social groupings and broad human interests, these terms are not meant to convey a monolithic conception of the values for which the "story-teller" is a conduit.

Just as any social grouping has special norms and values peculiar to it and deserving of particular attention, the provinces of Canada, which collectively represent a complex demography, have specific concerns that deserve expression by means of the contemporary "story-teller," the broadcasting system. However, before the system can process and convey this information, relevant matters of content have to be identified. Accepting the theoretical complexity of the interests served by the modern media, it would seem that the level of government closest to these interests is in the best position to give them legislative expression. That level of government is the provincial government.

⁹⁰ Boyle, *Responsibility in Broadcasting* (1970), 8 Osgoode Hall L.J. 119 at 124–25, 130–31. The pervasive influence of broadcasting on all aspects of daily life, and the multiplicity of services required to meet these demands leads to the inference that broadcasting is too complex to be left to the federal government alone when local governments are perhaps best able to identify and serve the needs to which modern broadcasting must address itself.

Swinton, *supra* note 57, at 553, refers to the need for some nation-state control of content in the framework of international telecommunications. The same argument can be applied to the need for at least limited provincial involvement in content regulation within the broader national framework.

⁹¹ *Id.* at 546–47 n. 15. See also Harwood, *Broadcasting and the Theory of the Firm* (1969), 34 Law & Contem. Prob. 491. This is a more philosophical formulation of the public interest served by broadcasters and how it is measured.

The practical, political justification for provincial legislative involvement in the regulation of broadcasting content is at least as great as the theoretical. Intergovernmental discussions about the sharing of jurisdiction with respect to broadcasting have been going on since 1973. As Baum has observed, the legal "solutions" to complex broadcasting problems such as those addressed in this paper have not been satisfactory in any practical sense, and have led to concern about entrusting these important matters to the vagaries of the adjudicative process.⁹² The need for interprovincial co-operation originates in differences among provinces in needs and circumstances,⁹³ and has recently become manifest in the form of proposals for constitutional reform.⁹⁴ As the Hon. John E. Brockelbank remarked at the First Federal-Provincial Conference On Communications in a manner that revealed not only the urgency with which some provinces were, and are, seeking real power in broadcasting, but also the frustration arising from the inability to achieve such authority:

[I]t 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 the 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.*⁹⁵ [Emphasis added.]

The current procedure in dealing with all societal concerns with respect to broadcasting is entrusted to the CRTC, which has the jurisdiction to determine and enforce broadcasting policy for the entire country, within the confines of the objectives of section 3 of the *Broadcasting Act*. Although the CRTC's mandate is thus restricted by the Act, it still retains considerable discretion and authority, and is in effect a "Broadcasting Parliament," a powerful institution exercising wide policy powers.⁹⁶

The comprehensiveness of the CRTC's authority over broadcasting and broadcasting content raises two salient issues. In the first place, notwithstanding the conduct of hearings throughout the entire country, the CRTC is a central government institution and is perceived as such. Secondly, and more importantly, however, the Commission is an appointed body, an independent regulatory agency accountable only to the federal government, but not to

⁹² Baum, *Broadcasting Regulations in Canada: The Power of Decision* (1975), 13 Osgoode Hall L.J. 693 at 727.

⁹³ *Id.* at 729.

⁹⁴ See *supra* note 15.

⁹⁵ Baum, *supra* note 92, at 731 n. 126. As noted by Atkey, *supra* note 1, at 215; and Mullan and Beaman, *supra* note 1, at 73, the Aird Commission in 1928 advocated giving the provinces control over broadcasting content. This was the first official recognition of the provincial interest in broadcasting. Moreover, the Commission seemed to recognize the distinction between technical matters of broadcasting (to remain under federal jurisdiction), and programming matters (in which the provinces should be involved).

⁹⁶ Baum, *id.* at 722, and at 715-22 for further discussion.

those whose lives it directly influences and shapes through its policy development process.⁹⁷

From the foregoing, the fundamental concern that must emerge, given some constitutional support for a provincial role in the regulation of broadcasting, is whether the CRTC should have the broad, and in many respects undefined, powers that it does have. In its ostensibly "legislative" capacity the CRTC has no direct mandate from the societal interests that it is required to represent, and is not accountable to those interests except indirectly through Parliament. In the presence of potential provincial legislative capacity, at least with respect to broadcasting content, it is submitted that the CRTC should be required to defer to content policies representative of provincial interests.

Paul Weiler has succinctly summarized the representative function of a legislative body:

The rationale for a federal system is that the various kinds of statutory decisions should be made by the legislative body which is responsive to the electorate—national or local—which has the major interest in the results of the decision.⁹⁸

It is a strong argument that the legislature most responsive to social needs should legislate with respect to them. *A fortiori*, and especially on matters of intensely focused public concern, legislators rather than government appointees should formulate fundamental matters of policy.⁹⁹ The legislators are representative of the social and cultural matters that broadcasting communication exists to reflect and serve, and legislators are directly accountable to those who hold these interests.

Perhaps the most current manifestation of the practical climate of change in which jurisdictional issues about broadcasting are being raised is the recent collection of proposals for constitutional change contained in a report by the Canadian Bar Association entitled *Towards a New Canada*.¹⁰⁰ Recognized in

⁹⁷ It is true that the CRTC conducts public hearings and allows non-party intervenors to speak pursuant to the CRTC Rules of Procedure, C.R.C. 1978, c. 375, ss. 13-19. However, intervenors are responsible only to themselves and to the limited interests that they represent. They are not responsible to the general electorate and their positions are not necessarily representative of community interest or of standards generally; yet, it is community interest that is relevant in policy formulation and application.

⁹⁸ Weiler, *The Supreme Court and the Law of Canadian Federalism* (1973), 23 U. Toronto L.J. 307 at 313.

⁹⁹ Provincial governments, through independent corporations, are now permitted a greater role in defining the needs and content of educational television. The bases for this authority are contained in the *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 27; the *Direction to the CRTC on the Reservation of Cable Channels For Educational Broadcasting*; and the *Direction to the CRTC on Ownership by Provinces or Their Agents* (reproduced in Grant, *Canadian Communications Regulation, Part 1: Statutes, Regulations and Procedures Relating to Broadcasting and Cable Television* (Page Proofs, Restricted Distribution, Law Soc. of Upper Canada, 1978)). Provincial Acts that take advantage of this procedure include: *The Alberta Educational Communications Corporation Act*, S.A. 1973, c. 3; *The Ontario Educational Communications Authority Act*, R.S.O. 1970, c. 311; and *The (Saskatchewan) Educational Communications Corporation Act*, 1974, S.S. 1973-74, c. 35.

¹⁰⁰ *Supra* note 15.

the report is the practical need to provide provincial legislative capacity in matters of local or provincial concern in broadcasting. The Association has recommended, *inter alia*, a system of federal control over the radio spectrum and technical distribution aspects of broadcasting but concurrent federal-provincial jurisdiction with federal paramountcy over broadcasting undertakings.¹⁰¹ However, in proposing the concurrency approach, with provision for the federal authorities to vacate their licensing power in favour of the provinces, the Bar Association has realized the inherent instability of the proposal. Recognizing that the power might easily fall within *exclusive* federal control, the writers of the report have observed:

[I]n the case of certain matters the granting of concurrent jurisdiction is necessary because it is not possible to determine in the abstract the boundary line between national and local interests and . . . it must be worked out in context between the two levels of government. It follows that concurrent powers must be approached in accordance with the obvious spirit of the constitution. It is in the end necessary in the field of telecommunications to give federal paramountcy in the national interest *but that is not intended to give carte blanche to the federal government to occupy the whole field.*¹⁰² [Emphasis added.]

While the report has identified explicitly and implicitly many of the concerns with which this paper deals, it has two flaws. Of these, the least significant is the lack of specificity in describing how the concurrency proposal might work in practice, and in the context of the *Broadcasting Act*. More serious, however, is the report's acquiescence in the accepted existing constitutional division of powers over broadcasting with no critical examination of the foundation of this division. The latter fault is material in two respects. The report is predicated on the necessity of fundamental constitutional change in order to effect a real recognition of provincial legislative competence in certain aspects of broadcasting and broadcasting content. Given the present pace of constitutional change, the provinces may wait a long time for solutions to current jurisdictional problems in broadcasting.

A corollary of this observation is the importance of finding a jurisdictional solution in accepted constitutional doctrine in order to provide the provinces with at least an arguable constitutional claim over some matters affecting broadcasting. In the present context of constitutional negotiation of broadcasting issues, the provinces are essentially cast in the role of supplicants to the federal domain. They have nothing with which to bargain, or on which to build a case for legislative participation in broadcasting. An important goal of this paper has been to show that the provincial position, at least theoretically, is not as barren as it may seem. Although the Supreme Court of Canada might not be eagerly responsive to the proposals in this paper if they were presented to that Court, the proposals do seem to have some cogency in law, and might furnish the provinces with a stronger negotiating position in this area. At the very least, they demonstrate that jurisdictional issues in broadcasting cannot be solved as easily as the courts believe.

¹⁰¹ *Id.* at 122.

¹⁰² *Id.* at 124.

2. The Proposed Solution

Prevalent in the case law is an implicit belief that regulatory convenience demands a central regulator, thereby foreclosing any provincial regulatory involvement. However, it is arguable that the provinces should have some legislative jurisdiction to implement broadcasting content policies directed at matters of intrinsic provincial significance.

It is submitted that by a process involving concurrently operative legislation with federal paramountcy, and administrative interdelegation, the provinces may be permitted the opportunity to legislate on matters of general broadcasting content of a provincial character.¹⁰³ After a province has exercised its legislative capacity, this mechanism envisages a delegation of the regulatory implementation of this legislation to the CRTC, which would administer the provincial policy and its own matters of regulatory concern as a unit.

This procedure, premised on the existence of a valid provincial legislative capacity, need not impair the functioning of the regulatory process and might even improve the quality of CRTC decision making by providing legislative guidance to the particular meanings that various provinces attach to such terms as "the cultural, political, social, and economic fabric of Canada," which are set out in section 3(b) of the *Broadcasting Act*.¹⁰⁴ As has been argued, the Act sets general content standards of an ostensibly objective nature, concerned with general programming quality, matters of a national nature, and integrity and decency (in the broadest sense) of programme content. The coexistence of these general standards with province-specific content legislation is not impossible or necessarily impractical and is probably desirable.¹⁰⁵

The validity of the procedure suggested here depends upon whether the doctrines of administrative interdelegation and concurrency will countenance it as a solution. Of the two concepts, the interdelegation issue is probably easier to resolve in this context. Accordingly, it will be examined first.

Although direct legislative interdelegation is not permitted by *The British North America Act, 1867*,¹⁰⁶ the Supreme Court of Canada has upheld the device of administrative interdelegation.¹⁰⁷ Using this technique, the body with legislative competence in an area enacts legislation and then entrusts the

¹⁰³ McNairn envisages the use of this kind of approach in the regulation of aeronautics, citing United States and Australian experience in dividing jurisdiction over air transport between the national and state levels of government. The states are entrusted with matters of economic regulation, while the national level of government assumes responsibility for air safety and navigation. While the U.S. and Australian constitutional bases differ from Canada's, the comparison is instructive in showing the practical possibilities of divided jurisdiction that could be applicable procedurally in the broadcasting context. See *supra* note 33, at 424-26.

¹⁰⁴ R.S.C. 1970, c. B-11.

¹⁰⁵ See text accompanying note 71, *supra*, for an explanation of the objectives of s. 3 of the *Broadcasting Act*.

¹⁰⁶ *A.G. N.S. v. A.G. Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369 [hereinafter *Interdelegation case*].

¹⁰⁷ *P.E.I. Potato Marketing Bd. v. Willis*, [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

implementation of that legislation to a regulatory agency of the other jurisdiction, essentially on regulatory convenience grounds. In effect, the enacting jurisdiction chooses to invest with its regulatory mantle the executive of the other jurisdiction, which is regulating those aspects of the same or similar subject matter within its competence.

In the relatively recent cases of *Coughlin v. Ontario Highway Transport Bd.*¹⁰⁸ and *R. v. Smith*,¹⁰⁹ the administrative interdelegation procedure was expanded by its permitted combination with the technique of anticipatory referential incorporation.¹¹⁰ The effect of this is to vest in the "donee" jurisdiction not only the responsibility of administering the enactment of the "donor" jurisdiction, but also to provide for the incorporation in the delegated enactment the present and future legislative changes made by the "donee" jurisdiction to its own parallel legislation. Although the functional effect of this is to permit one jurisdiction to legislate in areas in which it has no constitutional competence, perhaps overborne by the pragmatism of the process, the Supreme Court of Canada has effectively removed the fundamental prohibition of legislative interdelegation in Canada.¹¹¹

In applying the interdelegation procedure to the scheme described in this paper, little needs to be said beyond an elaboration of the applicable doctrine. The operability of the scheme is of course dependent on the existence of provincial legislation which is of a sufficiently local or private nature to be accommodated by section 92(16) of *The British North America Act, 1867*. However, if the substantive validity of provincial legislative involvement in broadcasting can be established, the procedure of administrative interdelegation would seem to provide a functional method by which that provincial interest can be implemented in a framework of administratively central regulation.

Just as the interdelegation doctrine appears to be elastic enough to facilitate the sharing of broadcasting content jurisdiction suggested in this paper, so the law on concurrency or paramountcy can be invoked in further support. The origin of the test for concurrency is in the paramountcy doctrine which represents the proposition that "when there are inconsistent (or conflicting) provincial and federal laws (each of which is valid) it is the federal law which operates."¹¹² The jurisdictional solution proposed in this analysis postulates federal control over general content standards and national objectives, with provincial legislative competence with respect to content matters of particular interest to the individual provinces, such as cultural matters. Ac-

¹⁰⁸ *Supra* note 53.

¹⁰⁹ *Supra* note 54.

¹¹⁰ *A.G. Ont. v. Scott*, [1956] S.C.R. 137, 1 D.L.R. (2d) 433.

¹¹¹ Lysyk, *Constitutional Law—The Interdelegation Doctrine: A Constitutional Paper Tiger?* (1964), 47 Can. B. Rev. 271 at 278. The dissent in *Coughlin* recognized the patent artificiality of the process of effectively permitting legislative interdelegation. However, even though the *Smith* court must have been cognisant of these countervailing concerns, it upheld the device. See also Hogg, *supra* note 1, at 229, 230; and Weiler, *supra* note 98, at 316.

¹¹² Hogg, *id.* at 102.

cordingly, the concurrency doctrine is crucial to the success of this paper's proposals.

The difficult aspect of concurrency analysis is deciding the nature and extent of conflict required before a provincial law will be declared to be inoperative. The broadest of the concurrency tests is the "conflict of policy" view, which contends that in the event of a policy or legislative intention conflict between otherwise valid federal and provincial laws, the federal Parliament is deemed to have occupied the field with its legislation, excluding the operation of any provincial statute with the same or similar policy objectives.¹¹³

The "policy conflict" test does not appear to be that which currently prevails. The test more likely to be applied is the narrower "direct conflict" approach to paramountcy.¹¹⁴ This test was originally characterized in the case of *O'Grady v. Sparling*, where it was determined that both a federal and a provincial law could operate since "both provisions [could] live together and operate concurrently."¹¹⁵

Perhaps the most recent expression of the "direct conflict" test was by Morden J. in *Multiple Access v. McCutcheon*,¹¹⁶ approved without extended reasons by Jessup J.A. in the Ontario Court of Appeal.¹¹⁷ In the case, Morden J. applied the narrow test of concurrency to resolve a conflict between the insider trading provisions of the *Canada Corporations Act*¹¹⁸ and *The [Ontario] Securities Act*.¹¹⁹ Rendering judgment, he said:

[E]ach piece of legislation looks to the same 'direct loss' or 'direct benefit or advantage' and in this regard creates the *same* correlative rights and liabilities. It is *impossible* for each of the two provisions to operate concurrently with respect to this single loss—or single benefit or advantage.¹²⁰ [Emphasis added.]

Apparently, in Ontario at least, the "direct conflict" test of concurrency is very narrow, contemplating an impossibility of concurrent operation before the provincial legislation will be declared to be inoperative.

On the "direct conflict" test of paramountcy or concurrency, which appears to be the test currently accepted, the coexistence and concurrent operation of provincial legislation with respect to specific content matters and the general content standards in the *Broadcasting Act* is possible. It is submitted

¹¹³ *McKay v. The Queen*, [1965] S.C.R. 798, 53 D.L.R. (2d) 532.

¹¹⁴ Colvin, *Custody Orders Under the Constitution* (1978), 56 Can. B. Rev. 1 at 9, gives a brief discussion of paramountcy. Hogg, *supra* note 1, at 103, 109, says that the effect of recent cases is to confine the paramountcy doctrine to one of express contradiction.

¹¹⁵ [1960] S.C.R. 804 at 811, 25 D.L.R. (2d) 145 at 153. For further support of the "direct conflict" test, see *Mann v. The Queen*, [1966] S.C.R. 238, 56 D.L.R. (2d) 1; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, 42 D.L.R. (3d) 68; and *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753, 72 D.L.R. (3d) 500.

¹¹⁶ (1977), 16 O.R. (2d) 593, 78 D.L.R. (3d) 701 (H.C.).

¹¹⁷ (1978), 19 O.R. (2d) 516, 86 D.L.R. (3d) 160 (C.A.).

¹¹⁸ R.S.C. 1970, c. C-32, ss. 100.4, 100.5.

¹¹⁹ R.S.O. 1970, c. 426, ss. 113, 114.

¹²⁰ *Supra* note 116, at 596 (O.R.), 704 (D.L.R.).

that direct conflict of legislation can be avoided if each level of government were to be confined, and to confine itself, to its own area of practical and legislative interest.

C. The Courts: The Key to Change

If, as is contended, there is doctrinal support for the involvement of the provinces in broadcasting programming content legislation, and if there is a mechanism whereby this role may be made operational, then the final hurdle to achieving such provincial involvement is the attitude and doctrinal orientation of the courts in examining provincial claims for legislative jurisdiction in this area. The courts' well-entrenched conception of broadcasting jurisdiction has been distressingly one-dimensional and "absolute control" oriented. Of considerable influence in restricting provincial competence in broadcasting regulation has been judicial self-perception, as reflected in the negative analysis of the broadcasting cases. No more evident are these attitudinal and judicial self-perception aspects of constitutional adjudication in broadcasting than in the *CFRB* and *Capital Cities* cases, and in the dissent in the *Kellogg's* case. The reasoning in these cases betrays an almost indignant incredulity, however doctrinally expressed, that the provinces should pretend to claim jurisdiction with respect to matters of general broadcasting content. Unfortunately for the courts, the self-evidence of provincial non-involvement in this area is considerably diminished on careful and more imaginative analysis.

The courts must make a concerted effort to avoid doctrinaire, abstract analyses that direct *The British North America Act, 1867* toward an undesirable and unnecessary state of atrophy.¹²¹ Referring to the work of Professor Davis, whose ideas are entirely apposite in this regard, Strayer has remarked that "there is a certain judicial tendency to convert difficult questions of fact into presumptions of law."¹²²

At the very least, to avoid the negative consequences of difficult adjudication that Strayer has identified, a functional approach to constitutional decision making is required. It is essential to examine what the law of the constitution is intended to do and how it can, within its legal context, be used to facilitate the creative resolution of contemporary social problems or issues with proper cognizance of the circumstances in which those issues arise and within which the legal solution must operate.

Strikingly, though not evident in the broadcasting decisions dealing

¹²¹ In spawning the "living tree" metaphor of constitutional adjudication, the judgment in *Edwards v. A.G. Can.*, *supra* note 82, characterized the *B.N.A. Act* as an organic document, capable of responding to changing social circumstances in a constitutionally principled and well reasoned manner. The alternative is the kind of rigidity described by Lord Atkin in the *Labour Conventions* case, *supra* note 21, as the "watertight compartments" approach to division of powers adjudication.

¹²² Strayer, *Judicial Review of Legislation In Canada* (Toronto: University of Toronto Press, 1968) at 153. See also at 27, 28, 148, 149; and Whyte and Lederman, *supra* note 12, at 4-17, where Lederman discusses the importance of relating the legal system and that which takes place within it to the "social, economic, and cultural realities, and to the accepted values and beliefs of the country concerned."

with content jurisdiction, the Supreme Court of Canada now seems to recognize the importance of a functional approach to constitutional problems, suggesting that the manner in which the broadcasting cases have been presented to the Court has hampered their resolution in a more doctrinally expansive way. For example, when contrasted with his remarks in the *Capital Cities, Dionne, and Kellogg's* cases, Laskin C.J.C.'s reasons in the case of *R. v. Zelensky*¹²³ are not easily reconciled, at least on the level of the approach to constitutional adjudication.

The constitutionality of compensation provisions in the *Criminal Code* was at issue in the *Zelensky* case. With respect to Matas J.A.'s comparison of the procedure in a civil action for damages and the position of a defendant in this kind of action with a person's similar status under section 653 of the *Criminal Code*, from which comparison an adverse constitutional conclusion had been reached, Laskin C.J.C. remarked:

I do not disagree that in assessing constitutionality there is merit in such an approach, but relative advantages in applicable procedures cannot, in my opinion, be determinative of validity *where the primary consideration is a more functional one*, with regard being had to the *object* of the impugned legislation and its connection with other admittedly valid aspects of the criminal process. It appears to me that in his stress on the comparison above noted, Matas J.A. *has put answer before question...*¹²⁴ [Emphasis added.]

In the approach that the courts have taken to jurisdiction over broadcasting content, the phrase "has put answer before question" has particular significance. In the three most recent broadcasting cases that form the basis of this examination, factors of regulatory convenience militating against divided jurisdiction in broadcasting have been accepted as compelling. Therefore, it has been relatively easy for the courts to find established doctrine to support exclusive federal jurisdiction over broadcasting content. However, to accept this approach as necessarily excluding other conclusions which might be more rational in the circumstances concerned is to ignore the essential malleability of Canadian constitutional law, and the effectively functional base upon which it is founded. Perhaps the best recognized, and extremely articulated, view of this inherent functionality is that of Paul Weiler, who envisages this pragmatic approach to the constitution in his "marching in pairs" metaphor:

What is distinctive about the judge-made "law" of Canadian federalism is that our constitutional doctrines are always expressed in very abstract formulae and there are at least *two opposing formulae* for every situation When an area of law is shot through with verbal standards such as these, *marching in pairs, the Court is always given a choice between two alternative decisions*. Instead of there being legal rules having an intrinsic content shaping or channelling the decision in one direction or another, we have legal rationalizations which the court can use in its opinion to protect its choice whatever it might be.¹²⁵ [Emphasis added.]

Lest a cynical view of constitutional adjudication be inferred from this

¹²³ *Supra* note 82.

¹²⁴ *Id.* at 948 (S.C.R.), 184 (D.L.R.), 708 (W.W.R.).

¹²⁵ *Supra* note 98, at 364. Weiler, *Two Models of Judicial Decision Making* (1968), 46 Can. B. Rev. 406 at 429. For other comments on the judiciary's "outmoded and unduly narrow conception of the role of law in the courts," see Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) at 4.

paper's adoption of "Weiler realism," it should not be forgotten that a process of selective application of constitutional precedent does not relieve judges of the responsibility of reaching reasoned, principled decisions. To the contrary, it places on Canadian judges an even greater responsibility derived from the realization that inherent in the reasoning and adjudicating process exists a panoply of concerns that influence not only the results of decisions, but also the way in which they are reached.¹²⁶ Decisions that command respect do so not only because of their thoroughly principled character, but also because of their thorough sensitivity to underlying real considerations that must be articulated in a doctrinal framework in order to acquire legal efficacy. Formidable judicial effort is required even to articulate these underlying concerns. Yet, as the balance of this paper argues, in examining legislation with implications for the regulation of broadcasting content, Canadian courts can aspire to this higher order of decision making within existing doctrinal precepts.¹²⁷

The final concerns must be the extent to which the Supreme Court's commitment to precedent may impede the application of functional analysis to broadcasting legislation as it may in the future develop and the method by which these functional concerns can be placed before the Court.

Within the analytical framework of the constitutional placement of legislative and regulatory authority over the general content of broadcasting, the issue of precedent, or *stare decisis*, is a pressing one. After only a relatively small number of decisions, not all of which address the content question directly, courts, and the Supreme Court of Canada in particular, have reasoned themselves into a corner of provincial exclusion from which extrication will be difficult.

However, the Supreme Court of Canada is no longer rigidly bound by precedent. The relevant concern now is identifying the circumstances in which it will be considered advisable for the Court to depart from its previous deci-

¹²⁶ Weiler, *In the Last Resort*, *id.* at 158, 227.

¹²⁷ It has been presumed throughout this paper that constitutional decision making will continue to take place in an adjudicative model (see Weiler, *Two Models of Judicial Decision Making*, *supra* note 125, at 426, 430, 470). Weiler discusses the operation of both the adjudicative model and a policy model (*op. cit.*, at 463). While the latter model has some persuasive force in the re-orientation of judicial decision making that Weiler envisages, it is the contention of this paper that in view of the significant revision of judicial attitude necessary to achieve the expansion of substantive constitutional law as it applies to broadcasting content, this development is best left to take place within the adjudicative model, if for no other reason than that courts are comfortable with this model.

A complete re-orientation of the procedure of decision making could divert judges from the attention that this paper asserts they should devote to re-evaluating the substantive law, and their attitude to its operation in broadcasting matters, in order to develop a more functional approach to the issues concerned. The adjudicative model is perceived to foster rational, principled decision making. The basic incapacity of a rigid adjudicative framework to accommodate the "implementation into law of new social purposes which cannot be honestly arrived at merely by extending the reasonable implications of what has been done before," which, Weiler alleges (*op. cit.*, at 428), can be met in the broadcasting content context by a more functional decision making process and a re-orientation of judicial attitude as described in this paper.

sions.¹²⁸ While the persuasive force and value of precedent cannot be denied,¹²⁹ respect for previous decisions can only be based on the substance, rather than the mere existence, of these decisions as they may illuminate the problem presently before the Court. Without proper cognizance of the limits on the utility of precedent as it may apply to changing social and legal circumstances, the mechanical application of rules only derogates from the satisfactory and useful resolution of legal issues.

Weiler has articulated the responsibility of judges to face the substance of the issues to which their otherwise principled decisions must relate. In effect, he characterizes the "law" not as an impenetrable wall but as a screen through which precedent and the circumstances of cases must be filtered in order to reach acceptable decisions. He has stated:

If judicial influence on the evolution of our law is an inevitable feature of the adjudicative role . . . Courts must be vitally concerned about the policy embodied in the legal standards they do adopt and use. Judges cannot hide ostrich-like, behind the myth that the answers are provided in the statute books (and legal precedent), —ready made . . . [T]he decisions which have already been made will be of help to a court in delineating the social objectives it should strive to achieve. Still we need judicial imagination in building on this foundation and judicial sensitivity to the quality of the legal product our courts project in the future . . .¹³⁰

The Supreme Court's previous pronouncements on broadcasting jurisdiction with respect to content, as arguably tenuous as they are, should not be a bar to the modification of that position in the future where appropriate legislation demands such a modification. This is especially the case when it is remembered that the broad prohibitions against provincial involvement in broadcasting content regulation have been contained not in cases concerned with content needs specific to the provinces or to a province¹³¹ but in decisions coloured by "process of distribution" issues¹³² and matters of general content standards¹³³ in which a more careful analysis of jurisdictional considerations with respect to content may not have been viewed as appropriate, and in any case was not undertaken.

Of equal importance in establishing a basis on which judges can directly avoid contextually inappropriate or unfortunately narrow precedent is finding a means by which factual information can be placed before the Court to establish the necessity and desirability of adopting a functional approach in particular broadcasting cases. In the broadcasting content context, this information might include extrinsic evidence of local cultural characteristics, population dispersions and other salient demographic characteristics, and government policy pronouncements. How can the Court acquire the benefit of this material?

¹²⁸ Hall, *Law Reform and the Judiciary's Role* (1972), 10 Osgoode Hall L.J. 399 at 403.

¹²⁹ Hall, *id.* at 401.

¹³⁰ Weiler, *In the Last Resort*, *supra* note 125, at 37, see also at 117; and Hall, *id.* at 407.

¹³¹ See Parts II and III of this paper.

¹³² See *Capital Cities*, *supra* note 6.

¹³³ See *CFRB*, *supra* note 22.

In recent years, the Supreme Court of Canada has become more flexible in admitting extrinsic material in order to determine the purpose and effect of impugned legislation and to show the circumstances in which that legislation was enacted. In the *Anti-Inflation Reference*, Laskin C.J.C. refused to generalize about the admissibility of extrinsic material, but did admit its utility in appropriate circumstances:

[N]o general principle of admissibility (of extrinsic evidence) can or ought to be propounded by this Court, . . . and the question of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issue on which it is sought to adduce such evidence.¹³⁴

In the same case, Beetz J. examined House of Commons Debates in his analysis of the "national concern" and "emergency" aspects of the POGG doctrine.¹³⁵ The utility of extrinsic material has been evident in other recent cases. In *Di Iorio v. Warden of the Common Jail of Montreal*,¹³⁶ Dickson J. referred to British House of Commons Debates and, in particular, to statements made before the British Parliament by the Earl of Carnarvon during the debate of the *BNA Bill*, with respect to the allocation of the criminal law power. More recently, the Supreme Court has had recourse to law reform documents in its constitutional adjudication. In *R. v. Zelensky*,¹³⁷ while assessing the constitutional validity of *Criminal Code* compensation provisions, the Court examined *Working Paper No. 5* of the Law Reform Commission of Canada, October, 1974, quoting from this report in explaining the rationale and implications of the *Criminal Code* provision under scrutiny.

Collectively, these cases illustrate a recent "opening up" of the Court to material that must be available to the Supreme Court if it is to avoid the theoretical abstraction that sometimes accompanies the product of constitutional adjudication. In this regard, it is noteworthy that in the broadcasting cases discussed in this paper, and in particular those concerned with content regulation, no mention is made of attempts to address the Court with factual material supportive of an enhanced provincial role in the area. Nevertheless, just as precedent need no longer be a bar to a more imaginative process of decision making, neither should a paucity of relevant factual material impair the quality of the constitutional product.

In this last section of the paper, what may be called the legal process section, an attempt has been made to demonstrate how the Supreme Court of Canada can incorporate changing concepts of judicial decision making into its consideration of regulation of content in broadcasting in order to reflect the functional considerations that are relevant to the issue. To achieve this result, however, the Court will have to reconsider its role in Canadian federalism. Moreover, it will have to bring to bear on broadcasting issues the same functionalism that it has evidenced in other areas of the law. The onus

¹³⁴ *Supra* note 73, at 389 (S.C.R.), 468 (D.L.R.), 557 (N.R.).

¹³⁵ *Id.* at 470-72 (S.C.R.), 534-35 (D.L.R.), 629-30 (N.R.).

¹³⁶ Whyte and Lederman, *supra* note 12, at 14-11 ff., now reported at [1978] 1 S.C.R. 15, 73 D.L.R. (3d) 491, 8 N.R. 361.

¹³⁷ *Supra* note 82, at 952-53 (S.C.R.), 187 (D.L.R.), 701 (W.W.R.).

is on the Court. In a subject area as complex and ever-changing as broadcasting, in which social utility is a paramount concern, the approach of the Court should be to uphold valid provincial initiatives where constitutionally possible and convenient in a regulatory sense.

V. CONCLUSION

The objectives of this paper have been to criticize the accepted constitutional doctrine which excludes provincial governments from a legislative role with respect to general broadcasting content, and to examine the bases upon which such provincial involvement might validly be predicated. At the very least, the arguments in this paper demonstrate that the courts' perception of exclusive federal jurisdiction with respect to broadcasting content is too simplistic, and is certainly not based on self-evident constitutional or practical imperatives, or on carefully reasoned analysis. In addition, while the solution facilitating provincial legislative involvement in broadcasting may be open to criticism, as any such proposal may be, it does illustrate that constitutional principles are not immutable, and are not passive servants of a doctrinal *status quo*.

In the uncertain political climate within which constitutional change is being discussed, the importance of exploiting our present Constitution to its fullest potential cannot be underestimated. The state of negotiations with respect to broadcasting is illustrative of this contention. It was reported that, at the most recent Federal-Provincial Constitutional Conference: "[T]he conference agreed to set aside three more complex areas of communications jurisdiction: regulation of radio frequencies, telecommunications, and regular television broadcasting."¹³⁸ Whatever future meetings to discuss constitutional change in broadcasting jurisdiction may produce, it will not be produced quickly.

Underlying the thesis of this paper and its component parts is the submission that functional constitutional adjudication is necessary in order to realize in law the valid practical claims that the provinces may assert to legislate content standards of programming that is qualitatively provincial. Although anachronistic in many respects, the existing division of powers will accommodate this result if approached in an enlightened, functional way. Moreover, Canadian courts, and Canadian judges, have it within their capacity as trustees of the constitutional law to accept this challenge of progressive adjudication, without damaging or attenuating either the principles of the substantive law, or the way in which it is considered. The confusion that emerges from the juxtaposition of the decisions in the *Capital Cities*, *Dionne*, and *Kellogg's* cases begs for resolution. Carefully put to the Court in appropriate legislative form, this challenge can be met.

¹³⁸ Trueman, *supra* note 10.