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--Jurisdictions and decision-making in Canadian ...

SECOND PROGRESS REPORT

TITLE: Jurisdictions and Decision-making in Canadian Broadcasting: A Review of Present Configurations and An Analysis of Future Possibilities

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CHAPTER I

Additions to the Comparative Study (Chapter IV, 1st Progress Report)

1) Replace section D with the following:

Countries Considered

This analysis shall focus on the broadcasting systems in Western countries which, like Canada, exhibit a fairly high degree of industrialization and which are, for the most part, liberal democratic states. (One exception to this rule, Yugoslavia, will be discussed below.) Because of its familiarity, the case of the United States was not considered.

The primary concern of this analysis is the issue of how different groups or cultures (especially groups which are differentiated in geographic terms) share power, or are accommodated within the administrative structure of the broadcasting system in a single country. The cleavages involved may be not only linguistic, but also religious, ethnic, or even "geographic" (based on differences in "regional culture"). To provide a reference, and to give the reader some conception of how countries with deep-rooted cleavages differ from those which are reasonably homogeneous, some industrialized countries with unitary systems of government and not characterized by deep-rooted linguistic, ethnic or religious cleavages are also included in the analysis (The United Kingdom, France, Sweden and Japan). These countries not only serve as reference points, but also further expand the range of "examples" with respect to issues such as content/carriage separation, the public/private broadcasting distinction, and so on. While these issues are not directly related to the

separation of powers between levels of government, inasmuch as the latter bears not only on the question of who should control a broadcasting system but also on the antecedent question of what the nature of said system is in the first place, these examples have some relevance.

Strictly speaking, the following countries fit the definition of federal states: Australia, Austria, West Germany, Switzerland. Yugoslavia is generally considered a federal state, although some theorists refuse to accept this designation by virtue of the fact that the country is not a liberal democratic state (i.e., it has a single party system). This point of view is held, inter alia, by Wheare (Federal Government, 1964) and Dikshit (The Political Geography of Federalism, 1972). An extremely strict definition of "federal" government (mentioned by Wheare [1964:21ff]) would involve the retention of residual powers by the state/regional governments, and would exclude many countries normally considered federal states, including Canada.

Many of the countries in the analysis are not, under most definitions of the term, federal states, but display characteristics (most notably the fact that they are plural societies) which make underlying structural conditions similar to those existing in Canada. How linguistic (or other) cleavages are resolved in the creation of a stable system of government, and the degree of segmentation in broadcasting, is a fundamental issue in the Canadian case. It is one (but not the only) issue fundamental to the various questions regarding the division of power between the provinces and the federal government. Canada

shares with Belgium and Switzerland the existence of linguistic cleavages, that is, more than one language officially recognized by the state. Of these countries, Belgium is not considered a federal state. On the other hand, while countries such as Australia and the United States share the label "federal" with Canada, the structural situations in these countries (i.e., the degree of plural segmentation in society along linguistic or other lines) is not completely comparable. And the highly decentralized nature of the West German state, while providing an interesting example for analysis, stems not from deep-rooted cleavages in German society (which would make it analogous to Canada) but from the imposition of external restraints -- namely the desire of the Allied occupation forces to preclude the re-emergence of a strong, central German state and the manifestation of this desire in a highly decentralized constitution.

Given the fact that the nature of the relationship between central and regional governments is currently under re-evaluation not only in Canada but also in some of the plural European countries (most notably Belgium), it would appear to be astute not to consider a formal definition of "federal/non-federal" as a limiting factor or boundary in the analysis, but rather as one of the variables along which lines broadcasting systems can be evaluated and compared.

The following countries have been included in the analysis:

Country	Federal State	Degree of segmented pluralism	
		Language *	Religious-ideological **
Switzerland	Yes	High	Medium
Yugoslavia	Yes ***	High	High
Austria	Yes	Low	High
West Germany	Yes	Low	Medium
Australia	Yes	Low	Low
Netherlands	No	Low	High
Belgium	No	High	High
Italy	No	Low	Medium
United Kingdom (except N. Ireland)	No	Low	Low
France	No	Low	Medium
Japan	No	Low	Low
Sweden	No	Low	Low

* Source: World Handbook of Political and Social Indicators (2nd ed.)

** Source: Val Lorwin, "Segmented Pluralism," in McCrae, Consociational Democracy Toronto: McLelland and Stewart, 1974.

*** Yugoslavia not considered a federal state by some analysts due to the fact that its government is not liberal democratic.

2) Social-Political System Characteristics for Countries Referenced in Chapter IV

Austria

(a) System of government

- proportional representation from 9 major constituencies (states)
- one council represents states
- current majority; coalitions in past

(b) Linguistic groups

- no major division

(c) State/Regional Governments

- regional autonomy in administration of local affairs guaranteed by constitution
- most powers vested with central government (federal system is highly centralized)

(d) Non-linguistic Cleavages

- political and cultural 'diversity' of a 'metropolis/ hinterland' nature (Vienna vs. provinces) corresponding to Left-Right political division
- 89% of population Roman Catholic, 6% Protestant

[Remainder of subsects. 2-7 as original section F, pp IV-17 to IV-19].

Switzerland

(a) System of Government

- federal
- bicameral: Council of States has 2 representatives from each of 22 cantons (+1 from other 3)
- frequent changes of government
- highly fractionalized in terms of number of political parties

(b) Linguistic Groups

- French (19%), German (70%), Italian (10%) Romanch (1%)
- French, German division corresponds to geographic boundaries of cantons but other minorities throughout
- 5 cantons - majority French; 1 canton - majority Italian

(c) State/Regional Governments

- 25 cantons

(d) Non-Linguistic Cleavages

- Roman Catholic (49%), Protestant (48%) distinction
- 10 cantons have protestant majority, 12 catholic
- religious cleavages cross-cut linguistic cleavages in terms of geography.

Yugoslavia

(a) System of government

- communist (single party) federal republic
- one admin./legislative chamber consists of 30 delegates from each of 6 republics
- state (republic) assembly members can be appointed both to Chamber of Republics and Provinces and own assembly (members of national assembly retain membership in republic assembly)

(b) Linguistic Groups

- Serbio-Croation main language group; other groups Albanian, Turkish, Romanian, Slovak, etc.

(c) State/Regional Governments

- 6 Republics (one of them, Serbia, comprised of 2 "autonomous regions")
- federation responsible solely for national defence, foreign policy and related issues; most government powers in hands of constituent republics

(d) Other Cleavages

- strong ethnic/racial and religious cleavages

Australia

1. Socio-political system

(a) System of Government

- federal
- bicameral legislatures; senators elected from states

(b) Linguistic groups

- relatively homogeneous English population
- low level of ethnic/religious 'fractionalization'

(c) State/Regional Governments

- 6 State governments + territories

West Germany

1. Socio-political System

(a) System of Government

- federal
- Bundestag directly elected but Federal Council has representatives from Lander (latter has considerable power)
- coalition government in most cases

(b) Linguistic Groups

- homogeneous

(c) State/Regional Governments

- 9 Lander have considerable power: education, social services, housing, medicare, 'internal economy', etc. and receive 2/3 of joint tax revenues.

(d) Non-Linguistic Cleavages

- 51% Protestant; 44% Roman Catholic; segmentation corresponds roughly with geographic divisions
- religious segmentation not highly salient

Belgium

1. Socio-political system

(a) System of Government

- unitary state
- proportional representation
- coalition government
- considerable discussion regarding reorganization into federation with 3 constituent states

(b) Linguistic Groups

- French (Walloon) 39%
- Fleming (German/Dutch) 59%
- German + other 2%

(c) State/Regional Governments

- 9 provinces and 2,500 communes (local government units)
- large degree of autonomy on local matters, but not considered 'states' in sense of federal government
- local governments elected by proportional representation

(d) Other Cleavages

- most of country Roman Catholic.

The Netherlands

1. Socio-Political System

(a) System of Government

- proportional representation
- bicameral: 1st chamber elected by provincial states (limited power)
- not considered a federal nation per se
- reasonably stable governments
- government characterized by coalition executives: 1972 coalition involved 6 parties

(b) Linguistic Cleavages

- no major cleavages

(c) State/Regional Governments

- 11 provinces

(d) Non-linguistic cleavages

- religion: 34% Protestant (3 million Dutch Reformed, other Reform churches approx. 1 million)
  40% Roman Catholic (5 million)
  24% non-sectarian
- political parties represent left-right divisions as well as religions.

France

1. Socio-political system

(a) System of Government

- unitary state
- Presidential system (division of powers between executive and parliament)

- high number of changes of government since World War II (i.e., unstable)

(b) Linguistic groups

- mostly French-speaking; some minorities in areas such as Alsace (German), Brittany (Breton/Celtic), area near Belgium (Flemish) and area near Pyrenees (Spanish)

(c) State/Regional Governments

- local governments (communes) in process of merger; not very powerful relative to central government

Italy

1. Socio-Political System

(a) System of Government

- coalition government (in early 1970's, consisted of 3 parties)
- Senate elected locally
- very unstable (high number of changes in government)
- parties ordered on left-right continuum

(b) Linguistic Cleavages

- mostly Italian; some regional dialects (French, German, Spanish in border areas; some Arabic influence in areas)

(c) State/Regional Governments

- regional councils

(d) Other Cleavages

- religion mostly Roman Catholic; some cleavages corresponding to geographic areas.

Japan

(a) System of Government

- coalition government
- fixed term of office

(b) Linguistic Groups

- no major divisions

(c) State/Regional Governments

- no major powers

(d) Non-linguistic cleavages

- Shintoist (80%), Buddist (80%) [both followed by many people], Christian minority

- low level of ethnic/linguistic cleavage

Sweden

(a) System of Government

- unitary state
- proportional representation from 28 constituencies (plus some members elected at large)
- coalition government the norm
- upper house appointed by local representative bodies & has constitutional equality with lower house
- four major parties; 2 party coalition in early 1970's

(b) Linguistic Cleavages

- none

(c) State/Regional Governments

(d) Other Cleavages

- low level of religious cleavage (i.e., no apparent cleavages; Lutheran main religion)

The United Kingdom

(a) System of government

- Parliamentary system (constituency representation)
- single party cabinet
- stable government

(b) Linguistic groups

- Gaelic minority highly assimilated

(c) State/Regional Governments

- currently none; referendum on "home rule" for Scotland and Wales produced ambivalent results

(d) Non-linguistic cleavages

- Protestant/Catholic cleavage in Northern Ireland but not salient elsewhere.

3) Addendum to Section 7(a) Switzerland:

" - decentralized regional companies do not correspond to cantons; companies federal responsibility but receive considerable input from cantons."

4) Sources Used for Socio-political System Summary

Budge, Ian and V. Herman, "Coalitions and Government Formation," British Journal of Political Science, 8: 459-77 (1978).

De Swaan, Abran, Coalition Theories and Cabinet Formation, San Francisco: Jossey-Bass, 1973.

Dikshit, Ramesh, The Political Geography of Federalism, New Delhi: Macmillan of India, 1975.

Grove, D. J., "A Cross-National Examination of Cross-Cutting and Reinforcing Cultural Cleavages," International Journal of Comparative Sociology, 18: 217 ff. (1977).

International Year Book, 1978.

Lorwin, Val, "Segmented Pluralism: Ideological Cleavages and Political Cohesion in the Smaller European Democracies," in K. McRae (ed.), Consociational Democracy (Toronto: McClelland & Stewart, 1974).

Taylor, C. C. and M. C. Hudson, World Handbook of Political and Social Indicators (2nd edition), especially:
Degree of fractionalization table, p. 48
Table 3.7. Number of Regular executive transfers
Table 4.15. Ethnic and Religious Fractionalization

Statesman's Year Book, 1978-79. London: Macmillan, 1978.

Wheare, K. C. Federal Government (4th edition) London: Oxford University Press, 1964.

5) Bibliography - Broadcast Systems

Annan, Lord. "United Kingdom: Broadcasting and Politics." Journal of Communication 28 (Summer 1978):58-67.

"Australia-Broadcasting Tribunal." EBU Review 28 (September 1977):34.

Avramović, Miodrag; Marjanović, Stevan; and Ralić, Prvoslav. Communication policies in Yugoslavia. Paris: Unesco Press, 1975.

Bonnevier, Hans. "Swedish radio and television up for review." EBU Review 29 (March 1978):17-19.

Brack, Hans. "German radio and television: organization and economic basis 1969-1973." EBU Review 25 (July 1974): 12-18.

Brants, Kees, and Kok, Walter. "The Netherlands: An End to Openness?" Journal of Communication 28 (Summer 1978): 90-95.

Cazeneuve, Jean. "The place of educational television in the new French programme companies." EBU Review 27 (May 1976): 8-9.

Contamine, Claude. "FR3's access programme 'Tribune libre' the first year." EBU Review (March 1976):6-11.

Crawford, Robert P. "Comparative Aspects of British and American Commercial Television." Journal of Broadcasting 10 (Spring 1966):103-110.

De Brauw, Chris. "Broadcasting in the Netherlands: Institutionalized Access With Limitations." Journal of Broadcasting 18 (Fall 1974):453-463.

Emery, Walter. National and International Systems of Broadcasting: Their History, Operation and Control. East Lansing: Michigan State University Press, 1969.

Esposito, R., and Grassi, A. "The monopoly reformed. The new Italian Broadcasting Act (Part 1)." EBU Review 26 (July 1975): 38-45.

_____. "The monopoly reformed. The new Italian Broadcasting Act (Part 11)." EBU Review 26 (September 1975):52-57.

Flichy, Patrice. "France: 'Parallel' Radios and Program Revitalization." Journal of Communication 28 (Summer 1978):68-72.

"France-Reorganization of the broadcasting system." EBU Review 25 (November 1974):54-55.

"Germany (Federal Republic) Some recent broadcasting developments." EBU Review 26 (November 1975):23-24.

Grandi, Roberto. "Western European Broadcasting in Transition." Journal of Communication 28 (Summer 1978):48-51.

Green, Timothy. The Universal Eye-World Television in the Seventies. New York: Stein and Day, 1972.

Hadenius, Stig. "Mass Media and The State In Sweden." Gazette, Volume 23, 1977, pp. 105-115.

Hartley, John. "Direct broadcasting satellites: the Australian situation." EBU Review 28 (May 1977):73-77.

Haskell, Deborah. "Accountability In Australian Television." Gazette, Volume 23, 1977, pp. 89-104.

Hollstein, Milton. "Tiny Holland's Mighty Radio Voice." Journalism Quarterly 51 (Autumn 1974):486-489.

Hultén, Olof and Iver, Ivar. "Sweden: Small but Foreboding Changes." Journal of Communication 28 (Summer 1978): 96-105.

"Italy-Developments in Broadcasting." EBU Review 29 (July 1978):46-52.

Kooymam, A. "Problems of the pluralism of the Dutch broadcasting system." EBU Review 27 (March 1976):23-25.

Marting, Leeda Pollock. "British Control of Television Advertising." Journal of Broadcasting 17 (Spring 1973): 159-172.

Mayer, Mary Alice. "British Commercial Television: Advertising, Revenues, Taxes." Journal of Broadcasting 13 (Summer 1969): 253-264.

Mineus, Gerard. "Monopoly and derogations from the monopoly in the broadcasting field in France." EBU Review 29 (July 1978):46-52.

Modig, Jan-Olto. "The Swedish television system. Two independent channels in the same corporation." EBU Review 27 (January 1976):11-14.

Namurois, Albert. Structure and organization of broadcasting in the framework of radiocommunications. Geneva: European Broadcasting Union, 1972.

"Netherlands-25 years of television." EBU Review 27 (May 1976):21-22.

"NHK's fifty years." EBU Review 26 (January 1975):32-37.

Ono, Kichiro. "The 50th anniversary of NHK. The lessons of history." EBU Review 26 (January 1975):29-30.

Paulu, Burton. Radio and Television Broadcasting on the European Continent. Minneapolis: University of Minnesota Press, 1968.

_____. "United Kingdom: Quality with Control." Journal of Communication 28 (Summer 1978):52-57.

_____. Radio and Television Broadcasting in Eastern Europe. Minneapolis: University of Minnesota Press, 1974.

Peyson, Ulf. "Freedom of expression and the public authorities in Sweden." EBU Review 27 (January 1976):35-38.

Ploman, Edward W. Broadcasting in Sweden. London: Routledge & Kegan Paul Ltd., 1976.

Radojković, Miroljub. "Political Participation And Mass Media In Yugoslavia." Gazette, Volume 21, 1975, pp. 136-148.

Reich, Donald R. "Accident and Design: The Reshaping of German Broadcasting under Military Government." Journal of Broadcasting 7 (Summer 1963):191-207.

Richeri, Giuseppe. "Italy: Public Service and Private Interests." Journal of Communication 28 (Summer 1978): 75-78.

Rocchi, Jean. "France: Decentralization and Dissension." Journal of Communication 28 (Summer 1978):73-74.

Rugh, William Arthur. The Politics of Broadcasting In West Germany After World War Two. Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Faculty of Political Science, Columbia University, 1967.

Santoro, Emanuele. "Judgement of the Italian Constitutional Court on the monopoly of RAI-Radiotelevisione Italiana. A new ruling by the Italian Constitutional Court on the broadcasting monopoly: the monopoly mutilated." EBU Review 28 (January 1977):28-31.

Signitzer, Benno. "Austria: Media Dependence." Journal of Communication 28 (Summer 1978):79-82.

Smith, Anthony. The Shadow in the Cave-The Broadcaster, His Audience and the State. Urbana: University of Illinois Press, 1973.

Snare, Austin. "The Development and Problems of Australian Broadcast Services." Journal of Broadcasting 7 (Winter 1962-63):23-24.

"Sweden-Parliamentary enquiry into the future of broadcasting." EBU Review 25 (September 1974):37-38.

"Swiss second television programme plans shelved." EBU Review 28 (July 1977):28.

"The Nippon Television Network Corporation. Japan's pioneer commercial television network." EBU Review 23 (July 1972): 30-31.

Thomas, Ruth. Broadcasting and Democracy in France. London: Bradford University Press, 1976.

Thompson, John. "The development of Independent Local Radio in the United Kingdom." EBU Review 27 (July 1976):

Thurston, Carol M. "Accountability in Broadcasting." Journal of Communication 28 (Summer 1978):112-117.

Toogood, Alex. "West Germany: Federal Structure, Political Influence." Journal of Communication 28 (Summer 1978): 83-89.

UNESCO. World Communications: A 200 Country Survey of Press, Radio, Television and Film. Paris: UNESCO, 1975.

_____. Statistical Yearbook 1976. Paris: UNESCO, 1976.

Williams, Arthur. Broadcasting and Democracy in West Germany. London: Bradford University Press, 1976.

CHAPTER II

AN EXAMINATION OF SOME PROPOSALS FOR CONSTITUTIONAL REFORM

This portion of our progress report will deal with a number of issues which arise as a result of some of the proposals thus far presented by others on constitutional reform in general and on telecommunications specifically. The proposals which are of primary concern are:

a) The Pepin-Robarts Task Force on Canadian Unity, (hereinafter referred to as the Pepin-Robarts Report)

b) The Canadian Bar Association's Committee on the Constitution, Towards a New Canada (hereinafter referred to as the C.B.A. Report).

c) Draft Federal Proposals on Cable Distribution as presented to the Conference of First Ministers of the Constitution, February 5-6, 1979. (hereinafter referred to as the First Ministers report see Appendix A).

d) Quebec Proposal to Federal-Provincial Conference of Communications Ministers, Charlottetown, May 29-30, 1978 (see Appendix B).

We have not attempted to analyze any of these reports either exhaustively or intensively. However, a number of general issues dealing with the basic principles of constitutional law and constitutional reform are considered. These are:

I The criteria to be used in determining how Legislative powers are to be divided and to which level of government

II Concurrency and Paramountcy

III The Residual Power

IV Legislative Interdelegation, Legislative Adoption, Administrative Delegation.

I. The Criteria to be Used in Determining how Legislative Powers are to be Divided and to which Level of Government

Both the C.B.A. report and the Pepin-Robarts report turn their attention to the premises and principles underlying the division of powers in a federal constitution. The present B.N.A. Act allocates fifty "classes of subjects" between Parliament and the provincial legislatures. Aside from three areas (immigration, agriculture and old age pensions), these classes of subjects are within the exclusive jurisdiction of either Parliament or the provincial legislatures. The principle of exclusivity would seem to be a classic characteristic of a federal constitution. Although some have disputed the value of this doctrine (most notably P. J. O'Hearn, Peace, Order & Good Government, 1964, Toronto), most students of federalism support the principle of exclusivity. The principle of exclusivity is endorsed by both the C.B.A. report and the Pepin-Robarts report. The C.B.A. report at p. 66 sets out the disadvantage of concurrent jurisdiction (the alternative to exclusive jurisdiction) in that it leads to duplication of bureaucracies and hence increases the cost of government. They state that it can also create more opportunities for federal-provincial bickering. There are areas, they say, in which it is either essential or highly desirable that one level of government or the other has exclusive jurisdiction.

The Pepin-Robarts report also recognizes that concurrent jurisdiction is potentially a greater source of conflict than exclusive jurisdiction. One of the primary reasons given for

concurrent jurisdiction is to increase the flexibility of the Constitution. However, as was noted by the C.B.A. report (p. 66), the courts have been able to achieve flexibility by the use of the aspect doctrine which recognizes the overlapping nature of the various legislative powers.

However both the C.B.A. and the Pepin-Robarts reports have acknowledged the need for more concurrent areas of jurisdiction. This is particularly evident in the C.B.A. report which recommends that seven areas in the Constitution be areas of concurrent jurisdiction:

Taxation (Recommendation 12.1)
Retirement Insurance (14.4)
Family Benefits, Old Age Security (14.5)
Atomic Energy (19.7)
Broadcasting & Cable (21.1)
Intra-Provincial Telephones (21.4)
Immigration (23.3)

As the Pepin-Robarts does not attempt to provide a draft constitution, the areas of concurrent jurisdiction it proposes are less precise. But it gives some examples: language, culture, civil law, research and communications taxation, some aspects of foreign relations (p. 86). Two questions must be asked: (1) how did the respective reports determine which level of government would be entrusted with the power which was to be exclusive; and (2) what factors determined whether a particular power should be exclusive or concurrent (shared).

1) The Allocation of Exclusive Powers

Both reports provided the more traditional arguments in determining to whom the exclusive powers should go. Matters

of national concern should be entrusted with the central government; matters of local concern with the provincial governments. This was further developed to recognize that matters relating to economic policy should be federal whereas matters relating to the community, family, education, and culture should be left with the provinces. (See C.B.A. report p. 64 and the Pepin-Robarts report, p. 85.) This division however essentially represents the present division of powers in the B.N.A. Act. (See the interesting article by A. Abel, "The Neglected Logic of 91 and 92" 19 U. Toronto L. J. 487 1969.) But the Pepin-Robarts report attempts to articulate other criteria that should be looked to when determining whether a matter should be allocated to either the federal or provincial legislatures. This is a welcome approach to constitutional reform where the underlying premises for the division of powers are often ignored or subordinated to what may be considered political considerations. However it is respectfully submitted that the criteria chosen by the authors of the Pepin-Robarts report are with some exceptions, less than satisfactory.

Criteria 1. Public activities of Canada-wide concern should normally be handled by Ottawa and activities of provincial or local concern by the provinces.

Comments

This is quite obviously a valid criterion but because it is so general and more in the nature of a conclusion than an explanation, it is generally unhelpful. Sound criteria are

needed to determine when something is of national or local concern.

Criteria 2. Consideration should be given to which order of government can fulfill a responsibility most efficiently and most effectively in relation to cost. In measuring effectiveness consideration must include not merely administrative and economic efficiency but political responsiveness, sensitivity and closeness to the concerns of the individual citizen.

Comments

The major difficulty with this criterion is that it may be instrumental in creating a deadlock rather than a means of resolving the problem of allocating the various powers. If economic efficiency is the criterion one would suspect that in most instances, simply due to economies of scale, the subject matter would be allocated to the federal government. Whereas it would invariably be the provincial legislatures who are closer to the concerns of the individual citizens. Which factor should assume greater importance?

If administrative efficiency refers to the type of bureaucracy then this is not a function of any particular subject matter; rather it is a function of the type of administrative structure created to deal with the problem, the resources available to the administrators and the people appointed to be administrators. Some subject matter may be intrinsically more complex and require a complex administrative scheme. Others may involve very little government intervention. But assuming the former type of matter, which level of government will be chosen to administer it? Some would

argue that neither the Federal nor provincial governments are inherently more efficient administrators. Even if some would contend that the federal government is more efficient, then this would require all subject matter (or at least those requiring some administrative scheme) to go to the Federal government. If the opposite claim is made by others in favour of the provincial governments, we arrive at a standstill. Both conclusions depend upon a priori assumptions that, as a general proposition, either the federal or provincial government has a more efficient bureaucracy. It obviously could not depend on the particular government of the day as the constitution must be a relatively permanent document.

It may be that matters of local concern should be dealt with by local administrators and national concerns by a central administrator, but now the matter is being allocated on the basis of criteria #1, not criteria #2.

If criteria #2 refers not to the efficiency of the bureaucracy but rather to the feasibility and practicality of implementing a particular program, then it would be a valid criteria. In this sense it helps determine which matters are of national concern and which can effectively be dealt with on the local level. Hence confusion would result if the allocation of radio frequencies or airline routes were granted to ten different governments. Therefore, with certain subject matter, a single authority is required to ensure that the activity can be carried out effectively and without harm to others. The point is made by Dale Gibson (1967) 7 Man. L. J.

and again by Professor Hogg in his recent treatise, Constitutional Law of Canada at p. 260 when he says:

> There are . . . cases where uniformity of law throughout the country is not merely desirable but essential . . . This is the case when the failure of one province to act would injure the residents of the other (cooperating) provinces.

He then cites some well known examples of matters entrusted by the national concern doctrine to Parliament: aeronautics, broadcasting, the national capital region. Indeed the C.B.A. report gives another example: currency (p. 66).

Political responsiveness would also seem to be unhelpful as a criterion for dividing legislative power. It seems that if a problem is local then the local legislature is going to be more sensitive and responsive to the problem than the national legislature. There do not seem to be any classes of subjects which by their nature would indicate which order of government would be more responsive. If anything the existence of political responsiveness may be undesirable. If a subject matter is entrusted to a provincial legislature then,because of the principle of delegation, the same can be delegated to the local municipal councils. There may arise some volatile issue of "local concern" that ought to be dealt with by an authority which is less subject to local pressures and is capable of dealing more rationally and dispassionately with the problem. This is particularly true when the "local problem" involves the action by a minority whose civil liberties are at stake. The criminal law would probably be left with the provinces if political responsiveness was a

governing criteria. But the importance of that factor would seem to be overriden by a desire to have a uniform criminal law which reflects the fundamental values and norms of all Canadians and not the values of any particular group. It should be noted however that the Supreme Court of Canada has recently recognized the importance of "local evils" as a basis for provincial jurisdiction in A. G. of Canada v Dupont(1978)84 D.L.R. (3d) 423.

Criteria #3. Where there is already common agreement there is an advantage in incorporating that agreement. It would also be advisable to respect existing federal-provincial agreements such as the recent ones concerning the selection and settlement of immigrants.

Comment

This seems to suggest that politics are to be paramount over policy. It seems that the authors are saying that even if the "agreement" is inconsistent with the kind of arrangement dictated by the other criteria, it is nonetheless to be adopted into the Constitution.

This criterion would seem to take into account the reality that constitutional amendment involves a good deal of political compromise and should therefore be recognized. As long as this criterion is treated only as one factor, not in itself determinative, then there would not appear to be any serious objection to it. However as a guide to the formulation of an ideal constitution it does seem to be overly pragmatic. Although no one expects to have a Utopian constitution it

would have been better for the authors to think in terms of realizing an ideal and providing criteria which will help reach that objective. The political compromises will happen anyway but there seems little reason to elevate them to the status of normative criteria.

Criteria #4. Where there is no contention, this is an advantage to maintaining continuity with past practices . . . Furthermore, in the interests of continuity whenever there is agreement, the retention of existing wording is likely to produce greater certainty regarding future judicial interpretation.

Comment

The criticisms of criteria #3 would seem to apply here as well. As a pragmatic consideration it is beyond reproach. But is it too pragmatic? It says 'let sleeping dogs lie' and would imply that it is only where an area becomes contentious should it be ripe for constitutional amendment. It seems that before this course of action be adopted the framers of the new constitution should attempt to discover if they can why certain areas are uncontentious. Is it because the powers are rarely used or is it because both levels of government recognize that the present arrangement is workable? Some foresight should be employed to attempt to determine whether what is now a non-contentious area will remain that way or whether change in sociological, economic or technological forces will inevitably result in new areas of contention.

Criteria #5. The allocation of competence over specific subject matters should be evaluated in terms of the effects upon the overall balance of responsibilities which each order of government will have.

Comment

This appears to be an emminently sensible proposition but I quite frankly have a difficult time understanding how it would be applied. What kind of balance is envisaged? The wording suggests not only that federal and provincial powers should be balanced but also a certain balance must exist within each order of government. One example suggested in the report is that at present there is in the provincial sector "an imbalance between their legislative responsibilities and their fiscal capacity . . . "(p. 84). Perhaps what is also meant is a balance between the cultural and economic aspects of society. It would,however, have been very worthwhile had a few illustrations been provided by the Task Force so that the intention behind the criterion be better known.

2) Concurrency or Exclusivity?

Both the C.B.A. and Pepin-Robarts report recognized that some powers in the Constitution ought to be shared or concurrent. The C.B.A. recommended that concurrency be adopted only in clear or compelling cases. It however suggested that seven areas should be concurrent. The Pepin-Robarts report said that concurrence should be kept to a minimum but proposed six areas that could be concurrent (supra p. 3). What seems to be lacking in both reports are reasons for this shift,

albeit limited, toward concurrency. The C.B.A. report stated that the main argument for concurrency is to increase flexibility but it responded by saying that flexibility can be bought at too great a cost and in any event the authors felt that because of the aspect doctrine a constitution consisting of exclusive powers can be very flexible. What then were the reasons that some powers should be concurrent?

The C.B.A. report states (p. 124)

> . . . in 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 that it must be worked out in the context by the two levels of government.

One way in which the Pepin-Robarts report seems to resolve this problem is to allocate jurisdiction over very specific and detailed subject matters. This avoids the "all or nothing approach" which results when large domains of jurisdiction are allocated to one level of government or the other. It is obviously very difficult to reach an agreement as to which level of government should have exclusive jurisdiction over the vast field of telecommunication. But if the field is broken down into smaller subject matters it will be much easier for Parliament to agree to give exclusive jurisdiction on one or more small areas to the provinces if it can obtain exclusive jurisdiction on other smaller areas in the same field. Hopefully the choice of the areas and the allocation to one level of government or the other will be dictated primarily by sound principle as well. Hence resort

to concurrent power can be avoided if the general field of powers are subdivided and then allocated on an exclusive basis. The broader field may be shared but now in a highly regulated and defined manner.

Nothwithstanding the suggestion by the Pepin-Robarts report which would seem to obviate the need for concurrency, the authors of that report still acknowledge that in some areas concurrency will still be necessary. Again the question arises as to why? At p. 40 they state that there are areas which are particularly contentious. If this is the reason (and it reflects the view held in the C.B.A. report), then the decision to opt for concurrent power can be viewed as a last resort measure or a cop-out, depending on one's point of view. In effect they seem to be saying if no agreement can be reached by the politicians at the time of the creation of the new constitution, then the decision will be deferred until such time as agreement can be reached and failing that, the decision will ultimately be one for the courts. It should be noted that there is one valid reason for resorting to concurrent jurisdiction, if the matter is arguably both of national and provincial concern. If the power was allotted exclusively to one level of government but it chose not to exercise its jurisdiction, the other level of government could not choose to do so. But where the power is concurrent, either level of government can exercise their jurisdiction and in the event of a conflict, the power would be exercised by the paramount legislature.

One other reason is provided by the Pepin-Robarts report, and again it is akin to a "lesser-of-evils"-type argument. The Pepin-Robarts report stated that Quebec had distinctive needs which should be recognized and accommodated in the Constitution. One way of achieving this would be to afford Quebec a "special status" whereby it would have legislative power not granted to the other provinces. This method however was not favoured, basically because it would suggest that Quebec was superior to the other provinces,which was contrary to their basic position that all provinces are equal,albeit "different."

The C.B.A. report however expressly gives four reasons why special status should not be afforded. (These were in fact adopted from the Special Joint Committee of the Senate and the House of Commons on the Constitution.)

1) That it isolates a particular Province and in effect, destroys the minimum requirements for a federal state;

2) That it places the special-status Province and its representatives in an untenable position in Federal institutions;

3) That it creates different classes of citizenship within the same state;

4) That it jeopardizes the integrity of the state, internally and externally.

To avoid granting Quebec a special status, the Pepin-Robarts report opted for concurrency. Indeed this seemed to be the main reason for concurrent powers. Thus they recommended placing under concurrent jurisdiction those areas needed by Quebec to maintain its distinctive culture and heritage, with

provincial paramountcy, and leaving the other provinces with the option of exercising these powers as well, or if they did not want to exercise these powers, they would be left to Parliament instead.

One has to wonder whether the use of concurrency for this reason is somewhat irrational. It was resorted to, to avoid allegations of favouritism towards Quebec. But that allegation should only hurt if there is some truth to it, and then obviously, any such acts of playing favourite should be avoided. However if Quebec does have some legitimate needs, then is it being treated as superior to the other provinces if only it is given certain powers not granted to other provinces? By the same token, other provinces may have certain special needs and they too could be specially accommodated. If policy and sound principle dictate that only Quebec have certain powers, then arguably only Quebec should receive those powers. To do otherwise could lead to a deluge of concurrent power. The Prairie provinces might claim to have a distinctive need to have exclusive power over national resources and Indian rights. The Maritime provinces may have a distinctive need over fisheries and off-shore minerals. Do we therefore add all of those powers to the lot of concurrent powers? If in fact so many of our provinces do have many distinctive needs, then perhaps one has to rethink very

seriously our present federal model.

The concern expressed by the C.B.A. and the Joint Committee cannot be underrated or overlooked. They are unquestionably valid. No choice will be made at this juncture. The matter is raised for the purpose of further discussion, the choice being "Do we avoid the appearance of favouritism by resorting to distribution of power that cannot be justified on the basis of sound principles?" The other question of course is "Does Quebec have needs that are so distinctive that we are forced to alter the basic framework of the Constitution to accommodate her?"

II. Concurrency and Paramountcy

Having decided that there will be certain areas of concurrent jurisdiction, some attention should be paid to the way in which it will work in practice. Neither the C.B.A. nor Pepin-Robarts reports do so. The doctrine of paramountcy is well known in Canadian constitutional law. Where a valid provincial law conflicts with a valid federal law, the federal law is paramount and the provincial law is rendered inoperative. This does not mean that the provincial law is repealed. Indeed if the federal law is subsequently repealed by Parliament, the provincial law is revived and becomes operative.

Although this doctrine is simple to state, it is very difficult to apply. The thorny problem has been when a "conflict" arises. On the one hand the court may take the approach that a conflict only arises when there is an express

contradiction, i.e. where one law expressly contradicts the other. On the other hand the courts could activate the paramountcy doctrine when a provincial law is simply inconsistent with the spirit and intent of the federal law. The jurisprudence in the area will not be analyzed or canvassed at this point, but an excellent discussion of the paramountcy doctrine is provided by Hogg, Canadian Constitutional Law, 1977, 101 to 114. Suffice to say at this juncture that our courts have adopted a very restrictive approach to the paramountcy doctrine, thus leaning towards the former rather than the latter method. In effect very few provincial laws are rendered inoperative, even though to most people there is an obvious conflict.

The paramountcy doctrine has only been applied when two laws, each within the exclusive jurisdiction of the enacting legislature are concerned. There have been no instances, to my knowledge, of paramountcy arising within the existing areas of concurrent jurisdiction in the B.N.A. Act. One wonders therefore if the paramountcy doctrine would be treated any differently when the conflict exists between two laws in a concurrent field. This of course depends upon the reasons why the courts have adopted the present approach to paramountcy. If the restrictive approach stems from an attitude of judicial restraint, "leaving all but the irreconciable conflicts to be resolved in the political arena" (Hogg, p. 102), then the same approach will be taken when the conflict arises in a concurrent field. If the present approach reflects

a pro-provincial,bias then a concurrent power with provincial paramountcy (which is recommended in some areas by both the C.B.A. and Pepin-Robarts reports) would result in a more common invocation of the paramountcy doctrine. It is highly unlikely that this latter reason is a valid explanation for the way the paramountcy doctrine is used.

Another reason can be suggested,which is somewhat related to the first one, i.e. judicial restraint. Judicial restraint may simply be a function of the court's perception of the judicial role particularly in a democratic country,where the will of the legislature should be accorded deference. However judicial restraint may be more compelling when the clash is between two valid laws,each of which are enacted by equal legislatures and each of which have exclusive jurisdiction to enact the law in question. However one might argue that a concurrent field is one which implicitly recognizes the need for cooperation. Cooperation is not contemplated when powers are by definition mutually exclusive. If cooperation is the byword of a concurrent field, the courts may be more ready to invalidate those laws which frustrate the implementation of policies in the concurrent field. Hence if both legislatures are given jurisdiction over immigration,the primary consideration should be the implementation of sound immigration policies. But where one legislature is given exclusive jurisdiction over highways and the other exclusive jurisdiction over criminal law, the court may strain to allow both the highway laws (policies) and the criminal laws (policies) to operate not-

withstanding some obvious inconsistencies.

An argument can be made which supports an opposite conclusion: viz., that the courts may take an even more restrictive approach to paramountcy when two laws exist in a concurrent field. If a provincial law is allowed to interfere with the operation of a law which is in the exclusive domain of Parliament, then it is arguable that an even greater interference will be permitted when Parliament (or the paramount legislature whichever that is) only shares the field.

The C.B.A. report (p. 117) grants Parliament and the provincial legislatures concurrent legislative power respecting broadcast undertakings (radio and television stations and cable television systems) and closed circuit cable systems, with federal paramountcy. Analogizing to other fields of jurisdiction where the paramountcy doctrine has been applied, the following situations might arise (assuming the paramountcy doctrine is applied in the same restrictive fashion):

a) A broadcast undertaking could be required to obtain a license from both the federal authorities and the provincial authorities before it could operate. Parliament might authorize the license to last for five years, where the province could require that the license be renewed every year.

b) If Parliament imposed a 40% Canadian content rule, the provinces could impose a 50% requirement: O'Grady v Sparling [1960] S.C.R. 804.

c) If a broadcaster violates a federal law and Parliament authorizes only a monetary penalty, the provinces could

authorize the revocation of the broadcaster's license: Ross v Registrar of Motor Vehicles [1975] 1 S.C.R. 5. Similarly the provinces could require that an additional monetary penalty be paid to them.

d) If Parliament prohibits pay television, the provinces probably could not permit it. However if Parliament does not prohibit it (thus implicitly but not expressly permitting it), the provinces may be able to prohibit it. Even if the province could not expressly prohibit it, they might be able to deter its use by stating that it will be taken into consideration as a negative factor when the broadcast license comes up for renewal: Reference the s.92(4) of the Vehicles Act 1957 (Sask.) [1958] S.C.R. 608.

e) The area of identical or duplicitous legislation is somewhat in doubt. In Multiple Access v McCutcheon 78 D.L.R. (3d) 701, the Ontario Divisional Court rendered inoperative a provincial insider trading law which was identical to a federal law. It is submitted that the paramountcy doctrine was not invoked simply because the legislation was duplicitous. Rather it was because the two laws could not co-exist. The laws required an insider who made a profit by trading shares as a result of the misuse of corporation information, to compensate any person or corporation for any loss suffered as a result. This was not akin to a double penalty; rather here there was only "one pot of gold" and both levels of government authorized the taking of all of it. Since the insider should logically only repay what he improperly received (and indeed

in many cases that is all the individual will have to pay), it meant that the action could be instituted by one authority or the other, but not by both. Instead of relying on the administrators to cooperate, the court used the constitution to prevent a potential administrative conflict. The decision was affirmed by the Ontario Court of Appeal.

Hence applied in the context of broadcasting, if both the province and the federal government had an identical "fairness rule," a broadcaster who showed one side of an issue would only have to show the other side of the issue once and not twice. However if both Parliament and the provinces prohibited the use of cartoons when advertising for children, the broadcaster could be required to pay the penalty, if a fine, to both authorities.

The problems of paramountcy in a concurrent field are exacerbated when the paramount legislature alternates between Parliament and the provincial legislatures. Both the C.B.A. and Pepin-Robarts reports contemplate a list of concurrent powers with federal paramountcy and a list with provincial paramountcy. For example, the C.B.A. proposal makes retirement insurance a concurrent field with provincial paramountcy, and also makes atomic energy a concurrent field, but with federal paramountcy. Suppose the <u>provincial</u> legislature enacts a law requiring the operators of all uranium mines to contribute a certain amount to a fund which will provide a worker with a pension when he or she retires. However a person will only be entitled to the pension if they work more than ten years in

the mine. Suppose also, that Parliament requires that all workers in a uranium mine must retire after ten years in the mine (supposedly because of the health hazard of extended exposure to the uranium). Which law is paramount? The courts would have to characterize the provincial law and decide whether its "pith and substance" or leading feature is atomic energy or retirement insurance. Assume the law is characterized as a retirement law. The federal law must then be characterized and it could be characterized as a law in relation to atomic energy. Now we have a situation with two paramount laws. Both should be operative but obviously both can not practically coexist. The federal law frustrates the provincial, and the provincial frustrates the federal. The courts would probably make the federal law paramount to the provincial, although it is not at all clear that such an option is available under the C.B.A. proposals.

The problem becomes more complex if in our hypothetical case, the provincial and federal laws are reversed. If Parliament passes the law on retirement insurance and the province passes the law on atomic energy, which would be paramount? Now we have a valid federal law in an area of provincial paramountcy versus a valid provincial law in an area of federal paramountcy. Should the field resolve the problem? Is atomic energy more important than retirement savings laws, or should federal law, as a matter of policy, always be paramount to provincial laws?

This problem could also occur as a result of the proposals

on cable provided in the First Ministers report. Both the province and the federal government have concurrent jurisdiction over cable distribution with provincial paramountcy and it seems (although it is not perfectly clear) that both levels have jurisdiction over Canadian content (as one example) on cable systems. If a provincial cable distribution law is "inconsistent" with a federal Canadian content law then the federal law is probably paramount. (Query: will the word "inconsistent" be interpreted differently than the paramountcy doctrine which renders inoperative laws that "conflict"?) But what would occur if a federal cable distribution law conflicted with a provincial Canadian content law? No answer is provided in the proposals.

Another complication arsies in the First Ministers proposals. Instead of providing a comprehensive and exhaustive code on the distribution of powers in the field of telecommunications, the First Ministers reached agreement only on the area of cable distribution. Even if this is not a valid assumption, as that may have been the only area in which reform was sought, the problem remains. Section 5 of their proposals preserves the status quo except where it was expressly changed by the preceeding four sections. The result of a piecemeal approach to constitutional reform can be that the past will return to haunt and complicate the interpretation of the newer provisions. One example will suffice. It is generally agreed that educational broadcasting is still a contentious constitutional issue. Suppose one day in the future, but after

the First Ministers proposals come into force, a court decides that the provincial legislatures have exclusive jurisdiction over the content of educational broadcasting. This power would be deemed to have always existed and will therefore become part of the status quo preserved in s.5. If the provinces enacted a law relating to educational broadcasting over cable which conflicted with a federal law on Canadian content, which would be paramount? According to s.2 the federal laws on Canadian content are only paramount to provincial laws on Canadian content or cable distribution. Would the province's exclusive jurisdiction over educational broadcasting be paramount to a federal law in an area of concurrent jurisdiction? The court would probably invoke the more usual approach of federal paramountcy but it is by no means certain.

III. The Residual Power

The C.B.A. and the Pepin-Robarts reports adopted differing positions with respect to the residual power. The Pepin-Robarts report recommended that the residual power should be assigned to the provincial legislatures, as is the case in most other federations. The Pepin-Robarts report suggested that at present, the residual power in Canada "is largely vested in Ottawa" (p. 29). Although on a literal reading of the B.N.A. Act, this would appear to be accurate, in fact it is not. The C.B.A. report recognizes the reality that in Canada there is a shared residual power. At the present time,

if a matter does not fall within the enumerated classes of subjects in either the provincial or federal sphere, the court is required to determine whether it is a matter of national concern or a matter of local concern. If the former, it falls within the federal residual power (the Peace, Order & Good Government clause) but if local, it comes within the provincial 'residual power', s.92(16). In practice the courts have construed the federal residual power very narrowly. The C.B.A. report recommends that the present practice be expressly entrenched. Recommendation 25.1 reads:

> Any legislative matter not expressly granted by the Constitution should be within the exclusive legislative power of the provinces, unless it is clearly beyond provincial interests, in which case it should be within the exclusive legislative power of the federal Parliament. A matter ordinarily falling within provincial competence should not fall within federal jurisdiction merely because it had "national dimensions."

Although one might argue with the limitation on the "national dimensions" issue, it is surely not as restrictive as the approach advocated by the Pepin-Robarts report. Denying Parliament any residual power, effectively locks Parliament into only those issues which are conceived to exist in 1979 or the immediate future. If a matter of national concern arises in the future which does not fall within the Parliament's list of subjects, it would have to be allocated to the provinces. Not only is this a ludicrous situation but it is inconsistent with the quest for flexibility considered so important by the authors of the Pepin-Robarts report. One might ask how the federal government fares in such countries as the United States

where the states possess the residual power. The C.B.A. report provides the answer: " . . . in these countries the courts have interpreted the enumerated heads of federal power so widely that there is little need for a federal residual power" (p. 140). This situation however would not exist under the new Constitution as proposed by the Pepin-Robarts report. Earlier it was noted that the Pepin-Robarts report advocated a listing of powers that were very detailed and specific to reduce the confusion and controversy that exists when general classes of subjects are relied on to describe the division of powers. It is because the Pepin-Robarts report advocates a detailed description of the division of powers that a shared residual power is now even more necessary to insure that the Constitution does not soon become outdated.

IV. Legislative Interdelegation, Legislative Adoption, Administrative Delegation

The Pepin-Robarts report also recommended that there be a provision in the constitution which would enable one order of government to delegate legislative power to the other order of government. The C.B.A. report, on the other hand, rejected such a proposal and instead approves only administrative delegation. Under the present B.N.A. Act, this trading of legislative powers is unconstitutional.

The Pepin-Robarts report supported the principle of interdelegation of legislative power for the same reason it supported concurrency, viz., primarily to "enable the distinctive requirements of various provinces (in particular Quebec) to be met without having to apply those arrangements to all provinces" (p. 104). Although the C.B.A. report also recognized that Quebec may have some distinctive needs, it concluded that these needs could be accommodated by administrative delegation. It is submitted that the C.B.A. proposal is the preferable one. The benefits of legislative interdelegations are far outweighed by their costs. The only obvious benefit would be to increase the flexibility of the Constitution, but that can be achieved by less drastic measures. From a policy perspective, it might be more rational and is obviously more precise, than the option of concurrency. However if special powers are to be transferred to any one province, it seems that it should be entrenched in the constitution rather than allowing the constitution to consist of a shifting sea of powers.

The disadvantages of legislative interdelegation can be listed as follows:

a) It could result in a partial or wholesale amendment of the Constitution which should only be effected by a strict and formal procedure.

b) Taken to its extreme, it could result in Canada becoming either a unitary state or a loosely formed confederal state. Admittedly (as the Pepin-Robarts report points out) it is unlikely that any massive delegation would occur.

c) It could create dissension amongst the provinces. Conceivably Parliament could delegate jurisdiction over communications to Quebec, but not to any other province. This would effectively result in granting Quebec a special status, which the Pepin-Robarts expressly disapproves of. Admittedly the special status would not be entrenched, and the potential exists for the delegation of the same legislative power to all the provinces, but other political factors may prevent that from occurring.

The C.B.A. report also recognizes this possibility. On p. 67 it states that interdelegation "could as well be used to create a special status for a province . . ." If "special status" is to be afforded one or more provinces in recognition of their special needs, then it should be a constitutional decision and not a political one.

d) The converse is also true. As stated in the C.B.A. report, " . . . the very existence of the power to delegate can give difficulty by encouraging pressure by one level of

government on the other to transfer powers, sometimes powers that clearly should only be exercised by the level of government to which they were given." (p. 66)

e) The C.B.A. report also states that legislative inter-delegation could "add to the confusion in the electorate regarding who is responsible for certain functions." (p. 67) As well it can impair the political process itself. A matter may be inherently one of local concern, but is traded away to the federal government in return for some coveted federal power. If the federal government passes a law on this local matter, the provincial citizens would not have an effective voice in the political process to express their disapproval of the law. The federal government's fate would rarely depend on the disaffection of only one province, particularly a small province. Since the Pepin-Robarts report advocates a division of legislative powers that takes into account political responsiveness, this would clearly be inconsistent with that criterion.

f) The C.B.A. report also cites a very practical problem that would exist if only one provincial legislature were given jurisdiction over a matter otherwise within federal jurisdiction. At p. 67 the author states:

> Suppose, . . . Parliament retained divorce jurisdiction except in the case of Quebec, and the government wanted to introduce a bill on the subject. What legitimacy would the members from Quebec have to vote on the Bill? Yet the government might well have need of its supporters from that province to ensure passage of the Bill. If any significant number of other legislative powers were involved, Parliament would find it extremely difficult to function.

This would also militate against any formula whereby a province

was given jurisdiction over a subject matter that is otherwise within federal jurisdiction.

g) There presently exist a number of mechanisms of cooperative federalism which enhances the flexibility of the constitution without resorting to legislative interdelegation. Some examples are:

(i) Parliament can delegate the administration of federal laws to a provincial board. (Similarly the provincial legislature can do the same viz-a-viz a federal board.) This is the approach proposed by the federal government in Bill C-16, The Telecommunication Act. Under this scheme a provincial board would be able to assume the powers exercised by, for example, the CRTC. The policies administered however are still those of Parliament, not the provincial board and not the provincial legislature. Admittedly the more discretion that is delegated to the board, whether it be a provincial or federal board, the more power the board has to make policy choices. This raises the question whether or not Parliament could enact a Telecommunications Act which consists of only one sentence: "The C.R.T.C. (or a provincial board) shall regulate broadcasting in the public interest." If it could do so then broadcast policy would effectively be determined by a board rather than Parliament. The traditional view is that this is simply a lawful delegation of legislative power to an administrative board. In the U.S. this might be regarded as violating the doctrine of separation of powers, since it effectively transfers legislative powers to the executive. Although the separation of power doctrine has

little application in Canada, one might argue that this would amount to an abdication rather than a delegation, and hence should be invalid. Professor Laskin (as he then was) has written that abdication is a political, not a justiciable concern, and that in fact no abdication exists if the delegating authority can always retrieve its law. However the Supreme Court of Canada has recently recognized that a legislature can abdicate its law-making function, although it provided little guidance on how to recognize when that occurs: Manitoba Government Employees Association v. Government of Manitoba, [1977] 6 W.W.R. 247, at 257 (S.C.C.). It can now be argued that where Parliament does not at least provide some standards or principles to act as guidelines to the administrative body, then an unlawful delegation occurs. This however is still an unproven thesis.

(ii) One legislature can adopt some laws of the other legislature and then delegate these laws to its own board or a board of the other level of government. This scheme of "adoption plus administrative delegation" has been widely used in the field of transportation and the marketing of agricultural products. It enables the legislature to circumvent, to a very large degree,the holding in the Nova Scotia Interdelegation case which forbade legislative interdelegation. However there are still some significant differences in the two approaches.

A legislature can "adopt" the law of another legislature if two conditions are present (for ease of illustration,

assume Parliament is adopting a provincial law):

a) The provincial law must be valid in its own right

b) Parliament would have been able to enact the law itself had it wanted to.

Legislative interdelegation can be contrasted with adoption with the following simple example. Under a scheme of legislative interdelegation, Parliament, which has exclusive jurisdiction over postal workers, could transfer that jurisdiction to the provincial legislature. The province could then in enacting labour legislation, prohibit postal workers from striking, but at the same time allow all other "provincial workers" (e.g. teachers) the right to strike. This today would be invalid.

Under a scheme of legislative adoption, Parliament could adopt provincial labour laws and apply them to its postal workers. If the provincial labour laws prohibited teachers from striking; then the postal workers would also be prohibited from striking. Since Parliament could itself pass labour laws for its postal workers it can adopt the provincial labour laws. The provincial labour laws are valid because they apply to provincial workers (teachers) not postal workers. In effect Parliament has simply seen an attractive law and instead of rewriting it, it just adopts it. The policy to prohibit postal workers from striking is still Parliament's; it simply coincides with the provincial labour policy vis a vis teachers.

The courts have allowed this mechanism to be taken to

even greater lengths. Parliament can adopt not only existing provincial labour laws but also all future labour laws and have them apply automatically to postal workers. This now appears to come close to abdication of law making power, but it can still be constitutionally defended. The class of subject 91(5) "Postal Service" does not dictate any particular postal service law or policy. It is simply the vehicle through which Parliament enacts postal service laws. When Parliament adopts all provincial labour laws to be applied to postal workers it is making a policy decision, viz, that postal workers are to be treated the same as all workers in the province. If this is a valid policy, constitutionally, then the most effective way of implementing it is through the mechanism of adopting all provincial labour laws present or future. Unlike legislative interdelegation, the provincial legislature is not empowered to legislate for postal workers. The province legislates for teachers; Parliament legislates for postal workers.

This form of cooperative federalism can be taken even further. When Parliament adopts all present and future provincial labour laws to be applied to postal workers, it can then delegate the administration of those laws to its own board or to the same provincial board which administers the labour relations of teachers. Here in Mr. Justice Rands' words a "twin-phantom" is created. When the Ontario Labour Relations Board applies a labour law to a teacher, it is deemed to be applying a provincial law, but when it applies

a labour law to a postal worker, it is deemed to be applying a federal law. Both laws of course are identical.

In R v. Smith [1972] S.C.R. 359 the Supreme Court of Canada approved a scheme of adoption plus administrative delegation that seemed to obliterate any differences that might have existed between that and legislative interdelegation. To some, the Supreme Court went too far. There, a provincial highway board was administering both inter-and intra-provincial trucking pursuant to an adoption/delegation scheme. However the board was imposing conditions on the federal truckers that it was not imposing on the provincial truckers. It appeared, therefore, that the province was able to legislate for interprovincial trucks in a manner different from intraprovincial trucks, and this was the very reason legislative interdelegation was invalidated. However the problem with this scheme was not one of interdelegation but of delegation. Because the law adopted vested so much discretion in the board, it chose to exercise its discretion in an inconsistent manner. Theoretically it could have treated one provincial trucker differently from another provincial trucker. By "coincidence" however it only treated federal truckers differently from provincial truckers. Although the spirit of the Nova Scotia Interdelegation case has been violated by this decision, its letter remains intact.

Even if the two levels of government are now able to achieve by this procedure something they sought to achieve by legislative interdelegation, there is still a built-in check or limit to its use. Essentially it is only workable when there

are semi-concurrent areas of jurisdiction in the constitution. It involves norms -- e.g. labour laws, -- which are constitutionally neutral, or at least within the jurisdiction of both levels of government, but become exclusively federal or provincial when applied to particular persons or things (e.g. Indians, postal workers, railways and banks). Since it involves areas which are "almost" concurrent, the fact that it results in something akin to fields of concurrent jurisdiction is not inconsistent with the spirit of the Constitution. Hence both levels of government can pass marketing laws but their constitutionality depends upon whether the marketing law affixes to a commodity in interprovincial trade or local trade. The content of the marketing law is irrelevant, and hence it should not concern anyone that, as a result of a legislative adoption, all goods in trade are treated the same.

However there is some classes of subjects in the constitution which are clearly the exclusive domain of one level of government or the other. The provinces could not adopt Parliament's criminal laws (although some adoption of criminal procedure is possible), or Parliament's currency laws. But by legislated interdelegation these exclusive powers could be transferred to the provinces. Where the framers of the Constitution decide that a power should be with the exclusive domain of one level of government, it is inconsistent and illogical to then allow it to be transferable.

The feasibility of this being used in the field of broadcasting depends upon whether or not the province has any

constitutional foothold in that field. If the provincial legislatures have exclusive jurisdiction over closed-circuit cable, as was suggested in obiter by the Supreme Court of Canada, then such a scheme can be implemented. Hence Parliament could adopt all provincial communication laws which are enacted for closed circuit cablecasters and apply them where applicable to open circuit cablecasters and broadcasters. The administration of these laws can be delegated to the provincial board. However if the court ultimately decides that Parliament alone has jurisdiction over all aspects of broadcasting, including closed circuit cable, then no adoption could occur. The most that could happen is that Parliament could delegate its communication laws to be administered by a provincial board as is contemplated by Bill C-16.

The difference between the two approaches is significant, for in the former (i.e. adoption) the provincial legislature is given a greater role in forming communication policy, rather than just administering it.

At the Charlottetown Federal-Provincial Conference of Communications Ministers in May 1978, the Province of Quebec advocated a system of adoption plus administrative delegation which was analogous to that used in the field of trucking as described earlier. However that proposal either seems to ignore the vital requirement that where a provincial law is to be adopted, it must be valid in its own rights, or, it is simply assumed that the provincial law is valid. Quebec proposes therefore that Parliament enact the Bill C-X which

contains the following provisions.

> s.3(1) where in any province a licence is by the law of the province required for the operation of a provincial telecommunication undertaking, no person shall operate a federal telecommunication undertaking in that province unless he holds a licence issued under the authority of this Act.
>
> (2) The provincial regulatory body in each province may in its discretion issue a licence to a person to operate a federal telecommunication undertaking into or through the province upon the like terms and conditions and in like manner as if the federal telecommunication undertaking operated in the province were a provincial telecommunication undertaking.

Hence, in essence the provincial board could require federal broadcasters to obtain a licence from the provincial board and that licence would be granted on the same terms and conditions that licences are granted to provincial telecommunication undertakings.

But provincial telecommunication undertakings are defined in the following way:

> "telecommunications" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio or other electromagnetic system or by any optical or technical systems.
>
> "provincial telecommunication undertaking" means a work or undertaking for the purpose of providing telecommunication facilities or services for gain or profit or otherwise, not being a federal telecommunication undertaking.

The problem with this definition is it assumes that the province has jurisdiction over these provincial telecommunication undertakings. Although at one time there may have been some doubt, there no longer is, as a result of the two Supreme Court of Canada decisions, Capital Cities and Dionne. Hence if the province has no right to require such a "provincial telecommunication

undertaking" to obtain a licence to operate and stipulate the terms of such a licence, then Parliament can not adopt such a law to be applicable to federal undertakings.

If the province does have jurisdiction over closed circuit cable then this scheme can work if a provincial telecommunications undertaking is redefined to mean only closed circuit cable undertakings. It could arguably be implemented even if there were no closed circuit systems in existence or in operation as long as there were laws in existence for them. However if this last area of the communications field is held to be also within exclusive federal jurisdiction, the whole scheme would collapse. Parliament could not adopt provincial telephone laws and apply them to federal broadcast undertakings. This would be like pouring gravy on your cornflakes.

In sum, if the field of communications becomes totally within the federal domain, the adoption/delegation scheme will not work and the only recourse will be simply to administrative delegation as in Bill C-16. If there is recognized a need to allow some provincial jurisdiction in this field, then the choice should be toward some measure of concurrency entrenched in the constitution, rather than allowing legislative interdelegation. The latter is not only antithetical to a federal constitution but it knows no bounds and can be used indiscriminately in all areas of the constitution, rather than in only those areas in which concurrency is desirable.

Appendix A

Draft Federal Proposal on Cable Distribution

(as presented to the Conference of First Ministers on the Constitution, February 5-6, 1979.)

Cable Distribution

1. In each province the legislature may make laws in relation to cable distribution within the province, including the reception and re-distribution of broadcast signals; Parliament may also make laws in relation thereto for each of the provinces.

Relationships between laws of the provinces and laws of Parliament

2. Any law enacted by the legislature of a province pursuant to section 1 shall prevail over any law of Parliament enacted thereunder except in relation to the following matters: Canadian content, Canadian broadcast programs and services, and technical standards, in which case any law of Parliament shall prevail to the extent of the inconsistency.

Consultations

3. The government of Canada shall consult the government of the province concerned before Parliament makes a law in relation to cable distribution within that province pursuant to section 1.

Telecommunications undertakings

4. Telecommunications undertakings coming under the jurisdiction of Parliament as well as those coming under the jurisdiction of the legislature of a province and engaging in activities coming under section 1 other than as carriers shall be subject, in so far as such activities are concerned, to the laws enacted under section 1.

Powers continued

5. Except where otherwise expressly provided in section 1 to 4, nothing therein shall derogate from the legislative powers that Parliament and the legislatures of the provinces had immediately before the coming into force of these sections.

BILL C-"X" : An Act respecting federal telecommunication undertakings

SHORT TITLE

1. This Act may be cited as the "Federal Telecommunication Undertakings Act".

INTERPRETATION

2. In this Act,

"provincial regulatory body" mean

a) a commission, board, tribunal or other body established by or pursuant to an Act of the legislature of a province, or

b) a person designated by the lieutenant governor in council of a province,

to regulate telecommunications in the province;

"telecommunication undertaking" means an undertaking that is carried on within Canada for the purpose of providing telecommunication facilities or services for gain or profit or otherwise;

"telecommunication" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio or other electromagnetic system or by any optical or technical system;

"federal telecommunication undertaking" means a work or undertaking for the purpose of providing telecommunication facilities or services for gain or profit or otherwise, to the extent that it is subject to the legislative authority of the Parliament of Canada;

"provincial telecommunication undertaking" means a work or undertaking for the purpose of providing telecommunication facilities or services for gain or profit or otherwise, not being a federal telecommunication undertaking;

"law of the province" means a law of a province or municipality not repugnant to or inconsistent with this Act;

OPERATION OF UNDERTAKING:

3. (1) Where in any province a licence is by the law of the province required for the operation of a provincial telecommunication undertaking, no person shall operate a federal telecommunication undertaking in that province unless he holds a licence issued under the authority of this Act.

(2) The provincial regulatory body in each province may in its discretion issue a licence to a person to operate a federal telecommunication undertaking into or through the province upon the like terms and conditions and in the like manner as if the federal telecommunication undertaking operated in the province were a provincial telecommunication undertaking.

TARIFFS AND TOLLS

4. Where in any province tariffs and tolls to be charged by a provincial telecommunication undertaking are determined or regulated by the provincial regulatory body, the tariffs and tolls to be charged by a federal telecommunication undertaking in that province may in its discretion be determined and regulated by the provincial regulatory body in the like manners and subject to the like terms and conditions as if the federal telecommunication undertaking were a provincial telecommunication undertaking.

GENERAL

5. Subject to agreements between the government of Canada and the government of a province, the Governor in Council may exempt any person or the whole or any part of federal telecommunication undertakings from all or any of the provisions of this Act.

6. (1) Every person who violates any provision of this Act or who fails to comply with any order or direction made by a provincial regulatory body under the authority of this Act is guilty of an offence and is liable on summary conviction to a fine of one thousand dollars or to imprisonment for a term of one year, or to both.

(2) A fine imposed under subsection (1) shall be paid over by the magistrate or officer receiving it to the treasurer of the province in which it was imposed.

CHAPTER III

FEDERAL AND PROVINCIAL OBJECTIVES IN COMMUNICATIONS

1. Preliminary Notes

The positions of the various provincial governments on matters germane to broadcasting can be located by an examination of public statements made by these governments and by an analysis of documents submitted (or speeches made) in the course of federal-provincial negotiations. Aside from the ongoing constitutional discussions which have dealt with the division of powers in general (i.e., dealing with all aspects of government activity) between the federal government and the provinces, there have been a number of meetings in the area of communications between the federal Minister of Communications (and/or her officials) and her (their) provincial counterparts. The two most recent meetings involving the respective cabinet ministers were held at Edmonton on March 29-30, 1977 and Charlottetown on March 29-30, 1978.

One difficulty in undertaking an analysis of broadcast policy objectives is that many stated objectives operate at different levels of generality. That is, while some reference specific policies, others constitute broad statements with rather ambiguous policy implications. Using the language employed by political scientist Murray Edelman (Symbolic Uses of Politics, 1969), we might distinguish between objectives which are largely "condensational" and those which are "referential." Referential objectives have clear policy implications:

for example, the objective, "The Canadian broadcasting system should be effectively owned and controlled by Canadians" has some rather clear-cut consequences, even though it may leave open some minor questions of degree (for example, what exact proportion constitutes "effective" control?). On the other hand, an objective such as, "To safeguard, enrich and strengthen the cultural, economic and social fabric," has no definite (umambiguous) implications, since almost any government policy could be said to further this objective (in fact, proponents of two opposing and contradictory policies might claim that each indeed fulfills this objective).

It will be important in the analysis of the broadcast objectives of the federal government and the provinces to identify areas of conflict or potential conflict. This implies a greater focus on referential objectives, as it is at this level that actual conflicts are likely to arise. In practice, many objectives would likely have some elements of both of the polar types (referential and condensational) described above. And, in the case of the dispute between Quebec and the federal government, even highly generalized objectives may not be accepted by all parties involved. (For example, Quebec might dispute the objective of "Canadian ownership" by arguing for "Quebecois ownership," even though the latter may not logically negate the former).

One further distinction might be made in the analysis of objectives: the difference between objectives relating primarily to means and those relating to ends. Because of

the nature of federal-provincial negotiations, many of the objectives formulated both by the provincial governments and the federal government appear to have an explicit reference to means rather than ends. That is, objectives point not to how the broadcast (or mass programming) system(s) should be constructed or how it [they] should serve citizens, but rather in whose hands effective regulatory control should lie.

Our concern at this stage shall be more in terms of those objectives referencing regulatory/policy ends rather than means. Our assumption is that the matter of who controls what elements of that which is currently known as the broadcasting system is open for discussion and negotiation, and that objectives relating to means need not be considered as cast in stone.

However, we assume that in regards to ends there exists some continuity between past federal concerns and those which are currently operative. That is, we view as constraining factors in the current discussion, certain federal government objectives such as the need for Canadian ownership and control, and Canadian content. These objectives are, we believe, limited in number, but will be viewed as elements least subject to modification in the current discussion. We will, on the other hand, regard as more changeable those objectives which assert that the best (or only) means for implementation of a policy is through federal legislative action and/or federal regulation (that is, those objectives which by implication make this claim). The purpose of this initial analysis of

policy objectives will be:

1) To identify areas of commonality with respect to policy ends;

2) To identify areas of conflict with respect to ends, and to evaluate the degree to which these conflicts might be resolved by changes in the negotiating positions of either party (especially the federal government).

An analysis of means will not be undertaken at this point, but rather will follow as part of the scenario exercise to come later.

2. Provincial Objectives -- English Canada

For the most part, statements made by the various English provincial governments at federal-provincial conferences indicate a desire to regulate or control cable distribution systems, which are regarded by them as "local works and undertakings" (notwithstanding recent Supreme Court decisions abnegating this interpretation). The degree to which the provinces see themselves regulating programming content (as opposed to hardware and/or non-programming services) is not clear, but there appears to be some range from the position of Saskatchewan (which sees as an important aspect of its policy platform the ability to make some laws of general applicability [e.g., regarding commercials] relating to broadcasting) to that of the Maritime provinces, which view broadcast signals on cable systems as a matter of federal concern and which in

the past have conceded some advantages to a strong federal role (i.e., this would enable cross-subsidization which could benefit the citizens of the Maritime provinces). Many provincial governments have laid claim to control over content relating to pay television, which is typically regarded by the province as a closed-circuit service.

The structural conditions under which provincial governments operate also give rise to a variety of provincial negotiating stances. The Prairie provinces of Alberta, Saskatchewan and Manitoba all own intra-provincial telephone undertakings, and objectives expressed by these provinces might in some senses be interpreted as resistance to any incursions (through the regulation of cable) into territory they previously occupied themselves (through the control of the telephone system). The opposite is true for the provinces of Ontario and British Columbia, in which private telephone companies operate under federal jurisdiction. Within English Canada, this difference has in some senses been related to the degree to which each individual provincial government promotes "competition" as a desirable policy in cable television services (and, especially, pay television). The differences might, of course, also be attributed to the different ideological perspectives of the various political parties currently in power.

(a) British Columbia

The position of British Columbia at the 1978 Charlottetown conference revolved around its criticism of the (then) proposed new communications legislation, Bill C-24. British Columbia

indicated at the time that it felt a statement recognizing provincial competence and declaring intergovernmental consultation as an objective needed to be included in the legislation. Also, the province felt it should be able to designate a person to sit on the CRTC, and that such a part-time member (one from each province) should be empowered to vote on matters which (s)he has been involved in through the hearing process. (Currently, part-time members of the Commission more or less serve as geographical representatives, but are appointed by the federal government and do not have the same voting powers as are vested in full-time members.)

British Columbia regards as unacceptable, federal intrusions into the area it claims as under provincial jurisdiction (relating to non-broadcast or closed-circuit services), the following provisions of Bill C-24:

1) that the CRTC can make regulations respecting <u>any service</u> (including non-broadcast services) provided by a cable system licensed as a broadcast receiving undertaking;
2) that any service is prohibited from carriage unless CRTC approval has been obtained;
3) that the executive committee can prohibit any service if it considers the resultant competition would not be in the public interest.

British Columbia's position regarding competition (applying to telecommunications as well as cable) is that, "competition on other than natural monopoly services should be

encouraged," and that the monopoly portion of a regulated industry should not be used to create a barrier to entry by a competitor in a service offering which is not in itself a natural monopoly.

The province's stand on pay television involves a rather extensive series of policy objectives, as follows:

1) regulatory authority reside as close as possible to the end user;
2) there be a degree of competition;
3) rates be fair and reasonable;
4) benefits from the development of pay-TV accrue to the B.C. economy;
5) the people be assured of having access to information 'closely related to their lifestyles' [i.e., regional input];
6) pay TV realize its potential to offer original, unique and varied programming.

At a more specific level, the following "goals" were delineated:

a) provincial jurisdiction;
b) province to have a role in regulation of any national agency;
c) competition in licence applications;
d) licenses to be open to cable operators, broadcasters, program producers or any other private or public entity;
e) licence applicants free to select any means of distribution;

f) if monopoly in nature, the pay TV service to be subject to regulation 'in accordance with provincial standards';

g) physical plant to utilize B.C. industry;

h) programming to utilize B.C. program producers;

i) operators to be from British Columbia and preferably local;

j) majority Canadian rather than foreign content;

k) regional and local programming to be available;

l) pay TV not to duplicate theatre or broadcast programming fare.

With respect to mechanisms for the sharing of power, British Columbia is willing to "consider accepting a delegation to exercise the powers, duties or functions of the federal government," but insists that this, "in no way refutes British Columbia's jurisdiction over non-broadcast or closed-circuit services." Such delegation would have to "give the province scope to encompass provincial concerns and interest," and not merely "transfer the work and cost to the provinces."

(b) Alberta

In the Western Premiers' Task Force on Constitutional Trends (May, 1977), it was reported that Alberta recommended:

1) that cable distribution undertakings be subject to provincial law [a position also held by Saskatchewan]

2) that all cable services not involving broadcast signals be subject to provincial control [a position also held by Saskatchewan and Manitoba]

3) educational communications carried out by cable or

wire should be exclusively a provincial concern [a position also held by Saskatchewan and Manitoba].

Alberta owns its major telephone company (Alberts Government Telephones) and an educational broadcasting corporation (Alberta Educational Communications Corporation). It has, in addition to the above, at various times indicated:

1) it would like participation on the CRTC
2) an expressed need for greater provincial affairs information on broadcasting undertakings (especially the CBC) in the province
3) it claims jurisdiction over pay television
4) it is concerned about the proliferation of cable systems (especially insofar as competition in long-haul microwave with Alberta Government Telephones is possible).

(c) Saskatchewan

Saskatchewan's strong advocacy of the non-profit, community-controlled, co-operative approach to Cable television ownership has in the past led to some level of confrontation between it and the federal government, especially surrounding CRTC decisions giving cable licences to private companies (not co-operatives) in some centres in the province. The government telephone company, Sask-Tel, has taken the position that it wishes to own and rent to cable companies the hardware used for cable television. The province, through an organization called the Cooperative Programming Network (CPN), also tried to introduce a form of cable-pay-TV without CRTC approval. This organi-

zation has since gone bankrupt. Saskatchewan, along with British Columbia, recommended (as part of the Western Premiers' Task Force) that commercial content (in broadcasting) should be subject to provincial laws of general application (with the possibility of formal delegation to an appropriate federal agenda if arrangements with individual provinces were made). The term "general applicability" undoubtedly refers to legislation such as that regarding advertising (provincial involvement occurring under the purview of provincial consumer legislation). Saskatchewan has claimed jurisdiction over pay television, educational television, and to some extent, "local broadcasting," with some expressed willingness to share responsibility in areas other than pay TV. It also favours the integration of CATV and telecommunications hardware, an issue arising both from its ownership of Sask-Tel and a felt need to improve service to outlying areas (through cross-subsidization).

(d) Manitoba

In November of 1976, Manitoba signed an agreement with the federal government regarding respective areas of responsibility. While it is not clear that this document has any legal status (e.g., as a mechanism for delegation), it does clarify provincial claims somewhat; services defined as "programming" are to be within the purview of the federal government while those defined as non-programming are to be the responsibility of the provincial government. (The CRTC was not a party to this agreement.) Elsewhere (the Western Premiers' Task Force), Manitoba agreed with other provinces: 1) that

cable services not involving broadcast signals should be subject to provincial control [this is consistent with the Canada-Manitoba agreement] and 2) that educational communications carried out by cable or wire should be exclusively a provincial concern. Implicit in Manitoba's signing of the Canada-Manitoba agreement is an acceptance of the concept of federal responsibility over pay-television (as a programming service). It is uncertain at this point whether this position will continue to be held by Manitoba in the face of a tendency for other provinces to argue that pay television is an area of provincial competency.

(e) Ontario

Ontario's interest in regulatory control over cable television has been long-standing. At the May, 1975 Federal-Provincial conference on Communications, the (then) Minister, John Rhodes, presented a proposal advocating provincial jurisdiction except over aspects of cable involving federal broadcast signals. At the 1978 Charlottetown conference, Ontario indicated that it wanted to licence and regulate cable, including closed-circuit services. In this regard, the province indicated a position in favour of single-tier (presumably provincial) regulation, with "clear lines of responsibility and accountability." The province also issued a series of policy objectives for the development of pay television, but stopped short of claiming provincial jurisdiction (except perhaps by implication). These objectives are as follows:

1) Pay TV should not just duplicate existing services,

but should offer choice and a greater diversity of programs and services

2) the consumer should have the flexibility to pay only for those programs he chooses to watch (pay-per-program)
3) pay TV must guarantee broader access to distribution systems and audiences for Canadian program producers (and cultural industries in general)
4) there should be emphasis on incentives which foster competition regarding Canadian programming and less on specific quota systems
5) cable is the preferred means of distribution although "off air" distribution may be suitable in non-cabled areas.

Generally, in the area of Pay TV, Ontario felt that "Pay TV is not broadcasting in the traditional sense" and that one should not attempt to "force-fit (pay TV) into a broadcasting mold."

Ontario's emphasis on control over cable television led it to express reservations (at the 1978 Charlottetown conference) about the way in which cable was treated in the draft communications legislation (Bill C-24); according to Ontario, cable needed to be treated in a separate part of the act. Ontario also felt that in the draft legislation the term "programming" was too vague, and ought to be replaced by a distinction between: 1) programs and 2) services; thus, stock market announcements, etc. would clearly be separated from

conventional mass media programming. Finally, Ontario was concerned that the powers of the Governor in Council (to set aside, direct or even vary decisions) be restricted in the event that power is delegated to the provinces (this currently is included in some but not all sections of the proposed act).

(f) Atlantic Provinces

In May of 1975, the Maritimes Provinces issued a working paper on Communications Objectives, which identified a number of objectives, mostly in the area of telecommunications. In the area of broadcasting/cable television, the following objective was outlined:

"To participate with the federal government in making available to all citizens of the Maritimes a broadcasting service that provides a proper balance of information, enlightenment and entertainment, which recognizes and promotes throughout Canada the unique culture of the Maritimes and which contributes to the development of national unity and regional identities."

While the Maritime paper did not recognize federal jurisdiction over cable distribution systems, its jurisdiction over the "broadcast" element of cable TV was acknowledged. The Maritime provinces also wanted "federal-provincial mechanisms" that would permit more effective participation and impact on decisions on broadcasting matters that affect the region. Objectives which appear implicit in discussions initiated by the Maritime provinces include:

1) the necessity of extending service to all parts of

the Maritimes: CBC service, 2nd language coverage in New Brunswick, alternative programming in New Brunswick;

2) a positive commitment to increased regional programming, including a regional CBC television broadcasting centre.

Nova Scotia in particular has been pressing for direct input into the decision-making process.

Newfoundland's position might be considered somewhat independent from those of the other Atlantic provinces. Its concerns revolve around the broadcast coverage problems experienced by those in remote areas of the province (especially Labrador). At the 1978 Charlottetown conference, Newfoundland presented a paper regarding "Mechanisms for Consultation" which argued in favour of regulatory consultation to parallel federal-provincial consultation (i.e., ministerial consultation).

In the area of pay television, the following objectives were outlined as part of the Final Report of the Working Group on Pay Television (Nov. 1, 1977):

New Brunswick:
- pay TV should maximize viewer choice
- should be received by as many Canadians as practicable
- should be positive force in advancement of Canadian and regional program production
- must not impair or impede off-air broadcasters in providing service
- should promote development and understanding

of Canadian and regional cultures

Nova Scotia:
- should be made available to all Canadians at equitable rates
- can be viewed as pay-as-you-use telecommunications service
- should operate in competitive environment rather than having content or structure legislated
- should play positive role in development and promotion of Canadian program production facilities
- should play role in creation of Canadian market conducive to development of Canadian talent from all regions

Newfoundland:
- should increase choice and diversity of services
- should be available without discrimination as to rates and quality of service, to all Canadians
- must be logically and consistently integrated with existing national and provincial communications systems and services.

These objectives appear to be very similar to those of Ontario; the general areas of commonality are 1) non-duplication, 2) pay-per-program (Nova Scotia), 3) regional production, and 4) competition (Nova Scotia).

3. Objectives of the Province of Quebec

Quebec's objectives in broadcasting are outlined 1) in a 1975 document entitled, "Quebec, Master Craftsman of Its own Communications Policy," 2) position papers concerning mechanisms for consultation, competition, pay television and proposed federal legislation (all of which were presented at the federal-provincial conference on communications in Charlottetown in March of 1978), 3) comments made by the Quebec Minister during the Charlottetown conference.

For Quebec, communications objectives can be subsumed under the general objective of, "achiev(ing) political sovereignty together with association with our Canadian friends in areas of mutual benefit to us" (Opening Address by Hon. Louis O'Neill, Charlottetown, March 29-30, 1978). Quebec concedes that there are areas of mutual concern over which Quebec is not making a complete jurisdictional claim in broadcasting, namely, 1) allocation of frequencies, 2) services available to respective minority groups, 3) the establishment of international tariffs (this latter item applicable to telecommunications and not in itself very germane to broadcasting). To this list, the discussion of the Quebec delegation at the Charlottetown conference seemed to indicate that Quebec would add, as part of a power-sharing arrangement under the "St. Laurent" formula, regulatory authority over federal undertakings such as the Canadian Broadcasting Corporation and certain (as yet unspecified) crown corporations regulated by the federal government. (cf. Quebec presentation, "Federal Legislation

and the Delegation of Powers"). It is not clear, however, that this arrangement for the division of powers was seen to be satisfactory to Quebec in the long-run. That is, the proposed division (à la St. Laurent) was to constitute an interim arrangement to be made pending a more "satisfactory" solution (i.e., constitutional and political changes vesting in Quebec greater if not complete legislative jurisdiction). Whether, in the ultimate scheme of "sovereignty" envisaged by the Quebec government, the Canadian Broadcasting Corporation ("and other federal crown corporations") would come under the purview of the Quebec regulatory board, remain under federal control (subject to mechanisms of consultation) or simply be dismantled entirely is, at this point, unclear.

In addition to the above claims respecting the division of powers, Quebec, during the Charlottetown conference, elaborated on two areas of fundamental disagreement with the federal government. The first of these concerned federal communications objectives, and the conception of the "single system" as embodied in the Broadcast Act of 1968 and carried through to the draft Bill C-24 which had just been given first reading prior to the conference. The appropriate clauses in that proposed legislation are:

> 3(e) Broadcasting undertakings in Canada make use of radio frequencies and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system . . .
>
> 2(1) "Broadcasting" means any radiocommunication in

> which the transmissions are intended for direct reception by the general public;
>
> "Broadcast undertaking" means a telecommunications undertaking that provides a service of broadcasting reception (in this Act called a "broadcasting transmitting undertaking") and includes a broadcasting network operation.

This phraseology remains unchanged in the more recent version of the new Communications legislation (Bill C-16, given first reading in November of 1978). The Quebec criticism was stated as follows:

"The decisions start from the artificial principle that cable distribution and radio and television must necessarily form part of an indivisible system and they justify this more by economic, technical and pragmatic criteria than by actual analysis of the medium and its role or its roots in Quebec life." (Federal Legislation and Delegation of Powers).

The second criticism which was levied at the federal government related to the matter of the ability of the federal executive to intervene in CRTC decisions (specifically, by setting aside or referring back certain types of decisions). The Quebec government was concerned about the "practical consequences of the application of certain sections respecting the powers which the federal government intends to take in regard to a new CRTC." According to Quebec, "To permit the executive power to intervene . . . would involve an intrusion of one authority upon another and would contravene the

principle of separation of powers."

This regulatory principle, then, is not consistent with the manner in which Quebec operates the Regie des Services Publiques, in which the government (executive) is responsible for setting policy but the Regie has the sole authority over decisions implementing that policy. Mme. Sauvé's response to this issue at the conference was that the power to overrule the CRTC has been rarely invoked, but M. O'Neill did not accept that response, stating that the important issue was the principle that intervention could take place.

Behind this concern of Quebec's, one might read (by implication) the message that Quebec would have a concern in the division of powers under situations in which the latter does not have legal jurisdiction (i.e., delegation). Specifically, Quebec would clearly be concerned that, if the Regie were to regulate some areas of that which is currently called "broadcasting," the federal government would not be able to overturn individual decisions.

The two issues of "single system" and "executive intervention" would appear to relate mostly to means of implementing policies, rather than policy ends. Yet, the "single system" issue also touches on the developments of policy objectives related to ends: specifically, the issue is whether or not a separate set of objectives should be devised for broadcasting, and cable television (to this, one might either add or subsume pay television, closed-circuit services, etc.). The Quebec government appears to be arguing that there ought to be a

separate set of objectives for broadcasting and cable, although it is unclear whether they are insisting that the federal government issue two sets of objectives. It is conceivable, for example, that the federal government could issue a broad set of objectives for both broadcasting and cable, and leave to the provinces the ability to set their own objectives for each respective area (separately). From a pragmatic (i.e., control/regulatory practice) standpoint, however, the implication of Quebec's statements are clear: the federal government must not insist that the provinces treat broadcasting and cable as a "single system." That is, the provinces (or at least Quebec) must be given the ability to exercise a separate policy over cable television.

In some senses, the issue of the degree of differentiation between broadcast and cable objectives would appear to be even stronger in provinces other than Quebec. Given Quebec's claim for sovereignty over all areas of communication except certain narrowly specified areas of "mutual concern," it is not clear if this claim were honoured that federal objectives should be very wide-ranging. In fact, except for those objectives relating to management of the frequency spectrum and the operation of the CBC, it would appear as if Quebec would argue that there is not much of a role for federal objectives at all, except insofar as they can be subsumed under Quebec's own cultural imperatives.

For the other provinces, most of which are demanding a role in cable television, this situation is less pronounced.

Many provinces concede continued federal control over broadcasting, but are requesting to have power to develop and implement policies in the area of cable television. Effectively, they are stating that the federal government should not regard broadcasting and cable as a single system (except perhaps insofar as cable carries broadcast signals), but should make objectives regarding broadcasting and leave to the provinces the formulation of cable policies. Certainly, in the instance in which the federal government has (almost complete) regulatory control over broadcasting but only minimal control over cable television, two sets of objectives become very necessary.

Quebec's current thinking with respect to communications policies might best be understood by a review of its position with respect to pay television (this position was tabled at the federal-provincial converence on communications in February of 1978 as the recommendations of the (Quebec) steering committee and working group studying pay television).

The general objectives stated in this document are paraphrased as follows:

1. Access be provided to "all elements of society."
2. Existing communications infrastructures be employed in the development and operation of Pay-TV.
3. Activities of private concerns provide maximum benefit to the public.
4. Quebec-based ownership and management.
5. Pay-TV contribute to the development of the audio-

visual production industry in Quebec

6. Quebec culture be protected and promoted.

The actual text of the third objective listed above is as follows: "While respecting free enterprise within the economic system, the State must ensure that the activities of private concerns provide maximum benefit to the public." This is consistent with the interventionist strategy seen by Quebec as key in the attainment of the province's cultural objectives. That is, while Quebec accepts the idea of development in the private sector of communications, it appears to be more willing than other provinces (most notably Ontario) to subsume the activities of private enterprise under larger cultural objectives established by the state. This also implies ensuring that the State plays an active role in the development of communications systems (rather than passively reacting to the development of technological systems regarded after the fact as faits accomplis).

Much has been written about the special role the (provincial) state has played in the development of Quebec since the "Quiet Revolution." (cf., H. Guindon, "The Modernization of Quebec and the Legitimacy of the Canadian State" in Glenday, Modernization and the Canadian State (Toronto: Macmillan, 1978). Quebec's current pronouncements appear to be a (consistent) continuation of past policies which have evolved since the early 1960's and presaged the position not only of the Parti Québeçois but also other political parties in that province.

A summary of some of the more important proposals pertaining to pay television which Quebec included in its working document are as follows:

- pay-per-program (vs. pay-per-channel) to be favoured if economically feasible
- pay television to be "separate from all other goods or services provided by the cable distribution system"
- administration and management to be handled by a central agency
  - this agency shall have no production infrastructure
  - this agency have exclusive rights
  - agency to be non-profit & private
  - agency to be exclusive property of pay TV broadcasters
  - agency to be regulated by the public service board (Regie)
- access to the pay TV market in a given territory to be given to a single broadcaster (term "broadcaster" does not refer to "official broadcaster")
  - the pay TV enterprise is not to be given to a newspaper, telephone, telegraph, radio, television, cinema or drive-in theatre operation
  - cable distributors, if given a pay TV franchise, are to operate through a separate (provincially incorporated) concern
  - 2/3 of the Board of Directors must be residents of Quebec
  - all members of management must be residents of Quebec

- the headquarters of all such enterprises must be in Quebec and use French as a working language
- French language programming is to be given priority
- French-language and Quebec-based programming is to reach a minimum of 50% of content "as soon as possible"
- 80% of all programs should be in French (20% max. other languages)
- a portion of the revenue be redistributed to Quebec programming industry
- programming should not duplicate conventional broadcasting fare
- no advertising to be allowed
- no direct broadcasts except for sports
- 2/10 rule for movies except Quebec productions (i.e., not until after 2 years, no more than 10 years old).

It might be argued that some of the general thrusts of the tentative Quebec policy towards pay television are similar to those of, say, British Columbia (albeit more strongly worded). Hence, for example, the general objectives regarding regional ownership are common in that British Columbia cited as one of its objectives the need for regional (B.C.) content, control and ownership. Also, on the matter of the relationship between regular broadcasting and pay television, the policies of the two provinces are somewhat similar. What differentiates the two, however, is the strength with which Quebec appears to be intent upon applying its regulations (assuming it is capable of exercising control), and the degree of specificity

contained in the Quebec pronouncements. Evidently, the detail accorded the Quebec policy, and the degree to which these policies are very pronounced (e.g., the 2/3 rule for directors) is a reflection of the concern, within Quebec society, for the preservation of a culture seen as threatened by the onslaught of American cultural content. In the words of the Quebec minister,

> "Indeed, what has been called the communications revolution, marked by the instantaneous and multiple conveying of messages, leaves the Quebec society increasingly exposed to the culture surrounding it comprising two hundred million English-speaking persons. The often attractive and virtually exclusive proximity of American culture makes the close association between communication and culture even more apparent."

Survey research in Canada seems to indicate that the concern over the influence of American culture is more pronounced in Quebec, even though the products of that culture are less available there.

This is not to suggest that the concern over the influence of American culture is not present elsewhere in Canada, or that the ideal of attenuating the influence of American society on Canada is not consensually held across Canada. But it would seem that the degree of urgency attached to policies designed to counter external influence on Canadian culture (English-

and French-speaking respectively) is more severe both on the part of Quebec politicians and on the part of the attitudes held by the Quebec population. This difference between English and French Canada is an important one which must be considered in the evaluation both of the objectives of individual provinces and of current and projected national objectives. (The relationship between Quebec objectives and federal objectives will be discussed in more detail below.)

Federal Objectives

The objectives currently held by the federal government are elucidated in section 3 of Bill C-16, the current version of the new communications legislation. Those objectives which relate in whole or in part to broadcasting in this section are (a), (b), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n). Much of the wording in the broadcast objectives of this section is identical to that contained in section 3 of the 1968 Broadcast Act, although there have been some changes. The contentious pronouncement involving the "single system" concept is contained in sub-section (e) of section 3. It is perhaps ironic that, according to some analysts, part of the intent of the terminology "single system" was in response to the criticism, originally levelled by the Liberal Party at the ruling Conservatives with the Broadcast Act creating the Board of Broadcast Governors, that the establishment of a separate regulatory body (vs. regulation by the CBC) fragmented the broadcasting system (into private and public sectors) and thus diminished its capacity

to respond to Canadian needs. The other objectives outlined in the proposed act are summarized as follows:

a) To safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

b) Radio frequencies are public property.

c) Broadcasting as single system; system to be effectively owned and controlled by Canadians.

d) Programming should be varied and comprehensive; balanced opportunity for expression of differing views on matters of public concern; to reflect diversity of cultural and social values.

e) To use predominantly Canadian creative and other resources.

f) Right of freedom of expression and right to receive programs.

g) Fees charged by broadcast receiving undertakings (cable) should be equitable.

h) Canadians entitled to service in both languages.

i) A set of special objectives for the national broadcasting service.

j) Priority to national broadcast service objectives if conflict arises.

k) Facilities to be made available for educational programming if requested by provincial authorities.

l) Canadian control of telecommunication systems and services through ownership or regulation.

(For the exact wording of these objectives, the reader is referred to Appendix A.

These objectives operate at different levels of generality,

and in some cases, those which are enumerated in the proposed act constitute, in fact, more than one single objective (e.g., right of freedom of expression and right to receive programs). Those objectives which have important and direct policy implications, aside from the "single system" concept, are:

- Canadian ownership and control
- programming to be varied and comprehensive, and balanced
- use of predominantly Canadian creative and other resources
- right of freedom of expression
- right to receive programs
- equitable fees for cable television
- service in both languages for all Canadians
- the various objectives established for the C.B.C.
- paramountcy of C.B.C. objectives.

According to an evaluation prepared by Jean-Paul L'Allier and Associates, the two areas of contention between the federal government (from objectives as stated in the original Broadcast Act) and the aims of the provinces (i.e., Quebec) are: 1) the "single system" concept and 2) the concept of the availability of service in both languages to Canadians. The authors proceed, however, to indicate that the latter objective -- availability of service in both languages -- poses no practical problem inasmuch as this objective has already been achieved through the operation of the C.B.C. As indicated elsewhere, there do not appear to be any current objections to the operation of

(and continued federal authority over) the Corporation.

None of the provinces would appear to have any objections to the Canadian ownership and control objective. Insofar as some provinces have regional ownership and control objectives, the Canadian ownership objective would logically be met. The same applies to the concept of the use of Canadian talent (creative and other resources).

The objective of achieving varied and comprehensive programming, and the objective of the "right of freedom of expression" operate at higher levels of generality than some of the other objectives. The precise definition of "balance" has, indeed, been the subject of some concern on the part of the Canadian Radio-Television (and Telecommunications) Commission (witness the debate over the "Air of Death," the CHNS controversy over a commentary about "Miles for Millions," the anti-Bill 22 campaign of CFCF in Montreal and the Committee of Inquiry into the National Broadcasting Service). If, in some move to delegate power, the federal government wished to retain sufficient control to ensure that this objective could be met, it would have to specify this objective with a far more precise definition than currently exists in the present or proposed legislation. What performance implications follow? The CRTC has itself debated the issue of whether or not "balance" implies that each element (e.g., each broadcaster) must provide balance or whether, instead, it is merely the system as a whole which must provide balanced programming. Two considerations come to mind: first, there appears to be no a priori reason to suspect that the

provincial governments would not have the same sort of general commitment to balance, and second, that if the federal government retained control over some elements of broadcasting -- for example either all regular broadcasting (using Herzian airwaves) or even just the CBC, it could presumably redress perceived imbalances through those elements it has authority over.

If on the other hand, the federal government wishes to imply in this objective that every programming element (broadcast, cable distribution of closed-circuit) must provide balanced programming, then the issue returns to that of specifying a more precise meaning of balance. Otherwise, there are two polar options available to the federal government: 1) trust in provincial agencies the ability to make decisions as to whether "balance" -- however nebulously defined -- exists, or 2) to retain some sort of a veto by which provincial decisions can be overturned. It is likely that no provincial agency or government would accept the sort of potential interference implied by veto powers granted on the basis of "ensuring balance," as almost any sort of intervention could be so justified. Generally, the same holds true for the concept "right of freedom of expression."

A similar consideration also holds for the objective, "equitable fees for cable television," although here one has an issue dealing with an industry which might, under some future forecasts, be placed solely within the purview of the provinces. The adjective "equitable" is somewhat ambiguous.

As stated, it does not necessarily imply complete cross-subsidization (a single rate for service in all areas), nor can it be said to necessarily imply complete cost-recovery (i.e., no cross-subsidization whatsoever). What, then, does the term "equitable" mean in this context? As with the previous objectives, this objective could be used to justify federal intervention, yet it need not necessarily do so. Perhaps the problem with retaining this sort of objective in a set of federal objectives is that one might read in it an implicit claim for federal control over cable television (i.e., "to ensure rates are reasonable"). If the purpose of this objective is primarily peremptory, then we need continue the discussion no further. However, it is more likely that the objective is a statement of support for regulatory intervention <u>of some sort</u> in the process of rate-setting in what is a fundamentally monopolistic industry (i.e., one in which there is a need to protect consumers from the abuses of monopoly power). Given this recognition, it would seem to follow that this objective would be met under any circumstance in which the rate-setting process is adjudicated by a public authority with decision making power, and it would not seem to be terribly important whether that agency were federal or provincial. If, on the other hand, the federal government wishes to further specify what it means by equitable rates (e.g., one universal rate), potential for conflict would likely emerge.

The objectives discussed thus far (excepting the "single system" concept) would not in themselves appear to be antithetical

to provincial control over some or all sectors of what has thus far been referred to by the federal government as "broadcasting" (i.e., cable television and regular broadcasting). It would not appear to be the case that any provincial government would dispute the objectives as worded, except perhaps insofar as one might (for example) read into an objective of federal control (e.g. when the term "ensure" is used) the implication that the federal government must retain power to indeed "ensure" the objective will be met. With the exception of the Canadian content and control objectives, much of the complementarity between federal objectives and provincial objectives stems from the generality of the former. It may well be, however, that if the federal government were to wish to state more specific objectives, consensus would dissolve into conflict. If it becomes the intent of the federal government to consider seriously a division of powers in broadcasting/cable, then it would be important not to specify these objectives in a more detailed form, leaving them as general statements of consensus among levels of government, the specific ramifications of which could be decided upon by the provinces.

The concept of service in both languages for all Canadians may be the cause of some potential friction in certain areas of the country. In Quebec, opposition might be raised to any attempt to use scarce broadcasting frequencies to further disseminate English culture in that province (with the presumed attendant consequence of the further erosion of French culture). In English-speaking areas where the proportion of French-speakers

is low, there might similarly be opposition to the establishment of French media outlets (witness, for example, the outcry in Toronto when CBLFT's introduction affected the order of priority of American television stations on cable in that city). Two issues arise here: a) what degree of paramountcy or priority is attached to this objective? b) what are the premises upon which this objective is based.

It would appear that the concept of second language service is a consistent theme in all federal government policies stated thus far. It would be quite beyond the purview of this study to provide a comprehensive evaluation of this policy as it applies generally to the provision of government services, the right to a trial in one's own language, educational services, as well as broadcasting. It might be noted in passing, though, that a body of demographic evidence suggests a continuing pattern of assimilation over a period of a couple of generations in those areas of Canada to which official language minorities have emigrated. That is, with the possible exception of a few narrow "bilingual belts" in the country (and perhaps there too assimilation is the dominant tendency), the active use of the second language is maintained only by continued immigration -- those whose families have spent a couple of generations in the milieu of the majority language tend not to speak in the tongue of their ancestors (cf., Coon et al., The Individual, Language and Society in Canada (Canada Council, 1977), especially the article by deVries; also, Richard Joy, Languages in Conflict (Toronto: McClelland and Stewart, 1972) and Canada's Official

Language Minorities (C. D. Howe Research Institute, 1978). This situation also appears to apply to the English minority in Quebec.

There are, of course, reasons other than the maintenance of language and culture for which one might want to ensure second language service" to ease the transition for immigrants and ultimately (but ironically) facilitate an assimilationist strategy. Alternative (and more realistically), one might see a strong symbolic attachment to the concept of equal rights and from this attachment evolve a bilingualism policy designed more for expressive than for functional purposes.

It appears unlikely that the federal government would be prepared to alter the objective of providing second language television and radio service throughout the country. Even the Task Force on Canadian Unity, which argued in its report for a strongly decentralized state (as evidenced by its recommendation that residual power be vested in the provinces) retains this objective as a subset of its first recommendation (1. - v). (cf. Report of Task Force on Canadian Unity).

Perhaps, though no real conflict would emerge from this objective if it is left to the federal government to implement it through the provision of funds to the C.B.C. In this sense, the objective has been largely accomplished; the networks are for the most part in place, and second language transmitters exist in most major centres in the country. Does the existence of second language service (much of it on UHF TV) imply this objective has been fulfilled, or must "available" take on a

stronger meaning, to incorporate the concept of priority on cable service, availability of second language service in the realm of pay television, etc.

If the objective is deemed as having been fulfilled by the simple existence of regular broadcast facilities in a second language, then perhaps the question becomes a non-issue; the service in already largely in place and there does not appear to be any major dissatisfaction on the part of the provincial governments (even Quebec). It is largely in the matters of cable television and pay television that the issue of second language service could become a source of disagreement between the provincial and federal levels of government. Must the second language service be assured carriage priority on cable television systems? Must pay television provide second language service? Should provincial government control over either or both of these areas be contemplated, federal objectives regarding second language service should be clarified.

If one might make a cautious inference from the objectives Quebec formulated for pay television, it would appear as if the provision of a full-time English-language pay TV service in Quebec might imply conflict with Quebec's policy intentions. Likewise, federal rules regarding the priority of broadcast signals on cable could lead to some form of conflict in this area. Should the federal government, on the other hand, accept the existing provision of second-language service as sufficient to fukfill the stated objective, there would appear to be little room for conflict.

Similar issues arise from those federal objectives relating to the C.B.C. While all provinces would appear to respect the federal government's exercise of complete authority over the C.B.C., should the federal government wish to extend the paramountcy the C.B.C. enjoys under the Broadcast Act (in principle, at least) to a special priority in terms of cable television channel allocation, one might envisage some disagreement at least on the part of Quebec (which might argue that it ought to have complete discretion over the priority of channel allocations on cable). This issue might have to be explored specifically in any negotiations attending the division of powers.

The one objective which has not been considered thus far is the "right of persons to receive programs." It would appear, from an analysis of the Parliamentary debates preceding the passing of the 1968 Broadcast Act, that this clause was inserted under pressure from cable television operators. Specifically, it appeared to refer to the "right"of cable operators to enable their customers to "receive" programs which they could in turn pick up off the air. That is, this clause, rather than protecting individual rights, appears more to protect the interests of the cable television industry which was (and is still) based primarily on the reception of broadcast signals. How much can be read into the wording of this objective? At one level, it could be deemed simply to imply that individuals should not be prohibited from picking up signals off air.

There would appear to be no opposition whatsoever to this sort of objective, in that almost all Canadians would find

abhorrent the idea of state control over the individual listener/viewer. Where, however, the objective takes a stronger meaning, some potential conflict does arise. Hence, if the objective is interpreted to mean that cable operators should be allowed to carry all American signals (albeit as distant signals) normally available off-air (consistent with current CRTC policy), one province (Quebec) may object to the resultant English-French imbalance that might be created, and the undesirable nature of the importation of American television signals into certain areas in Quebec near the American border (most notably Montreal where a variety of English Canadian signals can already be received). But the objective becomes even more contentious if used to imply that cable operators should have the "right" to operate microwave distribution systems (or at least to lease facilities) to import distant (American) television signals.

Currently, the CRTC has acceded partially to this interpretation by permitting microwave importation in most situations (excepting those in which second service -- CTV in English Canada -- is not yet available), although there are some limits to the number of signals the CRTC permits. This CRTC policy, it might be added, followed considerable pressure on the part of the cable industry after an original CRTC ban on microwave in 1969. The objective of <u>extending</u> the availability of "additional choice" -- i.e., American channels imported via microwave -- seems to be part of the policy of most English provinces. Except with regards to some details as to <u>how fast</u>

such service becomes available, and the nature of cross-subsidization schemes, there appears to be no major dispute between any of the English provinces and the federal government's current policy (as made operational through the rules the CRTC has devised). But with respect to Quebec, one might see the "right to receive programs" as causing some potential difficulty. It is not at all clear that Quebec would concur with this "right" insofar as it applies to the importation of more English (American) programming in that province. Such a move would, it seems, be viewed by Quebec as being a further (and dangerous) erosion of Quebec culture, which would simply not be acceptable.

So while the "right to receive programs" would have complete consensual support if left to operate at its weakest level (the right of individuals to receive programs off-air), using stronger levels of interpretation (the right of cable companies to provide signals), this objective may have to be qualified with respect to Quebec. The intent of this objective needs to be clarified. If given only the weaker meaning, the objective might be reworded to state, "The right to receive programs generally available." If, on the other hand, the intent leans towards the stronger meaning identified above, consideration must be given to the possibility of conflict between the federal government and Quebec.

5. The Policy-Making Activity of the CRTC

A discussion of federal objectives would be incomplete without at least a cursory examination of the policies enunciated by the Canadian Radio-Television (and Telecommunications) Commission, as well as those policies which, rather than having been directly stated, have been implied by past CRTC decisions.

Some of the Commission's activities -- such as the recent announcement concerning "Non-Programming Services by Cable Television Licensees" (26 March 1979) -- might be regarded as peremptory in nature (that is, a move on the part of the Commission, or the federal government in general, into an area subject to some jurisdictional dispute). More important, though, is the nature of the policies themselves: do these policies, as reflections of federal concerns, differ from that which might be expected under provincial control? Where do conflicts (or potential conflicts) exist between the objectives of the Commission (or, perhaps more legalistically, the interpretation of federal objectives given by the CRTC) and those of the provinces?

A detailed review of CRTC policies will not be undertaken at this point. However, some of the more salient policies -- at least in terms of federal-provincial negotiations -- currently in effect will be examined briefly. Three areas will be considered at this point: 1) policies relating to "balanced and diversified programming," 2) policies respecting non-broadcast programming services on cable television, and 3) policies regarding pay television. To some degree, these issues overlap.

The CRTC's policies respecting "balanced programming" are

long-standing, and seem to indicate the Commission's desire to impose upon each broadcaster the requirement that balance be achieved. The Broadcast Act itself merely states that the "Canadian Broadcast System shall provide a balanced opportunity . . ."; that is, it does not indicate specifically that such a balance be maintained within each broadcast unit, but rather that it be maintained on an overall basis. Obviously, the CRTC's interpretation of this objective is one in which it is not deemed feasible to implement the overall objective without imposing a "balance" requirement on each and every broadcaster. This policy is outlined quite explicitly in the CRTC's announcement concerning CHNS in Halifax, and in the announcement concerning the CBC program "Air of Death" (Public Announcement of July 9, 1970): while any particular program need not provide a completely "balanced" look at issues ("honest bias" being permitted), a station's (or network's) programming as a whole must do so. Other CRTC regulations -- that all FM broadcasters program "foreground format" programming, for example -- also reflect this orientation.

The implication of the CRTC position on the previous discussion regarding "balance" and "diversity" of programming services is that the notion, discussed above, of the federal government using some elements (broadcaster undertakings) to "counterbalance" any bias in the system introduced by other elements in the system (e.g., cable undertakings not under federal control) would be seen as an unacceptable response to the problem. That is, to uphold an objective of balance for the

entire system implies, in the eyes of the CRTC, a need to uphold balance in each individual element.

The CRTC does not, however, extend its concern for "balance" to cable television undertakings (i.e., services provided by cable operators) because, in its words, "cable television licensees do not produce the type of programming or make the kinds of programming and editorial decisions that give rise to the concerns about content and diversity of programming" (CRTC Decision 79-9, concerning Rogers Cablesystems Limited and Canadian Cablesystems). (Curiously, in the same decision, the CRTC supported a cable takeover bid citing, among other advantages, a somewhat expanded programming role the initiator of the merger was proposing.)

Even though each individual broadcaster is responsible for "balance" and "diversity," the CRTC also has a concern at the systemic level, such that concentration of ownership is seen as problematic (cf., CRTC decision 78-669). The Commission specifically exempts cable television from this consideration, however, in that the Commission's policy is to limit the role of (monopoly) cable operators to minority interest programming (e.g., community channel, childrens' programming, etc.) which will not presumably compete with over-the-air broadcasting. (Whether one can thus ignore the issue of balance simply because the target audience is smaller, is perhaps arguable.) While revised policies are currently being considered (cf., CRTC public notice of 9 February 1979: "Concentration of Ownership"), the CRTC's past stance regarding ownership

(justified in terms of the problem of balance and diversity) has been that "except in special circumstances television undertakings should be independent of cable television undertakings, both as regards ownership and control and as regards substantial shareholdings" (CRTC Decision 74-58). A similar concern has been expressed by the Commission regarding broadcasting undertakings and newspapers in the same market.

Much of the issue of "balance" revolves around the degree to which federal objectives are seen to apply to all aspects of programming (the "single system") or just some of them. If, on one hand, CRTC-style objectives are applied only to those areas defined as a federal broadcast system (this could be as little as the CBC or as much as broadcast, cable and closed-circuit), then no problem is created. However, should the federal government wish to retain the CRTC's orientation towards balance in the broadcast system, conflicts emerge in relation to the retention of control in federal hands.

While the CRTC's policy of not being concerned about balance in cable programming (the CRTC is not extending "balance" criteria to cable programming), in some senses mitigates the seriousness of the issue, the underlying premise -- that cable systems should not provide significant forms of programming -- needs to be examined for implications in the area of the division of powers between the federal government and the provinces. It is true, on one hand, that some provinces have the objective of ensuring that pay television does not duplicate existing broadcast fare (which is not the same thing as saying it should be

restricted to minority -- i.e. insignificant -- audiences!). But it does not follow that a similar objective would be applied to cable television (locally-originated) services in general. That is, the provincial concerns for non-duplication appear to stem not from the sort of protectionistic attitude characteristic of the CRTC (whose avowed aim is to ensure broadcasters are not threatened), but rather from the standpoint of consumer protection: the provinces wish to ensure that services currently available free of charge do not become "pay" services in the future (this issue is commonly referred to as "siphoning"). And some provinces -- such as Ontario and Saskatchewan -- view cable as having the potential to offer an expanded range of new (presumably programming) services which they would like to see developed. (Further comments on this issue are, of course, difficult, pending some clearer definition of what these services might be, aside from pay television).

It is clear from a reading of the Commission's 1975 Policy Statement on Cable Television (updated on 26 March 1979) and its statement regarding Pay Television (Report on Pay Television, March 1978), that the CRTC gives priority to the objective of ensuring that any new service provided does not prejudicially affect revenues (or even potential revenues) of existing broadcasters. From this objective, policies prohibiting advertising and mass appeal programming have arisen. Even in the relatively insignificant area of closed-circuit audio programming, the Commission recently reiterated, in its policy statement of 26 March 1979, its position that such services: 1)

must not imitate off-air broadcasting, and 2) must not contain advertising (an exception was recently made in the case of programming not done in English or French).

The CRTC objective of limiting the development of "competing" services on cable television would appear to come in direct conflict with some of the stated intentions of various provincial governments. Indeed, one might read into provincial objectives pertaining to "competition," a desire to criticize the CRTC's policy of restricting competitive development. From the perspective of federal policy, though, the issue of the potential diminuation of broadcaster revenues under any more "relaxed" policy must be addressed. If cable television and/or pay television, ceases to fall under federal control, and if no overriding federal guidelines are implemented (e.g., provincial regulatory control, but with some small set of federal rules, such as a ban on advertising), then it is not inconceivable that there will be the potential for financial damage to existing broadcasters. Insofar as one of these broadcasters, the CBC, relies mostly on federal funding, an obvious remedy exists: if the federal government is concerned that not enough money is going into, say, Canadian broadcast production, it can increase the Corporation's budget to do so (or, alternatively, fund programming agencies which would produce programs for the Corporation). In light of the recent $71 million CBC budget cut, however, the stark reality of CBC's continued reliance, at least in the short run, on advertising revenue (not just for itself but also to sustain affiliates

which it cannot afford to "buy out") needs to be considered. The situation respecting private broadcasters is even more dramatic, in that in this case there is a complete reliance on advertising revenues. However, it is unclear whether the protection of private broadcasters should,in itself, be considered an objective.

In the case of the CBC, there are a number of objectives -- the extension of service to all Canadians, the provision of second language service, etc. -- which the corporation fulfills uniquely. There is also an important objective common to the entire broadcast system (as envisaged in previous Broadcast Acts) which it alone is largely responsible for achieving (or attempting to achieve) -- namely, the employment of Canadian creative resources. To dismantle the CBC would have direct implications in terms of these objectives. On the other hand, the role of private broadcasters in achieving any of the objectives mentioned in the Broadcast Act -- including the employment of Canadian resources -- has been debated heavily in the past. We would be loath to suggest that private broadcasters have not worked towards extending service to remote areas in the country (where it is normally unprofitable for them to do so), yet the CBC plays the pre-eminent rolė in this regard with its Accelerated Coverage Plan. Nor would it be accurate to say there has not been <u>some</u> Canadian production on private networks, although this level of production has, according to many observers, been incredibly low, and the <u>net</u> effect of the operation of the private networks (e.g., the introduction

of Global) may well have been simply the greater availability (in absolute and perhaps even relative terms) of American programming as a proportion of the peak viewership period availabilities.

At stake here is the degree to which private broadcasters need protection in order for the general objectives in the area of broadcasting to be best fulfilled. Would a greater reliance on cable television closed-circuit programming defeat the objectives of the federal government? Alternatively, could the federal government implement certain "covering" laws (e.g., restrictions on the importation of foreign programming) which might ensure that the objectives would be met at least as well as is currently the case, regardless of whether or not the existing broadcasters cease to exist? These issues need to be discussed further.

Perhaps the most obvious area of conflict between the CRTC and the provincial governments is in policies or policy proposals related to pay television. The issue of pay television -- especially relating to the technologies involved and to developments in the United States -- will be discussed elsewhere in the study. But it would appear relevant at this point to introduce some of the key concepts underpinning the CRTC's position on pay television. These are summarized as follows:

1) The pay television system should be predominantly Canadian.
   - there should be a minimum 50% Canadian content rule.
   - At least 35% of the gross revenues should be applied to Canadian production.

2) Maximum exhibition opportunities should be provided for Canadian producers.

3) The service must be national.

- There should be a single national network to:

a) effectively negotiate the purchase of American programming (the assumption being that bidding competition would increase the price Canadians end up paying for American products).

b) underwrite the development of a large-scale production industry (e.g., fund large-scale film projects).

c) achieve economies of scale.

4) The system must provide service in the two official languages.

In addition to the above, the CRTC made the following recommendations: (i) that the system be private, (ii) that anti-siphoning regulations be applied, (iii) that pay TV programs should be ultimately aired on regular broadcast outlets, (iv) that subscribers will be able to choose pay TV service without subscribing to additional cable services (e.g., "basic service" of off-air broadcast signals), (v) that while a system initially be "subscription" (per channel), that it move as quickly as possible to a "per-program" configuration.

The system envisaged by the CRTC is quite different from that envisaged by some of the provincial governments. A few problem areas will be mentioned at this point. First, the provision of service in two languages seems to be somewhat

unnecessary. The real issue here is service in Quebec, for it seems obvious that there is substantial pressure in English Canada for the development of pay television.

Undoubtedly, Quebec's concerns regarding pay television will be somewhat stronger than those of most other provinces (as indicated by the degree of specificity with which it has adopted a policy). Evidently, Quebec would be opposed to the introduction of pay television unless some rather strict guidelines regarding Quebec production are adhered to. At issue here might be the question of the development of a pay television network in Quebec solely to meet CRTC objectives (with the actual "pressure" for development coming from English Canada). Should a pay television network, regarded by its operator as an adjunct which is necessary in order to acquire government approval for operation in English Canada (where potential profits are higher), be a good thing for the province of Quebec or for Canada at large? This issue needs to be discussed. If one adopts a policy of encouraging the indigenous development of pay television systems in English Canada and French Canada separately, the objective of "pay TV service in both languages" may not be met in the short run (although probably, in the long run, such a system would develop in Quebec in the absence of any prohibition). But then, given Quebec's concern over its cultural environment, one might ask if, in fact, the short-term absence of pay television in Quebec would indeed be problematic.

The "national service" concept for the development of pay

television need not be antithetical to the objectives of provinces such as British Columbia, which conceded this possibility in its objectives, but the mechanism for placing such an agency under effective provincial control (all provinces appear to want a voice in, if not authority over, the development of pay television) may raise some practical problems. With respect to one of the CRTC's rationales for the establishment of a national service, it might be noted that a single, national "purchasing agency" (to purchase foreign programming and keep costs down) could conceivably operate in tandem with regional pay television agencies. This does not, however, negate the fact that there are other reasons which support the concept of a single, national pay television authority.

APPENDIX A

TELECOMMUNICATION POLICY FOR CANADA (Bill C-16)

3. It is hereby declared that

(a) efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunication services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
(b) the radio frequency spectrum is public property that should be administered in the public interest and in accordance with international agreements and conventions to which Canada is a party;

. . . . . .

(e) broadcasting undertakings in Canada make use of radio frequencies and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements, which should be effectively owned and controlled by Canadians;
(f) the programming provided by the Canadian broadcasting system should be varied and comprehensive, should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern and should reflect the diversity of Canadian cultural and social values;
(g) the programming provided by each broadcasting undertaking should be of high standard, using predominantly Canadian creative and other resources;
(h) all persons licensed to carry on broadcasting undertakings have a responsibility for the programming they provide but the right to freedom of expression and the right of individuals to receive programming, subject only to generally applicable statutes and regulations, is unquestioned;
(i) the fees charged by broadcasting receiving undertakings should be equitable having regard to the responsibilities of such undertakings as part of the Canadian broadcasting system;
(j) all Canadians are entitled to broadcasting service in both official languages as public funds become available;
(k) there should be provided, by a corporation established by the Parliament of Canada for the purpose, a national broadcasting service that is predominantly Canadian in content and character and that should

(i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,
(ii) extend to all parts of Canada as public funds become available,
(iii) use both official languages, serving the special needs of geographic regions and actively contributing to the flow and exchange of cultural and regional information and entertainment, and

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

(l) where any conflict arises between the objectives of the national broadcasting service and the interests of private elements of the Canadian broadcasting system, it should be resolved in the public interest but paramount consideration should be given to the objectives of the national broadcasting service;

(m) facilities should, if requested by provincial authorities, be provided within the Canadian broadcasting system for educational programming;

. . . . . .

(q) for the purpose of promoting the orderly development of telecommunications in Canada, there should be consultation between the Minister and the governments of the provinces; and

. . . . . .

and that the telecommunications policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system, and for the regulation of telecommunication undertakings over which the Parliament of Canada has legislative authority, by a single independent public body.

CHAPTER IV

THE SCENARIO BUILDING ACTIVITY

A. Definition, Advantages and Characteristics of Scenarios

Carney (1976) points out that the origins of the term "scenario" can be traced back to Italian comedy of the Middle Ages in which the actors improvised dialogue within the structure of a preconceived plot. More recently, of course, "the term scenario used to be the exclusive property of the motion picture world" (DeWeerd, 1974) and was used loosely to refer to the written outline of a movie. In the 1960s, the term was appropriated by the think-tank operatives (most notably Herman Kahn) and was used to denote "the detailed representation of the future outcomes of a given policy" (Carney, 1976).

The utilization of scenarios was aimed at "forc[ing] decision makers to consider alternatives and to guesstimate the results of likely interactions" (Carney, 1976). More specifically, Kahn and Wiener (1967) delineate six advantages to using scenarios as an aid to thinking:

1. They serve to call attention, sometimes dramatically and persuasively, to the larger range of possibilities that must be considered in the analysis of the future. . . .

2. They force the analyst to deal with details and dynamics that he might easily avoid treating if he restricted himself to abstract considerations. . . .

3. They help to illuminate the interaction of psychological, social, economic, cultural, political, and military factors, including the influence of individual political personalities upon what otherwise might be abstract considerations, and they do so in a form that permits the comprehension of many such interacting elements at once.

4. They can illustrate forcefully, sometime in overly simplified fashion, certain principles, issues or questions that might be ignored and lost if one insisted on taking examples only from the complex and controversial real world.

5. They may also be used to consider alternative possible outcomes of certain real past and present events. . . .

6. They can be used as artificial "case histories" and "historical anecdotes" to make up to some degree for the paucity of actual examples.

The techniques and methods of scenario construction and utilization have increased greatly in sophistication in the last several years. The basic features or characteristics have changed very little, however. As outlined by Carney (1976), a scenario has the following characteristics:

1. It provides as many of the important details as possible, systematically and in an easy-to-understand, story-like format.

2. It spells out as many assumptions as possible.

3. It tries to identify the branch-points where decisions will have to be made.

4. It highlights the points where conflict or confusion seems likely.

5. It sets out the main consequences likely to follow from a given policy.

B. Approaches to Scenario Building

The generation of scenarios normally adopts one of three possible basic approaches: problem-sensing, normative forecasting or consciousness raising (Carney, 1976). In problem-sensing, one starts from the present and traces various possibilities into the future via a set of branching tracks, each track representing a separate scenario. Normative forecasting, on the other hand, starts from a desired end state in the future and traces different possible paths back from it to the present, each path again constituting a separate scenario.

Finally, the consciousness raising approach involves generating two diametrically opposed methods of tackling a problem (i.e. two scenarios) which are then presented to the clients to discover the degree of fit between what is desired and what is likely to happen. (This last approach would seem to be the one adopted for the sake of simplicity by Richard Simeon[(1976b)] in his discussion of the possible modes of disengagement of Quebec from Canada — a subject which has also attracted the attention of futurists in France [Zorgbibe, 1975]. Toffler [(1975)]also offers two contrasting general scenarios of economic decline, although he also provides the outline for a range of more detailed ones.)

The consciousness raising approach would not seem to be appropriate for the purposes of this study, however, since only two possible futures would not adequately represent the full range of approaches to federalism that have been prevalent in Canada at one time or another since Confederation (Black, 1975). In addition, the lack of an overwhelmingly accepted future goal or end state for broadcasting (at least at a level of any great detail) was felt to invalidate the normative forecasting approach. Consequently, it was agreed that the scenario building activity would adopt a problem-sensing approach. While avoiding the negative features of the other two as outlined above, such an approach would also have the positive benefit of maximizing information about the strengths and weaknesses of possible future courses of action.

C. Uses of Scenarios

Normally scenarios are not an end in themselves, but rather are a source of information for further activities: "Building a scenario is usually only the first step in a two or three step sequence, in which the latter steps involve using the scenario" (Carney, 1976).

The follow-up techniques which utilize scenarios fall into three basic categories: those which determine when certain events are likely to happen (Delphi, Sprite); those which calculate the cost-benefit ratio of various strategies (Cross-impact analysis, Outcomes assessment); and those which estimate the likelihood of adoption of particular solutions (Analysis of options). Given the nature and purpose of the study, the second variety of follow-up technique would seem to be the most appropriate. Of the two, outcomes assessment would seem to be the preferable since "it does much the same job [as cross-impact analysis], with far less friction" (Carney, 1976). The two approaches involve a matrix which systematically explores the relationships among the variables under consideration, but outcomes assessment looks at a more restricted range of possible solutions and problems and examines costs and benefits much more explicitly. It is imperative that in utilizing this method, however, that both problems and solutions be defined precisely, otherwise confusion will result (Carney, 1976).

D. The Elements and Techniques of Scenario Building

1. Purpose

An explicit statement of purpose is felt to be the sine qua non of scenario building (Carney, 1978; de Leon, 1975). This requirement would seem to have been fully met in the study, in that the contract states that "The purpose of the study is to assist in formulating, designing, and assessing proposed or recommended changes in the division of powers and jurisdictions with respect to broadcasting . . ." It should be noted that this policy focus places a considerable onus on the investigators to produce adequate scenarios. For as de Leon (1975) points out,

> If the purpose of the game or simulation is to offer policy recommendations or implications, the scenario acquires a dominant role. Without a set of accurate and relevant assumptions and predictions in the scenario, the policy purposes would not be realized and the game must, a priori, be found worthless.

This last comment should probably be tempered by the observation that "the normal use for a scenario is NOT prediction, but the generation of reactions, of new insights and options — in short, the aim is to sensitize users to the potentials inherent in the situation that the scenario sets out" (Carney, 1978). Ferkiss (1977) makes the same point with regard to prediction in relation to scenarios.

2. Time Frame

A second important element involved in the generation of the scenarios is the period or time frame with which the scenario will deal. In this regard, de Leon (1975) notes that

the time setting "should not be so near at hand that current events can overtake the game . . . [while] the scenario must also avoid moving so far ahead that it outruns the capacity of the players to conceive a consistent future." Given this consideration, then, the suggestion that the time frame be approximately 10-15 years into both the past and the future would appear to be reasonable.

3. The Context

A third consideration has been referred to variously as the "context" (DeWeerd, 1974), the "environment" (de Leon, 1975), the "framework" or the "structure of the situation" (Carney, 1978). Basically all these terms refer to the same thing: "the detailed background from which the scenario . . . [is] drawn . . ." (De Weerd, 1974). This context includes all those groups, events, organizations and institutions which have relevance for the subject under study. It should include a "list of major elements in the situation, crucial decision alternatives and important issues" (Carney, 1976).

A difficulty in this regard is establishing an appropriate equilibrium between the detail and simplicity of the context. One must have sufficient, but not too much information, lest the writers of the scenario become taxed beyond their information-processing limits and/or distracted from their primary purpose (de Leon, 1975). This decision about detail is subject to the additional consideration of the scenario writers' background knowledge (which in this study can assumed to be high, therefore making greater detail acceptable). Nevertheless, the process

does necessitate certain abstractions and simplifications as a "model" of the "key" items is created (Carney, 1978).

A very large portion of the detailed background for the scenarios has been (is being) compiled in Sections A and B of the study. The detailed background contained therein includes:

a) A history of federal-provincial relations in the area of communications.

b) Federal and provincial powers and structures in communications.

c) A comparative study of powers and structures in communications in various foreign nations.

d) Federal and provincial objectives in communications, and their social, political, economic and cultural implications.

e) Issues related to certain communications technologies, economic matters, and content and regulatory concerns (Section B).

The pivotal role of "objectives" should probably be noted at this point. On the one hand, they play a very large part in understanding how events will unfold, since they should be assumed to guide the actions of the various governments (i.e. they are an expression of the principles or ideals on which stands will be based). On the other hand, they provide the template against which the results of the scenarios can be assessed (i.e. which jurisdictional arrangements will realize and which will frustrate which combination of objectives?).

4. "Trends"

The elements of the context listed above are basically ones that exist in the present and the immediate and distant past. Since scenarios project a future picture of some more or less specific area, some notion of the general shape of the

future in which that area will be embedded is required. Such a perspective requires that the scenarist develops "an overview of the major trends likely to influence whatever it is that [he's/she's] considering in [his/her] scenario" (Carney, 1976). One of the early devices of this sort was the "long-term multifold trends" of Kahn and Wiener (1967), the components of which are actually derived from "a common complex trend of interacting elements." As Carney (1976) points out, however, the "long-term multifold trends" takes a long time to develop properly and requires access to experts who are often difficult to reach or unavailable entirely.

A more practical device, then, is Thompson's "range tables." This technique assumes that the key elements, decisions and issues of the problem area are already known, although elements that are omitted initially and are identified as important later on can be incorporated as the scenario building activity progresses (Carney, 1976). Some items are amenable to quantification, and statistics for these items for the present and the recent past (in our case c.1969) are collected and projections for 10-15 years hence (since this is our future time frame) are made for three different conditions: things go well; things continue unchanged; and things go poorly. The other elements (assumptions, attitudes, values, etc.) have to be assessed qualitatively under the same three conditions as for the quantifiable elements (improvement, continuation, worsening). (It should be noted that the table of "trends" that was submitted in Chapter V of the first progress report,

then, was actually a qualitative range table not a long-range multifold trend analysis.)

These "trends" should not be viewed as a strict limitation on the scenarists, however. As Carney (1976) points out:

> The range tables are meant to sensitize those using them, not to act as a straight-jacket. Users should feel free to add, change, delete and re-emphasize. Providing the range tables is merely a stratagem that gets people started by giving them a ready-made frame of reference plus challenges to what they've always assumed as certain or likely. The range tables should also show them something of the overall configuration of issues, and suggest something of the complexities of interrelationships involved in the issues. Range tables are meant to give things a start, not to paralyse them.

There are obviously problems that are encountered in developing scenarios on the basis of such "data." These difficulties seem to stem largely from the preconceptions that the scenarist exhibits, and include: shaping the data to fit the preconceptions; ignoring novel possibilities; constraining what is seen as opportunities or problems; and neglecting the wider issues (Carney, 1978). Measures to counteract these tendencies can be taken, such as generating several scenarios, including outsiders in the scenario building activity, and limiting the data to "those pertinent only to the time, place and complex of issues embodied in the scenario" (Carney, 1978).

With regard to the range tables for this particular study, there are several elements which could probably be extracted from the existing qualitative one and included in a quantitative range table along with others not yet considered. These items would include:

a) Cable subscription and penetration figures

b) Broadcasting industry revenues

c) Cable industry revenues

d) Communications manufacturing industry revenues

e) TV viewership statistics (both level of overall viewership and of Canadian programs)

f) Expenditures on communications research and development

g) Data on media corporate concentration

h) Regional (or provincial) population distribution

i) Revenues of individual provincial and federal governments.

Given their greater proximity and accessibility to Statistics Canada sources and other data bases/banks, DOC staff would be the logical ones to generate such statistics — for the past and present, at least.

E. The "Policy Perspectives"

As noted above, a scenario is "the detailed representation of the future outcomes of a given policy." In this particular study, "policy" is construed very broadly: it is the general orientation toward the distribution of powers over broadcasting between the federal and the provincial governments. There will be a separate scenario for each such general orientation or policy perspective examined.

The policy perspectives selected for consideration represent four positions on a continuum of centralization/decentralization of powers. The end points of the continuum have been selected, as have two intermediate positions. The extremes of central-

ization and decentralization (or "greatly disseminated responsibilities," to use the language of the contract) are illuminating because they tend to highlight many issues very clearly; in addition, they represent two orientations toward the distribution of powers between the federal and provincial governments which have held sway at some point since Confederation (Black, 1975). The intermediate positions selected would seem to be more politically viable given the present tenor of federal-provincial relations, and have precedents as well (Black, 1975).

The relationship between the proposed policy perspectives and various conceptualizations of federalism (Black, 1975; Mallory, 1977; Task Force on Canadian Unity, 1979b) are presented in Table 1. As can be seen readily from Table 1, there are several federalism positions or proposals which fall through the "net" of the proposed policy perspectives. Nevertheless, the range of scenarios proposed would seem to be adequate for the purpose of examining the potential costs and benefits of future arrangements since:

a) the perspectives included will tap virtually all of the major relevant concerns with regard to the division of powers over broadcasting;

b) these perspectives have sufficient similarities to the excluded positions to be able to incorporate the latters' unique provisions in one or another of the four scenarios;

c) the positions or proposals excluded from the analysis will be borne in mind as the scenarios for the perspectives adjacent to them are constructed;

d) and if all else fails, the follow-up activities utilizing the scenarios should "tease out" any and all issues that are contained in the positions not

TABLE 1

The Correspondence Between the Scenario "Policy Perspectives" and Conceptualizations of Federalism

	Scenario Policy Perspectives						
	Highly centralized		Shared		Separated		Greatly Disseminated
Black[1]	Centralist concept		Administrative concept (also called executive or cooperative)		Coordinate concept	Dualist concept	Compact theory
Pepin-Robarts[2]	Major centralization	Status quo	Provincialization of central institutions	Renewed federalism		Asymmetrical federalism; Restructured federalism	Major decentralization
Mallory[3]	Quasi-federalism; Emergency federalism		Co-operative federalism		Classical federalism	Double-image federalism	

[1]Edwin R. Black. Divided Loyalties; Canadian Concepts of Federalism. Montreal: McGill-Queen's University Press, 1975.

[2]Task Force on Canadian Unity. Coming to Terms: The Words of the Debate. Hull, Quebec: Supply and Services Canada, 1979.

[3]J. R. Mallory, "The Five Faces of Federalism," in J. Peter Meekison (ed.), Canadian Federalism: Myth or Reality, 3rd edition. Toronto: Methuen, 1977, pp. 19-30.

included initially.

Some attention should be given to the nature of the policy perspectives themselves. "Highly centralized" and "greatly disseminated" are the easiest; both deal with exclusive powers in broadcasting, the former giving control to the federal government and the latter to the provincial governments. The two intermediate positions involve joint federal-provincial powers over broadcasting; therefore, they are more complex and interesting.

The "shared" policy perspective envisages the allocation of powers over broadcasting to both levels of government, while the "separated" perspective would make each level responsible for different aspects of broadcasting — what the Task Force on Canadian Unity (1979b) terms "interlacing legislation." Traditionally, the former approach has been termed concurrent powers and the latter coordinate powers. Political science teachers have also attempted to explain the difference by use of analogy: the separated approach is like a layer cake, the shared like a marble cake.

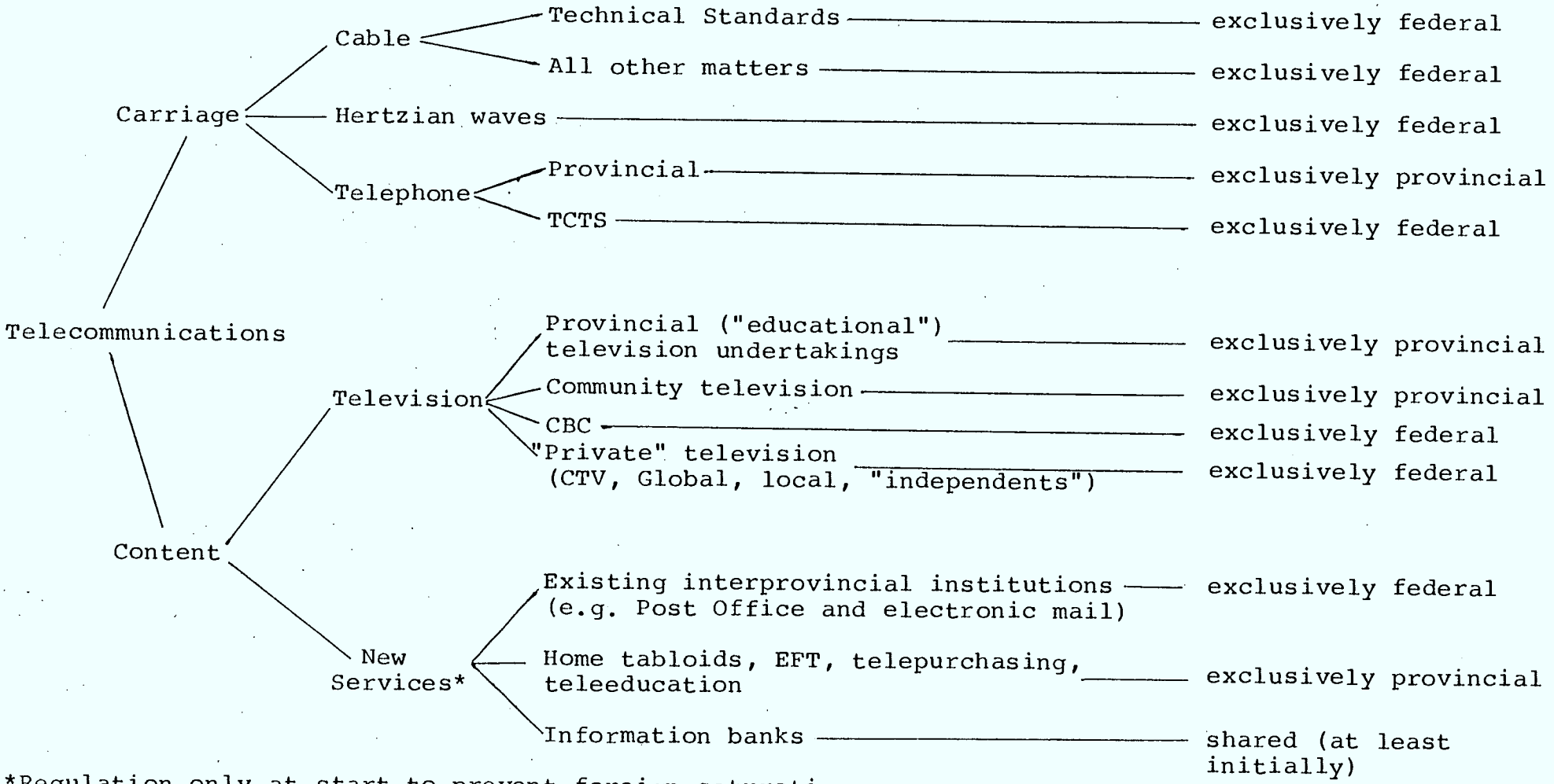
The analogy is useful in suggesting that the principal difference between the two approaches is the ability to "carve up" the field so that conflict is minimized — or perhaps more accurately, eliminated. As Jean-Paul L'Allier and Claude Fortin suggest in their notes for the March 14 meeting, under separated powers, "the two [federal and provincial] pieces of legislation would deal with different goals, or even with such distinct aspects of the same area of activity that there would

be almost no risk [of conflict]." With shared powers, however, since the areas are overlapping, the potential for conflicting legislation is extremely high; consequently, the principle of paramountcy (or priority) of the legislation of one level of government over the other must be established. In this way, the shared arrangement begins to resemble the separated one. As Richard Simeon (1977a) notes, however, "Watertight compartments of sharply defined responsibilities no longer exist, if, indeed, they ever did," and in most policy fields, shared powers have become the operative arrangement. This increase in concurrent powers has increased the chance and number of "entanglements," such conflicts taking a variety of forms: duplication, fragmentation, incursion, spillover and neutralization.

L'Allier and Fortin present a somewhat detailed delineation of a possible hybrid division of powers, based on the Task Force on Canadian Unity (1979a) approach, in Table 2 of their notes prepared for the March 14 meeting. This notion of "distribut[ing] specific responsibilities within a given general domain exclusively or concurrently to the order of government best suited to carry them out" is also utilized in Ouimet's (1978) proposal for reform of the Canadian broadcasting/telecommunications system. Ouimet's proposal is presented in Table 2. Most obviously, Ouimet has proposed somewhat farther reaching rearrangements than L'Allier and Fortin have (the latter probably being constrained by the limitation of the terms of reference to "broadcasting"). On the other hand,

TABLE 2

Ouimet's Proposal for the Distribution of Jurisdictions/Powers in a Restructured Canadian Telecommunications System



*Regulation only at start to prevent foreign saturation.

Source: Alphonse J. Ouimet. "Rationalizing Canadian Telecommunications: A Plan for Action." Discussion paper prepared for Delta Dialogue Series Seminars, Montreal (Toronto), November (December) 1978.

L'Allier and Fortin utilize concurrency more frequently. The point of raising this matter is to suggest that there are many possible ways of dividing powers and that the scenarists must bear that fact in mind as they develop their joint (shared and separated) scenarios.

In all of this, it should be noted that a functional approach is being taken toward the distribution of powers, i.e. the concern is with the powers actually exercised by the respective governments rather than simply with the formal or theoretical ones. Using L'Allier's and Fortin's terms, the study focuses on "powers" not simply "jurisdictions."

Note

It should perhaps be pointed out more explicitly, with regards to the utilization of the trends identified in the range tables (see p. 115), that the scenarist must select one set of conditions within which he/she will develop his/her scenario. For example, if one assumed that "things would get worse," then one would utilize the entries under that condition in both the quantitative and qualitative range tables when developing scenarios for all the policy perspectives.

F. References

Black, E.R. (1975). Divided Loyalties: Canadian Concepts of Federalism. Montreal: McGill-Queen's University Press.

Carney, T.F. (1978). "Scenario Building." Simgames 5(4): 1-4.

Carney, T.F. (1976). No Limits to Growth: Mind Expanding Techniques. Winnipeg: Harbeck & Associates.

DeWeerd, H.A. (1974). "A Contextual Approach to Scenario Construction." Simulation & Games 5(4): 403-414.

Ferkiss, V.C. (1977). Futurology: Promise, Performance, Prospects. Beverly Hills, California: Sage Publications.

Kahn, H. and Wiener, A.J. (1967). The Year 2000: A Framework for Speculation on the Next Thirty-Three Years. New York: MacMillan.

de Leon, P. (1975). "Scenario Designs: An Overview." Simulation & Games 6(1): 39-60.

Mallory, J.R. (1977). "The Five Faces of Federalism," in J. P. Meekison (ed.), Canadian Federalism: Myth or Reality. Toronto: Methuen, 19-30.

Ouimet, A.J. (1978). "Rationalizing Canadian Telecommunications: A Plan for Action," Discussion paper prepared for Delta Dialogue Series Seminars, Montreal (Toronto), November (December), 1978.

Simeon, R. (1977a). "The Federal-Provincial Decision-Making Process," in Intergovernmental Relations. Toronto: Ontario Economic Council.

Simeon, R. (1977b). "Scenarios for Separation," in J. P. Meekison (ed.), Canadian Federalism: Myth or Reality. 3rd edition. Toronto: Methuen, 442-459.

Task Force on Canadian Unity (1979a). A Future Together: Observations and Recommendations. Hull, Quebec: Supply and Services Canada.

Task Force on Canadian Unity (1979b). Coming to Terms: The Words of the Debate. Hull, Quebec: Supply and Services Canada.

Toffler, A. (1975). The Eco-spasm Report. New York: Bantam.

Zorgbibe, C. (1975). "Québéc: Scénarios pour l'Independance." futuribles 1-2, hivers-printemps: 61-70.