

# Jurisdictions and Decision-Making in Canadian Broadcasting

## **VOLUME 1**

### **Scenarios of Future Developments in Jurisdictions in Canadian Broadcasting/Communications**

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FINAL REPORT

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Broadcasting: A Review of Present Configurations  
and an Analysis of Future Possibilities

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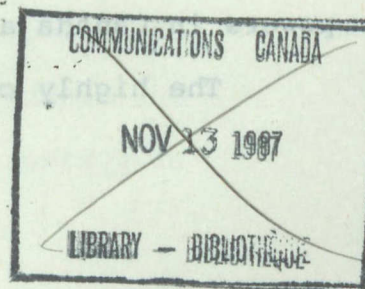
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## ABSTRACT

This study presents four scenarios for the distribution of powers over Canadian broadcasting/communications within the existing constitutional framework over the next ten years. These scenarios are the end product of the application of problem-sensing scenario building techniques to: the delineation of pertinent trends; a detailed examination of numerous legal/constitutional, structural, technological, regulatory and economic issues in Canadian broadcasting/communications; and the explication of the assumptions implicit in the four basic policy approaches to such a division of powers.

The four basic policy approaches to the division of powers over broadcasting/communications utilized in the scenario building represent four positions on a continuum of centralization/decentralization of powers in a federal state. The continuum positions utilized include the two end points (highly centralized and highly decentralized) and two intermediate positions (shared and separate) -- all four approaches being valid within the Canadian context since each has held sway as a general method of distributing powers in Canada at some point in time since Confederation.

The highly centralized and highly decentralized approaches

both contemplate exclusive powers over the entire field of broadcasting/communications, but the former would grant all those powers to the federal government while the latter would grant them to the provincial governments. Both the shared and separated approaches involve joint federal-provincial powers over broadcasting/communications, but by different arrangements: the shared policy perspective allocates all such powers to both levels of government, while the separated approach makes each level responsible for different aspects or sub-fields of the overall broadcasting/communications field.

The study also entails some limited follow-up activity to the scenario building itself. This involves the outlining of: the policy issues that the scenarios highlight; the possible choices for each of the issues so identified and their associated risks; and the configuration of choices which each power-sharing scheme would require in order to maintain its integrity.

## ACKNOWLEDGMENTS

In most studies and research projects, the contributors to the final product are more numerous than the author credits would suggest. This particular study is especially noteworthy in that regard:

- At different times during the study, research assistance was provided by Cathy Maloney and Andy Prokopich.
- Much advice and encouragement was provided by Dr. Tom Carney whose work is quoted liberally in what follows.
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reports and various working documents produced during the course of the study.

All of these people, then, made some contribution to the final report; however, the ultimate responsibility for the report, of course, rests with the authors themselves.

JURISDICTIONS AND DECISION-MAKING IN CANADIAN BROADCASTING:  
A REVIEW OF PRESENT CONFIGURATIONS AND AN  
ANALYSIS OF FUTURE POSSIBILITIES

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IN CANADIAN BROADCASTING/COMMUNICATIONS

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SCENARIOS OF FUTURE DEVELOPMENTS IN POWERS AND  
JURISDICTIONS IN CANADIAN BROADCASTING/COMMUNICATIONS

Preface

As Tom Carney (1978) has pointed out, "a scenario is rather like the tip of an iceberg: seven-eighths of the work involved in constructing it lies unseen beneath the surface." In and of itself, then, this brief study does not reflect the massive amount of time and energy that has gone into its development. To gain an appreciation of the kind of concrete details which were generated as a basis for the scenarios contained herein, the reader is referred to the more lengthy and detailed studies contained in volumes 2-4.

These background studies constitute what scenarists call "the context," i.e. "the detailed background from which the scenario . . . [is] drawn" (De Weerd, 1974), including "major elements in the situation, crucial decision alternatives and important issues" (Carney, 1976). It is this information or "data" which, when combined with a particular notion of future developments (trends) and the logic or assumptions underlying a particular strategy or approach (what we have called "policy approaches"), produces a scenario.

It is also important to note at the outset that scenarios are not predictions (in the normal understanding of the word). We are not contending that any of the following scenarios

will necessarily come to pass. Such an assumption entails the confusion of the scenarios' plausibility with their probability, possibly as a consequence of misunderstanding the basic purpose of the scenario technique. For as Carney (1978) points out, "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."

In the spirit of that approach (and also given the limitations imposed by the terms of reference of the study contract), we have not offered any conclusions or recommendations. It is hoped that both the benefits and costs of each of the following approaches to the division of powers in broadcasting/communications in Canada (or close variants thereof) are readily apparent. If the reader disagrees with any or all of the "pictures painted" in the scenarios, he/she is invited to join the process. In fact, the scenario building activity is premised on the scenarios being treated as means rather than ends -- as sources of information for further activities. As Carney (1976) describes it, "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." It is important, then, that some formal method of follow-up be organized so that the scenarios can be considered, and maximum utility derived from them. It is also important that participants in such a follow-up activity



fully justify their criticisms and/or alternate formulations, setting out explicitly the assumptions underlying them and the "data" on which they are based.

Finally, it should be noted that the following scenarios of jurisdictional arrangements have been developed within the existing constitutional framework, an approach also utilized in a recent study of the possibilities for Canadian Confederation undertaken by the Fraser Institute (Courchene et al, 1978). The assumption of the continuance of the existing constitutional framework was made for a number of reasons: Firstly, while there appears to be some movement toward constitutional reform in the recent round of constitutional conferences, the prospect of an early agreement on a new division of powers is uncertain. The examination of possibilities within the existing constitution, then, is probably more realistic in the short to medium term. Secondly, this approach adopts a comprehensive approach to federal-provincial powers in the communications field, as opposed to the piecemeal approach in the present constitutional negotiations. Thirdly, such an approach is a test of the flexibility or inflexibility of the existing constitution in the area of broadcasting/communications. Finally, the concern of the study was more functional than formal, i.e. the focus was on the effective control of broadcasting/communications (powers) rather than on the formal legal arrangements (jurisdictions). The assumption here is that while an activity may be assigned to one level of government,

there are certain mechanisms whereby that activity may be transferred to or undertaken by the other level of government. Furthermore, the functional approach to such powers could suggest models for formal jurisdictional modification in a revised constitution.

## CHAPTER I

### THE THEORY AND METHODOLOGY OF SCENARIO BUILDING

#### A. The Nature 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 has come to be used to refer to the specification of "the conditions and events which are considered to precede a particular prediction" (Gershuny, 1976); or "a quantitative or qualitative picture of a given organisation or group, developed within the framework of a set of specified assumptions" (MacNulty, 1976); or most germanely, "the detailed representation of the future outcomes of a given policy" (Carney, 1976).

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 always remained the same, 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.

The utilization of scenarios was aimed at "forc[ing] decision makers to consider alternatives and to guesstimate the results of likely interactions" (Carney, 1976). According to MacNulty (1977), the scenario technique has proven to be useful and attractive: "It is easily understood, and it allows different points of view to be considered, since the assumptions are explicit, and alternatives can be tried" (emphasis added). 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.

In addition, the scenario technique has the potential to (in fact, is premised on the possibility that it can) produce counter-intuitive insights, as in the study of the future markets of New York City banks wherein a series of scenarios demonstrated that "the 'common-sense' best conditions . . . do not produce the best corporate environment" (Palmer and Schmid, 1976).

#### B. Basic 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 (or an "exploratory" [Gerardin, 1973] or "forward-looking" scenario [Raynaud, 1976]), 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 (or simply a "normative" [Gerardin, 1973] or "backward-looking" scenario [Raynaud, 1976]), 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 did not seem to be appropriate for the purposes of this study, however, since only two policy orientations to the division of powers 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, as did the brief time frame for the scenarios (10-15 years), since normative forecasting requires a 30-40 year time frame "because of the inertia in the socio-economic environment which reacts only slowly to change" (MacNulty, 1977). Consequently, a problem-sensing approach was adopted in the

scenario building activity.

While avoiding the negative features of the other two as outlined above, such an approach was also felt to have the positive benefit of maximizing information about the strengths and weaknesses of possible future courses of action.

### C. The Method(s) Employed to Construct the Scenarios

Generating a scenario involves adopting a particular position or approach (which has implicit in it a certain set of beliefs and values) and projecting the results of pursuing that approach into a future, the nature of which one has delineated for that purpose. The procedure involves, then, an explicit statement of the purpose of the scenario building activity: in this case the purpose is "to assist in formulating, designing and assessing proposed or recommended changes in the division of powers and jurisdictions with respect to broadcasting . . ." It also entails the establishment of a time frame, the delineation of the "context," an outline of pertinent significant developments to be expected in the future (i.e. trends), the choice of appropriate approaches for which scenarios are to be developed and the explication of the assumptions (values and beliefs) underlying the approaches selected.

#### 1. Time Frame

The time frame is the period into the future that the scenario will consider. 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, a time frame of 10-15 years was selected.

## 2. The Context

Another major element in scenario building has been referred to variously as the "context" (De Weerd, 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 subjects under study. In addition, it should include a "list of major elements in the situation, crucial decision alternatives and important issues" (Carney, 1978).

A difficulty arises in 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. (This decision about detail is subject to the additional consideration of the scenario writer's background knowledge or expertise in the area.) 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 compiled in Volumes 2-4 of the study. The detailed background contained therein includes:

- a) A history of federal-provincial relations in the area of communications (see Volume 2).
- b) Federal and provincial powers and structures in communications (see Volume 3).
- c) A comparative study of powers and structures in communications in various foreign nations (see Volume 2).
- d) Federal and provincial objectives in communications, and their social, political, economic and cultural implications (see Volume 2).
- e) Constitutional issues in broadcasting/communications (see Volume 3).
- f) Issues related to certain communications technologies, economic matters, and content and regulatory concerns (see Volume 4).

The pivotal role of "objectives" should be noted. On the one hand, they play a very large part in understanding how events 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 combination of objectives will be realized by, and which will be frustrated

by, which jurisdictional arrangements?).

### 3. "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 picture of some more or less specific area in the future, some notion of the general shape of that future and of the specific nature of that particular area within that future is necessary. Such a perspective requires that the scenarist develops "an overview of the major trends likely to influence whatever it is that [he/she is] 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 inter-acting elements." As Carney (1976) points out, however, the "long-term multifold trends" take a long time to develop properly and require access to experts who are often difficult to reach or unavailable entirely.

A more practical device was adopted for this study, then: namely, 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). While a few of the items related to the study were amenable to quantification, the bulk of them involved assumptions, attitudes, values, etc. which had to

be assessed qualitatively (making them somewhat more similar in format to the long-term multifold trends). As with the quantitative range tables, however, projections for these elements were made for three different conditions: things continue unchanged; things go well; and things go poorly. A list of some of the trends considered in the scenario building activity is presented in Table 1.

These "trends" are not to 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 strategem 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

TABLE 1

QUALITATIVE RANGE TABLES FOR SCENARIOS  
OF JURISDICTIONAL ARRANGEMENTS IN CANADIAN BROADCASTING/COMMUNICATIONS

<u>Possible Beneficial Effects</u>	<u>Trend</u>	<u>Possible Deleterious Effects</u>
The populace turn to broadcasting/communications products and services as forms of diversion in troubled economic times.	1. Economic "stagflation" continues.	Consumers have less money with which to purchase broadcasting/communications products and services.
Broadcasting/communications activities funded by government become more productive (i.e. will operate more efficiently).	2. The government continues to cut back spending.	Broadcasting/communications activities funded by government are crippled or wiped out.
Deregulation of broadcasting/communications leads to greater competition and a consequent increase in diversity.	3. A free marketplace is increasingly advocated as a means of curing economic ills.	Deregulation leads to centralization of production and control, a decrease in Canadian content, and a replication of existing forms of broadcasting/communications.
Canadian cultural industries flourish as a result of increased investment.	4. The government increases its utilization of taxation (and other such devices) to encourage development of the cultural industries.	Investing in the cultural industries simply for tax advantages will result in the production of inferior products, resulting in decline or collapse in the long run.
A buoyant industry stimulates activity, increases competition, reduces costs to consumers/users, and increases diversity of products and services.	5. "Communications" becomes a high growth industry.	Increased growth widens the gap between the dominant and marginal segments of the industry, leading to centralization, monopolization, high costs and lack of diversity.

TABLE 1 (continued)

<u>Possible Beneficial Effects</u>	<u>Trend</u>	<u>Possible Deleterious Effects</u>
Vertical and horizontal integration and communications cross-ownership facilitates the expansion of broadcasting and the introduction of non-broadcast communication services.	6. Corporate concentration becomes an increasingly accepted fact of life.	Broadcasting/communications are only one facet of multinational conglomerates and their operations come to be governed largely by factors unrelated to communications needs and objectives.
Innovations in broadcasting/communications are facilitated and made available at lower costs.	7. Expenditures on Canadian research and development increase.	Emphasis on technological research displaces attention from the economic, social, cultural and political consequences of the introduction of such innovations.
Products for and services to consumers are increased dramatically.	8. Many innovations in communications technology are introduced in a short period of time.	The rate of change overtakes the policy makers' abilities to control the introduction of innovations and to deal with their social, economic, cultural and political impact.
Development costs are reduced, thereby reducing expenses to manufacturers (and increasing profits) and reducing prices for consumers.	9. Canada increases its co-operation with other nations in the area of technological development.	Canada becomes dependent on foreign countries for broadcasting/communications technology.
Reduced Western alienation (as a consequence of increased political clout) and greater identification with the broadcasting/communication needs (among others) of all of Canada.	10. As a result of the pattern of economic growth, population in Canada shifts increasingly to the West.	The West attempts to use their increased power to impose their desires (with regard to broadcasting/communications) on the rest of Canada.

TABLE 1 (continued)

<u>Possible Beneficial Effects</u>	<u>Trend</u>	<u>Possible Deleterious Effects</u>
Broadcasting/communications policies become more responsive to the specific needs of the regional/provincial residents.	11. The regional/provincial orientation of Canadians increases.	National broadcasting/communications policy goals become difficult to establish and implement.
The most important broadcasting/communications objectives and priorities of all parties become externalized and clarified, setting the stage for meaningful compromise.	12. Federal-provincial negotiations become more intense and hostile.	Negotiations are broken off entirely since no common ground is apparent.
Broadcasting/communications companies and organizations are held more accountable and responsible for their activities, operating more in the public interest as a result.	13. Consumer and "public interest" groups become increasingly aggressive in their activities.	Broadcasting/communications companies and policy makers are frustrated in their attempts to carry out their activities.
Producers employ an increasing amount of Canadian resources and talent in their wares, expanding the available pool of talent and creating the "critical mass" necessary for the blossoming of the Canadian cultural industries.	14. Cultural groups, organizations, artists and performers become increasingly organized and active in lobbying, etc.	Casting and production planning become highly politicized and as a result co-productions with Canadian interests will become less attractive to foreign producers.
Entrepreneurs try harder in order to be successful, resulting in a freshness and vitality of product.	15. Cultural industries continue their "boom and bust" development.	Uncertainty causes investors to cease investing and creative personnel to leave the country or pursue some other form of livelihood.
Canadian TV producers are forced to become more imaginative in their programming in order to attract viewers.	16. Canadian-produced TV attracts an increasingly smaller percentage of Canadian viewers.	Canada's unity and national identity continue to be eroded, facilitating absorption by the U.S.



TABLE 1 (continued)

Possible Beneficial Effects

Other facets of broadcasting/communications capture people's attention and experience growth.

All segments of the broadcasting/communications field are drawn together to combat a common "foe."

Trend

17. Viewing of TV in general continues to decline.

18. The U.S. intensifies efforts to "solve" the border TV problem and institutes sanctions if no negotiated settlement is achieved.

Possible Deleterious Effects

Broadcasters suffer economically and cut back their efforts and/or attempt to increase their commercial appeal to compensate.

U.S. markets are closed to Canadian broadcasting/communications products and the U.S. ceases to co-operate with Canada in other aspects of the field.

the time, place and complex of issues embodied in the scenario" (Carney, 1978).

#### 4. Scenario Selection

The foregoing elements could be considered the raw materials for the development of the scenarios. Once this information has been generated, a particular "method" of processing it must be adopted (the results of applying each such method to the "raw materials" being a separate scenario). While some scenarists would contend that the method entails a "set of external conditions" (Palmer and Schmid, 1976) or the permutations of "assumptions about the organisation and its environment" (MacNulty, 1977), the study has adopted the approach described by Carney (1978) in which the scenario is formulated by applying "one particular strategy" to this "given set of circumstances." In this particular case, the strategies utilized are broad policy approaches to the federal-provincial division of powers over broadcasting/communications. There is a separate scenario for each such policy approach examined.

The policy approaches selected for consideration represent four positions on a continuum of centralization/decentralization of powers in a federal state. The end points of the continuum have been selected (highly centralized and highly decentralized), as have two intermediate positions (shared and separated). These approaches are, of course, "ideal types" in the sense that in their purest forms they could not be found or implemented in reality, but their

utilization helps to clarify the results of such tendencies, and some variation of each of these approaches to the general distribution of powers has held sway in Canada at some point since Confederation (Black, 1975).

In examining the nature of these policy approaches, highly centralized and highly decentralized are the easiest with which to deal. Both contemplate exclusive powers over the entire field of broadcasting/communications: the former would grant all those powers to the federal government, while the latter would grant them all to the provincial governments. The two intermediate positions are somewhat more complex since they contemplate joint federal-provincial powers over broadcasting/communications (albeit by different arrangements). The "shared" policy perspective envisages the allocation of all powers over broadcasting/communications to both levels of government, while the "separated" approach would make each level responsible for different aspects of broadcasting/communications — resulting in what the Task Force on Canadian Unity (1979b) refers to as "interlacing legislation."

These latter two approaches have also been labelled concurrent powers (shared) and coordinate powers (separated), and the differences between them described by political scientists in terms of a cake analogy: the separated/coordinate approach is like a layer cake, while the shared/concurrent one is 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 entire field so that conflict is eliminated (or at least minimized). Under a regime of separated powers, the areas of responsibility are so discrete that they can be divided up into "watertight compartments" ruling out conflict altogether. With shared powers, however, such neat divisions cannot be made since the areas are overlapping, with the result that the potential for conflicting legislation is extremely high. To deal with the problems of conflict, then, the principle of paramountcy (or priority) of the legislation of one level of government over the other must be established. All four approaches exhibit more specific assumptions about the field of broadcasting/communications and some of these differing assumptions are reproduced in Table 2.

Finally, the relationship between the policy approaches and various conceptualizations of federalism (Black, 1975; Mallory, 1977; Task Force on Canadian Unity, 1979b) are presented in Table 3. As can be seen readily, there are several federalism positions or proposals which fall through the "net" of the policy approaches employed as scenario strategies. As was the case when considering the complexity of the context of an individual scenario, however, some compromise must be made between exhaustiveness of coverage and the information overload which the scenarists (and those who eventually use the scenarios) can experience. Given that consideration, the scenario building activity was confined to the four general policy approaches delineated

TABLE 2

## BASIC ASSUMPTIONS ABOUT BROADCASTING/COMMUNICATIONS UNDERLYING THE SCENARIO APPROACHES

	<u>Highly Centralized</u>	<u>Shared</u>	<u>Separated</u>	<u>Highly Decentralized</u>
1. Orientation to segmentation of broadcasting/communications sector	Indivisible nationally	Divisible (to an extent but not completely)	Divisible nationally (premised on this assumption!)	Divisible nationally but indivisible provincially
2. Method of exercising power over broadcasting/communications	Exclusivity	Concurrency	Concurrency within the entire field; exclusivity within sub-fields	Exclusivity
3. Perceived arena of operation of broadcasting/communications	National	National and regional/local	National and regional/local	Regional/local
4. Assessment of broadcasting/communications as a contributing factor to <u>national</u> identity and <u>national</u> unity.	Very significant	Moderately significant	Moderately significant	Negligible to completely insignificant
5. Perceived locus of efficiency and effectiveness in control of broadcasting/communications.	National	Combination of national and regional/local	Combination of national and regional/local	Regional/local

TABLE 3

THE CORRESPONDENCE BETWEEN THE SCENARIO "POLICY APPROACHES" AND  
CONCEPTUALIZATIONS OF FEDERALISM

	<u>Scenario Policy Perspectives</u>						
	<u>Highly Centralized</u>		<u>Shared</u>		<u>Separated</u>	<u>Highly Decentralized</u>	
Black <sup>1</sup>	Centralist concept		Administra- tive concept (also called executive or cooperative or functional)		Coordinate concept	Dualist concept	Compact theory
Pepin-Robarts <sup>2</sup>	Major central- ization	Status quo	Provincial- ization of central institutions	Renewed federalism		Asymmetrical federalism; Restructured federalism	Major decentral- ization
Mallory <sup>3</sup>	Quasi- federalism; Emergency federalism		Co-operative federalism		Classical federalism	Double- image federalism	

<sup>1</sup>Edwin R. Black. Divided Loyalties; Canadian Concepts of Federalism. Montreal: McGill-Queen's University Press, 1975.

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

<sup>3</sup>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.



above since:

- a) the four approaches tap virtually all of the major relevant concerns with regard to the division of power over broadcasting/communications;
- b) these approaches had 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 study were borne in mind as the scenarios for the approaches adjacent to them were constructed;
- d) and if all the above were insufficient, the follow-up activities utilizing the scenarios can "tease out" any and all issues that are contained in the positions not included initially.

## CHAPTER II

### A SCENARIO FOR A HIGHLY CENTRALIZED DIVISION OF POWERS OVER BROADCASTING/COMMUNICATIONS

#### A. Introduction

The basic assumption of this scenario is the rather fanciful idea that the federal government manifestly will give strength and purpose to the objectives of the present Broadcasting Act and to the similar objectives contained in proposed Broadcasting Acts. Specifically, broadcasting/communications will be directed toward achieving the goals of improving and safeguarding the social, political, economic, and cultural fabric of the nation; and will use predominantly Canadian content and creative resources. The furtherance of national unity and a Canadian identity -- a requirement of the national service (CBC) -- is given paramountcy in broadcasting matters should mutually exclusive demands of other elements of the system detract from the national service or weaken its ability to carry out this mandate.

This scenario appears to examine the option of maintaining the "status quo," i.e. the existing policy direction given by parliament to the government (as opposed to a sharing or division with, or devolution of the existing federal powers to the provinces). It assumes that on one hand parliament meant what it said and on the other hand, that the current problems are not the result of an inappropriate

or defective piece of legislation but the result of failure to give the Act either the priority or support necessary for the realization of its goals. This, then, is a dynamic option -- the active pursuit of objectives stated but not realized.

The struggle for national broadcasting in Canada has always been predicated on its necessity to prevent the "Balkanization of the country." The steady demise of national broadcasting over the last decade (a fact so obvious and well-demonstrated as to need no elaboration) has coincided with the growing divisiveness within the nation (also a fact hardly in need of elaboration). That these facts are connected causally has not been proved, but certainly there is an element of self-fulfilling prophecy in the parallel developments. And certainly the record of all the past enquiries, studies, commissions, etc. contain strong admonitions that central control and direction of broadcasting is vital to our national cohesion and development.

That the goals or objectives are not being met to the satisfaction of many critics, observers, leaders, etc. appears obvious. Certainly the program content expressing the objectives is reaching progressively fewer people. But,

- a) is the structure described in the Act at fault?
- or b) has the structure been mutated by evolving technologies and events? In other words, has the structure been implicitly restricted and is now in need of restoration?
- or c) do we need a new structure?

Given the preceding assumptions it is unlikely that the present Act and more particularly the proposed Telecommunications Act are capable of achieving the objectives or goals decreed by parliament. The existing divisions of power in telecommunications, the contentious ambiguity concerning which body is actually responsible both to develop policy and administer broadcasting, and even the absence of a representative and truly independent coordinating authority have all led to compromises and adjustments which have weakened the national service and the ability of broadcasting generally to achieve the objectives. Changes have taken place which no longer observe the symmetry of "public and private" elements but include the universe of political expediency, provincial interests, public utilities and common carriers, new technologies, and massive new intrusions of foreign content.

The structure itself has been changed, but in an ad hoc way to accomodate events, not to shape them. The power and profit centres in communications have become negotiable in the perceived larger context of appeasing provincial demands toward the hope of finding a constitutional modus operandi. Firstly, the process of weakening the national structure in communications may only contribute further to the problem of divisiveness, as has been observed in the recent past ("a hair of the dog" approach). Secondly, if ultimately major social and cultural concerns (of which broadcasting/communications is one of the most powerful) become exclusively the interest of sovereign provinces, then the objective is no

longer a strengthened Canadian nation but a loose affiliation of member states.

While the rather polemical assertions above raise no concrete solutions nor indicate the complexity or severity of the problems facing us, it does speak to the central issue: the cultural integrity of a nation cannot be achieved if the structures to implement this as a policy are so arranged as to actually serve other unrelated or contradictory objectives.

This scenario for exploring a centralist policy in broadcasting/communications does not recognize any constitutional claims which presuppose Canada to be a convenience for a loose aggregation of semi-autonomous states. The general peace, order, and good government are central and any matter of an international, interprovincial, or unspecified nature is a matter for parliament. This is not to say that homogeneity is the desired end or that there are not very significant regional, provincial, and local concerns. It is a matter of a primacy which permits an equitable nationwide distribution of services and resources, encourages diversity of expression with interchange, preserves media content from political interference and makes the system -- the indivisible sum of content and earnings -- economically responsible for assisting in the development and use of Canadian creative and cultural resources. It ensures that through national economies of scale and public subsidy that both delivery services and production resources are directed toward the widest possible

dissemination of indigenous content of a high standard.

Throughout this entire report most of the issues, problems, and alternatives have been explored. For purposes of this scenario the prime concerns will be briefly recapitulated in terms of a centralist rationale. This leads to an embrasive strategy which concedes that much of the damage is beyond immediate repair (politically impossible). However, with the restoration of a will to achieve the objectives already established, coupled with a new structure which takes advantage of the control of newer technologies and new forms of funding, the present trend of complete foreign acculturation of the broadcasting/communications media could slowly be reversed.

This scenario suggests that much of the existing legislation and technological initiatives are quite useful as a basis for the tactical battles leading to the eventual control of sufficient elements of the delivery system to conduct a national policy.

## B. Control

### 1. Jurisdiction and Regulatory Control

Broadcasting is defined as the transmission of "messages" (signs, symbols, etc.) to the general public by means of radio frequencies in space. It suggests that at each instant and from a single source the message is simultaneously sent to many recipients who are not categorized by any special interest, i.e. not police, taxis, etc. This distinguishes



broadcasting from telegram, telephone, data, etc. which are usually from single source to single recipient (point to point), and also from radio communication in space not designed for the general public. Cable which does not "broadcast in space" certainly disseminates messages simultaneously from a single source to a general public. Our only rationale for jurisdiction of cable is based on its capability to extend the reach of received broadcast signals -- that it is, in effect, a huge receiver serving a multitude of homes and is therefore an integral part of a transmitter-receiver system. This argument for jurisdiction fails, of course, if the cable does not utilize received over-the-air signals; however, a cable may very well be conveying messages to the general public and the cultural concerns remain.

The point of this is that the parts of the definition of broadcasting which govern jurisdiction and are essential to the national goals are not the ones on which the distinctions are made. Which is the important element -- whether the signal reaches the general public or whether the signal goes wireless or wired?

Any rethink of broadcasting control must start with an examination of what it is we are trying to do. The whole rationale of the shortage of frequencies, natural monopolies, etc. needs reexamination because of underutilized spectrum (e.g. UHF) and the capacity of cable. A far more compelling rationale to regulate communications may be found in the legal premise: that which manifestly interests the public becomes

the public interest. Home videoplayers, while not simultaneously releasing the same program, are by and large involved in content to a general public from an electronic exhibition system. Even within present definition, direct broadcast satellite to the home or satellite to local cable systems is considered radio communication to the general public and therefore "broadcasting" by the International Telecommunications Union.

Therefore this scenario suggests that the first steps toward recapturing national broadcasting are dependent on:

a) A redefining of telecommunications, radio communications, and broadcasting to make quite clear that the federal preeminence in these matters is not primarily because of a transmitter-receiver symbiosis but stems from a national public interest with stress on content to a "general" public. A "public convenience and necessity" point of view which recognizes the subservience of the actual technologies used to the maintenance of peace, order and good government.

b) That once parliament has determined the national objectives the realization of them must be placed in the hands of a central national regulatory body answerable only to parliament and the courts. This is to say that the cultural integrity of the country, i.e. the existence of the nation, is not negotiable.

It may be that the "CRTC" becomes more provincially partisan than representative of "regions," however, the disadvantages of a single central authority can only be weighed

against the merits of the present trend toward separated or shared jurisdictions. The DOC, in the recent past, attempted to rationalize telecommunications but found itself piecing together ad hoc approaches with individual provinces; often, in the opinion of the CRTC, at the expense of the national broadcasting system. The proposed new Telecommunications Act does little to restructure broadcasting except curb and remove from the CRTC any powers which might conflict with the day-to-day political process of government and its relations with provinces. It is even further removed from a focus on the delivery of content appropriate to Canadian cultural needs as the first priority and places the CRTC in the absurd position of having the responsibility of attempting to put together a coherent approach to achieving the national objectives, while permitting it to be second guessed on any of its activities. Not only is the integrity of information at stake but also the necessity of permitting the working out of major objectives over time without interference.

While the present Act would appear to define the objectives for a broadcasting policy, the more recent trends have been to overrule or emasculate the CRTC when the priorities of preserving the national interest in broadcasting are in conflict with other priorities of government. There is also considerable ambiguity concerning the areas of responsibility among the various branches or departments of government. Although the Clyne Committee recently released their report, it is almost fifteen years since a full Royal

Commission examined broadcasting, and almost double that since an extensive examination has been made of the totality of Canadian cultural and scientific resources. While it is claimed that events are moving too swiftly to permit such a ponderous enquiry, it would certainly be better to freeze the status quo than permit the ad hoc frittering away of federal initiatives before the situation is totally irreversible.

The initiation of such a major inquiry would be most helpful. However, this scenario suggests the terms of reference must be broad enough to include all the facets of the broadcasting infrastructure and relate the cultural role of broadcasting to an entire cultural priority for Canada. If this inquiry is simply painted into a corner to take off the heat while immediate substantive decisions are made without reference to their impact on (or destruction of) future options and approaches in broadcasting, we have simply concocted another exercise in futility.

The inquiry must therefore address itself to:

- a) Our cultural goals and their importance to national cultural survival;
- b) The importance of broadcasting to the realization of these goals;
- c) The structure that would best facilitate the task of broadcasting;
- d) The degree of independence of this structure from government;

e) Examination and recommendations on the control of delivery systems;

f) Assessment of newer technologies with their content implications;

g) Alternative production structures and sharing of production costs by all sectors of the public.

The strategy of this scenario suggests that the momentum towards balkanization of the country is held by the provinces; appeasement through trade-offs in communications is the most destructive element in the process and the best way to begin to reverse the process is at least to freeze the situation, marshal the latent forces of nationalism toward a real inventory of our cultural resources, and hopefully derive recommendations toward strengthening our national cultural consciousness.

In any case, in view of the constraints on the existing structure due to its lack of a clear-cut authority over all facets of the broadcasting infrastructure, the new Act simply intrudes another presence with the power to make decisions and changes, but which has very little accountability for these actions, and is inherently dangerous in permitting the easy frittering away of the really important elements in a national broadcasting policy.

The obvious conclusion is that the concept of "a single system of broadcasting/communications" under the direction of a single authority with control over all facets of broadcasting, and delivery systems in particular, is most conducive

to achieving goals set by parliament. Since these goals are dependent on a larger cultural environment, a great deal of interdepartmental co-operation and mutual support would be even more conducive to success. (The Annan Report recommends more rather than fewer regulatory authorities in U.K. broadcasting. This is possible and even desirable but only when the authorities have integral control of the delivery system.)

## 2. Ownership

On the whole, our approach in the past has been to permit private ownership of some of the broadcast delivery systems due to a perceived shortage of public monies to extend nationwide services. The authority of the CRTC is more limited in effecting demands on the private interests than if the state owned the actual transmitting and delivery systems. In the case of cable, the Commission's power to demand social responsibility has been almost nil. (It is only the fear of losing their hardware to the telcos that has recently produced the enlightened recognition in some cable operators that they are possibly broadcasters and have a program originating responsibility to the general public.) Further fragmentation of delivery systems to ownerships not amenable to the national interest only erodes the ability to provide central direction. Whether "possession is nine-tenths of the law" is true, it certainly is applicable to the hardware in broadcasting.

The problems of national public ownership lie in a



number of areas:

- a) the historic "accident" of provincial jurisdiction over telephones;
- b) the existence of TCTS as a common carrier's carrier -- not amenable to positive national direction;
- c) private hardware ownership in broadcasting and cable.

While there is considerable merit in permitting the private regulated ownership of these monopolies (or near monopolies) in many cases their entrepreneurial success has not been due to any business excellence. They have banked the advantages of national protection and/or monopoly rights without having to pay the real costs of developing a national content.

Changing this situation is fraught with political and economic difficulties. The best answers lie in developing national awareness of the problem and most particularly developing more cost efficient delivery systems within national control, i.e. DBS, and retaining public ownership of them. This calls for a strategy of "playing off" the existing institutions against each other, i.e. cable vs telephone, CN/CP vs TCTS, DBS vs provinces, etc. The first goal is to provide the consumer with a "package" almost as appealing as delivered by conventional privately-owned systems but at less cost -- i.e. to compete "unfairly" with existing services. Part of this can be achieved by the vigorous central control of "pay television" services as they are introduced so that the profit areas are directed

first to supporting a nationally owned delivery service.

The essential premise in a centralized view of communications is that delivery system ownership is much more important than content control, because:

a) content control will follow naturally;

b) decentralized content control is not necessarily destructive and does permit a "grass roots" upward development which is only possible when the profit incentives are moved from hardware ownership to program origination;

c) it is much easier to focus regulatory direction on national objectives when licensees, permittees are more divorced from the concerns of tangible assets.

### 3. Control of Profits

The present trend contains presumptions that all hardware parts of the system should be profit making with few burdens on content creation. The task of paying for Canadian content according to broadcasters, cable operators, and provinces becomes the sole responsibility of the federal taxpayer. Obviously all facets of the system should contribute to this financial burden and the structure should reflect this.

Since it is inherent in our political philosophy that the broadcast spectrum belongs to the people of Canada, it follows that profits from its use belong to the people. Our regulatory approach has been to extract a social dividend, if possible, from the delivery system owners for the privilege

of a spectrum allocation or spatial monopoly. It hasn't worked well. Rate increases in cable have not been geared directly to social benefits and profits in broadcasting are not directed to program creation. The trading in licenses, in many cases, has skimmed away much of the profit potential, so that the new debt burden leaves little beyond a reasonable return on investment.

All this stresses the need for greater central control and public ownership of delivery systems, or at least toward a licensing system that places the profit incentive in improved social benefits.

Various ideas have been contemplated in the U.S., i.e. a spectrum fee (to go to public broadcasting) for use of the public's airwaves, the auction of licenses so that at least spectrum use is charged for at fair market value and the social benefit would be at least an increase in general revenues. These ideas at least address the problem of making free enterprise "fair," and directing excess profits derived from near monopoly protection to be returned to society in general.

This scenario suggests that the whole licensing and rate setting approach in Canada be reviewed in terms of enhancing central control and certainty of policy direction so that socially appropriate behaviour is rewarded in profits and privileged institutions pay public dues. The strategy suggests that broadcast licenses are granted for limited periods and not subject to renewal without general and open applications; that ownership of the hardware reverts to crown

over time, e.g. MTS full service agreements.

The question is not whether the central government is capable of efficient ownership. The evidence is that private owners have been quite incapable of or resistant to carrying out the task given them and have no incentive to do so.

#### 4. Content/Carriage

The success of medium/message separations depends on who owns the medium; control of the message follows. The rationale of the Saskatchewan approach is that the message is separable from the medium but the curious reality of their position is a strong demonstration that given central control of the delivery system, the state has a high degree of control over the determination of the social goals to be met by the content. It is a telling example to our central government of how powerful a determined and well conceived strategy, when possessed with the state owned tools (Sasktel), may be propelled toward achieving a provincially interpreted public interest. It also exposes the weaknesses in our current federal structure.

More specifically, the Canada/Manitoba Agreement shows the weaknesses of attempting to separate "program service" from "Program carriage" ("content-carriage"; "medium-message" separation). Under the full service agreements, MTS owns the hardware save inside wiring and drops. It leases only the VHF channels (about 8 unimpaired) to the cable operators who are bound to the CRTC regulations of signal carriage

priority. Should the CRTC decide to allow rate increases with the specific condition of also enhancing community programming, there is nothing to prevent the MUB (Manitoba Utilities Board) from permitting MTS to raise its rates to the cable operator for further extension of service. While both objectives may have merit, obviously the provincial goals will be successful assuming that consumer spending is not totally elastic. With regard to the introduction of newer services such as Pay TV (which is agreed to be a "program service"), the fundamental questions of tariffs, access by whom, and responsibility for application of profits are all seemingly in provincial control. No apparent thought has been given to such questions as cost of pay channels to lessee -- incremental? marginal? proportion of gross revenue? -- a factor that would have a great deal of bearing on the content of a pay service even if there were a central pay program package. It is obvious too that in other "non program services" the carrier is quite prepared to exclude competitors in handling both the content and carriage functions in such areas as fire and burglar alarms, data transmission and data processing.

As Stuart Griffiths has indicated, the key to change is more absolute federal control over the delivery systems. With this accomplished, then program content can be created in a much more laissez-faire manner while the ultimate authority is effectual and secure. However, the constraints to so radically changing the structure would appear insurmountable. Private industry, the telcos, the provinces and the consumers,

backed by the immense resources of other media, would conspire mightily against the serious implementation of such a proposal. This proposal is completely predicated on extension of cable which would probably economically eliminate access to 30 per cent of Canadian homes. We are then back to magnifying the inequalities of service available to Canadians as a whole.

While the Griffiths' plan also fails to consider local and regional input because of its emphasis on a highly centralized control of the delivery systems, it has the great merit of recognizing that this control is fundamental to the ability to widen access and choice of content.

Alphonse Ouimet indicates that the trend of the future should be toward cable becoming a public utility, and ultimately as new technologies develop and are established (e.g. fibre optics), redundancy in means of communication should be reduced, i.e. a "single wire" concept and the phasing out of over-the-air transmission. Much like Stuart Griffiths, he sees access to a finite number of channels restructured to further national interests and to present the viewer with greater real choice compatible with the national goals. However, this public utility approach (while not quite so radical as Griffiths in immediately shifting ownership), implicitly assumes that rate-based regulation, etc. under provincial authorities may elicit more support for national objectives than federally rate-regulated cable operators might be coerced to do. Sometimes the distinction is made that over-the-air broadcasters work in a medium in which content and carriage



are somewhat inseparable while cable broadcasters with multi-channels should not combine programming with delivery system operation. The point here, as it applies to structure in this scenario, is that program "contractors" and delivery system operators can be separated (as in Great Britain) but that the real authority resides with the delivery system. The separation philosophy doesn't necessarily surmount the problems associated with combined carriage/content systems.

The separation of hardware from software could be beneficial, but the priority is centralizing the hardware, and then benefits may even be gained from decentralizing much of the software. This is, of course, quite contrary to the present activities which only accelerate the destructive processes which have taken place.

##### 5. Long-haul Communications

The CRTC Act and the contemplated Telecommunications Act do empower the CRTC to rate-regulate interprovincial telecommunications, but with little strength to initiate policy or determine objectives. First, TCTS (an unchartered entity) should be placed firmly under federal control and direction. The necessity for this goes much further than facilitating the needs of meeting broadcasting objectives and includes the entire integrity of the nation's communications including the protection of indigenous data banks, personal information, data processing and transmission, and the protection and development of high grade technological

knowledge and skills within the country. The present arrangement of a common-carrier's carrier association in which each member has a veto simply means that it can only function to perpetuate distance sensitive rates and the maximum return to the individual members. It can have no national objectives inconsistent with the self interest of each of its members and therefore will persist in opposing large reductions in long haul rates or the extension of service into remote and expensive locations. (It is considerably cheaper to communicate from Canada to an equivalent distance in the U.S. than within this country.) Easy, cheap, and efficient intra-national communications are very much a consideration in binding the nation. Where competition would reduce rates and/or further technological innovation it should be made possible. System and terminal interconnection should be possible on a national basis and beyond the powers of the provincial regulatory authorities.

The proposal would involve some judicial tests. The basis of the approach would be that intra-provincial telephony would be a provincial responsibility (as it is in seven of the ten provinces), but all interprovincial communications including the Trans Canada Telephone System (and Telesat) would be separated from the operating companies and should be placed under direct federal control. (However, it should be noted that the Privy Council refused to characterize Bell Canada<sup>11</sup> local and long distance operations as separate undertakings which is consistent with the courts' reluctance to divide an

undertaking unless it is fairly clear that the undertakings are in fact separate and distinct.)

Intra-provincial networks would either be separate entities or lessees of channel space from TCTS. The arguments would include:

a) The use of microwaves -- a technology of radio-communications within exclusive federal jurisdiction and subject to international agreement.

b) The telephone companies co-operate and in fact contract to interconnect across provincial boundaries, although in some instances concerning railways the courts have not found interconnection persuasive. Professor Lederman in "Telecommunications and the Federal Constitution of Canada" in Telecommunications in Canada (ed. English) states at p. 377.

The interconnection of two railway networks involves the movement of people or goods. They do not "pervade" both networks so rapidly or so completely as to require common controls in the technical sense in the same way that instant electronic impulses require common controls in interconnected telecommunication . . . networks.

If correct, this view would empower the federal authority to regulate the prairie telephone companies and the small independent companies in various provinces that connect with one of the TCTS companies in that province (Lederman).

c) If interconnection in respect of the prairie companies is not successful, the Atlantic companies are subject to federal control since there is some common control by a federal undertaking -- Bell Canada, because it owns a majority of the common stock in most of the companies. The weakness here is the extent to which Bell Canada exercises

this control.

d) Parliament could, of course, declare the provincial telephone companies or the inter-provincial aspect to be works for the general advantage of Canada[BNA s.92(10)(c)].

e) A court might be prepared to accept the argument that telephony is a matter which by its inherent nature is of national concern, thereby falling within the scope of "peace, order, and good government." The argument would be strengthened by the telephone use of radiocommunications in a matter subject to international treaty.

This scenario does not propose that all telephony be amenable to federal jurisdiction (which may be legally possible), but that the interprovincial aspects be placed under federal direction and control, possibly directly under a federal agency similar to Teleglobe which would own the delivery system.

Since it appears impossible to pierce the veils of the true separation of costs or to impose policies which would benefit the nation, such an action appears necessary. Doubtless most of the provinces would protest vehemently but it would seem to be jurisdictionally possible and could permit the regulation of intra-provincial telephony in Quebec, Ontario and B.C.

The "privatizing" of Teleglobe would, of course, be sheer madness in terms of this scenario.

## 6. Closed-Circuit Cable

Capital Cities Communication v. The CRTC (1977) 81 D.L.R. (3rd) 609 (S.C.C.) and also Re Public Service Board, Dionne and A. G. Canada (1977) 83 D.L.R. (3rd) 178 (S.C.C.) proved that in the view of the Supreme Court Parliament has exclusive jurisdiction not only over broadcasting but also cablecast systems which receive off-air broadcast signals. In both decisions, however, the court expressly refrained from determining which level of government had authority over closed-circuit cablecast systems (Arvay).

While there is a strong inference that such a system would fall within exclusive provincial authority, there are a number of arguments to support federal control. Essentially they include parliamentary declaration of a national concern, or works for the general advantage of Canada, or resort to P.O.G.G.

It is interesting that in Capital Cities Laskin C.J. stated at 623:

Programme content regulation is inseparable from regulating the undertaking through which programs are received and sent on as part of the total enterprise.

On the one hand, it gives provincial lawyers scope in limiting federal control to programming; on the other, it may reinforce the point that content/carriage separations are artificial.

The problem here is that the rapid proliferation of "pirate pay TV" cable systems could prejudice all the efforts made to structure a national system of broadcasting. More

danger has been involved in assenting to the notion that cable is separable into distinct channels, some of which are "off-air" and others "closed circuit." This is certainly not consistent with Laskin's "total enterprise" and does set a precedent for a revolt by cable operators by introducing their own "closed circuits" with appalling consequences.

This scenario therefore suggests that an effort is required to shore up the defenses against unregulated closed-circuit. Essentially this would be along the lines suggested earlier that the real rationale for regulating broadcasting is not use of the radio spectrum but the dissemination of content designed for the general public.

#### 7. A DBS Policy

This scenario calls for the implementation of a DBS policy that rapidly goes beyond "experimentation" and offers a multi-channel service to non-cabled homes in Southern Canada (footprint area of 14/12 GHz). The service would become the basis of priority carriage in cable systems and the means for introducing Pay TV and modified (cleaned-up) foreign TV shows. This basic service would attempt to provide a much better balance than contemporary cable offerings and hope to keep subscribers to the basic service through a large price differential from the augmented service which would still contain nearby U.S. stations. Legislation should be enacted in terms of copyright somewhat similar to that being contemplated in the U.S., i.e. retransmission consent



(but from the producer only). Firstly, through priority of signal carriage, this could force the cable system to reimburse Canadian producers (CBC, Private networks, Independents) and raise the costs of foreign content -- unless received via the satellite basic package or via a Canadian station that had paid for the rights.

The above raises a number of problems. DBS would have an adverse impact on small marginal TV stations. This is regrettable, but the problem is already well advanced and it is hardly equitable to deny Canadians good multi-channel service simply to prolong the tenuous economic livelihood of these minor stations. This is to say that the problem is not new and therefore the scenario requires no new solutions, just that they may have to be implemented sooner. This satellite technology can permit regional/provincial input but probably cannot solve the problems of local or community service. It is possible that small multi-channel local stations with translators could deliver the satellite "package" in many cases.

The proposal does increase the export of dollars for foreign programs; but so do all scenarios. Possibly advertising revenues could be shared by the satellite programming agency, local broadcasting stations and even the cable operators. What is accomplished is a slow weaning of the consumer, through economic incentives (penalties), from an unrestricted and unstructured diet of U.S. programs to a basic Canadian, Pay TV and International menu which reflects

the best available programs in a multi-channel presentation that could appeal to a broad spectrum of tastes and interests. It also relieves the national service from the pressure of programming for a single, all-inclusive service since many of the needs would be met by other channels in the service.

Obviously this proposal would cause convulsions in the cable industry, but it is less radical than expropriation (Griffiths) or conversion to public utilities (Ouimet). At the same time it contains the threat to compete directly with cable to provide a basic service with a one-time installation fee, plus the exclusive distribution of Pay TV.

It is clearly within exclusive federal jurisdiction, and by potentially siphoning the entertainment dollars, it could hamper extension of provincially owned cable unless reasonable accommodations were made. This aspect envisions no constitutional changes and anticipates legislation only in the areas of copyright and creation of a central programming agency.

### C. Political and Cultural

#### 1. Unity and Identity

The goals or objectives often contain areas of mutual conflict, e.g. identity vs. unity. Identity may have more to do with a perception of difference while unity suggests a commonality. Identity is often associated with a location, or province or region. Unity must embrace all these.

The BNA Act assumed in large measure that the social, educational, cultural, and religious concerns of the citizens

were the prerogatives of the provinces who are now more determined than ever to take on this role. The economic and political realities of keeping Canada a country requires strong East-West ties, most particularly in transportation and communication. These elements have no clear expression in a cultural bonding strategy, however. To be individually Canadian is to be heterogenous, multicultural, divided in heritage, language and social tradition, and protective of these differences. To produce a collective identity which is based on a mutual appreciation of these discrete identities is no mean task, especially so if we wish to maintain the uniqueness of the parts.

In French Canada, broadcasting (especially CBC-TV), no doubt, has had a great deal to do with "nation" building by providing social, political and cultural awareness in unifying and giving expression to a Quebec francophone identity. In English Canada much of the void has been filled with U.S. spill-over or imported content. Unfortunately, in our abhorrence of jingoism and homogeneity we have let a foreign nation provide this for us. Our collective identity is therefore not characterized by many enriching exchanges, or even much awareness between the two major language groups, and is often based on negative approaches, e.g. anti-Americanism rather than pro-Canadianism.

It then becomes apparent from the above that a major constraint in national broadcasting is a lack of a really clear understanding of what we are trying to achieve and how

this might be accomplished, and how identities may be strengthened and reflected without subversive effects on unity.

As the provinces reach for their own identities and attempt to meet the needs and wants of their citizens, many areas of contention arise with the federal government. This effect on broadcasting has been noted above. Most centre on where the power and money should reside when it comes to satisfying the citizens. A distrust of federal priorities is most apparent, and is coupled with a tenacious desire to hold on to and extend whatever powers in communications they already possess. No single federal solution can apply to all provinces, since existing powers differ and there are, in fact, great disparities in services and needs.

However, while it is quite possible to negotiate separate provincial understandings and accommodations, the central government must be in effective control of inter-provincial communications as the BNA Act would entitle it. This is not only important in terms of binding the nation, it is necessary to actually conduct meaningful negotiations with the provinces. This, too, is an area in which the exercise of federal power does not antagonize the consumer and which strengthens the federal government's apparent role in national leadership.

While it is difficult to improve on the present stated objectives for broadcasting this scenario suggests that the accountability to realize these objectives has been made much

more specific.

## 2. Spill-Over Content

Two threatening sources exist which could proliferate foreign content at the expense of our own cultural industries and national goals.

a) Over-the-air Pay TV (STV) is already in Windsor and within two or three years will intrude into Toronto from Buffalo. This is certainly not a problem anywhere near as severe as the initial spill-over of U.S. TV, but eventually consumer interest and expectations will be raised. De-scramblers, etc. should specifically be made subject to licensing as broadcast receiving apparatuses, the construction, sale or importation of which would be subject to certain conditions.

b) In-home delivery services. The rapid growth in the next decade of videoplayers (VCRs and Videodiscs) could undermine all the above, unless the importation of cheaply replicated content is controlled in some fashion which protects indigenous production. That it is within Parliament's power to make such laws appears adequate in relation to Trade and Commerce pursuant to BNA s.91(2) which includes powers over imports and exports. This importation could be specific to one area or province: *Caloil v. A. G. Canada* (1971) S.C.R. 543.

Most of our problems have originated with "spill-over" and the resultant of catch-up policies in the face of "grandfathered" situations. This stresses the need to re-

assume leadership in a satellite policy with emphasis on different standards or channels, regulation of earth stations, and DBS of a high standard immediately.

D. Economic

1. Vertical/Horizontal Integration

For many cogent reasons policies with respect to cable and satellite which diminish the federal authority over the technologies, of necessity, reduce the federal power in shaping a structure which places economic emphasis on program creation and production. As suggested before, all long haul telecommunications delivery systems should be publicly owned by the nation and all program importation controlled at the federal level. If this were accomplished then much of the rest could fall into line.

The economic reasons for suggesting this approach are well evidenced earlier in discussions of the economics of program production and independent production. Vertical integration in broadcasting (i.e. production-distribution-exhibition in one organization) is driven by the economics that dictate that costs of distribution are incremental. The costs of replication of content are only marginal. A broadcaster (delivery system owner) seeks not to create product but to rent it for a limited number of exposures. The more widely a product can be exposed, the greater the amount of money which can be spent on the original production and/or the more cheaply it can be rented. Canada, being something

of a dumping ground for U.S. content and still somewhat of a buyer's market, can purchase product at a small fraction of the original production cost. The economic imperatives of the existing structure therefore dictate that the owners of the delivery systems extend services only to the point of diminishing returns and maximize profits by limiting the costs of program content. In the particular case of cable, content costs nothing (excluding the community channel) and without content regulations there is no strong pressure to contribute toward indigenous programs. The present licensing structure based on hardware ownership of either limited broadcast transmitters or the spatial monopoly of cable means that the delivery capability is the profit centre.

These economic imperatives apply to some extent to the CBC. In times of austerity or inflation, the fixed costs of plant and personnel cannot be reduced easily. Costs associated with program origination, most particularly out-of-pocket expenses, are the most easily pared and the first to feel the pinch.

## 2. Protectionism

One hardly questions protective tariffs used to ensure the viability of local industry in the face of the economies of scale or cheaper labour of foreign nations. However, a violent convulsion overtakes the mass media whenever ideas are touted for economic protectionism of cultural industries. We protect the industrial plant but not the cultural products.



Most glaringly in cable we protect the hardware owners by not permitting U.S. transmitters on Canadian soil, yet fail to compensate the economic damage done to the cultural producers by the unpaid distribution of foreign product.

The economic structures are such that for the broadcasting entrepreneur to be a good Canadian he must be a poor businessman. Secure in the protection of limited access to the system and usually freed of foreign competition, the owner or operator is directed to programming the greatest appeal at the least cost (which unfortunately are synonymous).

Two powerful myths are endlessly trotted out:

a) Freedom of choice - the consumer has the right to anything he wants and that the consumer by majority vote (ratings) actually gets what he wants.

Let it be sufficient to point out that in the present structure in North America this contention is without substance. The constraints on diversity and heterogeneity of content are imperative. The consumer only gets what he wants within tight limits.

b) Free flow of information - that society is best served by a wide selection of views and opinion.

In reality much of the argument is about content that has little to do with "information"; content that is part of a one-way free flow; and content that often precludes or denies the Canadian the freedom to be able to see his native content.

However, this scenario does not deny the power of these

constraints. Short of a national crisis in which Canadians perceive cultural integrity to be of paramount importance, drastic tampering with present consumer expectations and conditioned preferences invites political suicide. This is very real and very obvious and cannot be dismissed. Aiding and abetting the consumers' hostility would be the other mass media industries who regard any attack on "the free flow of information" as a threat to "the free flow of profits."

Recognizing the power of these problems, most solutions are directed to increased funding to Canadian programs and vague exhortations to make programs Canadians "will want to watch." But with totally unrestricted importation of foreign product this is not realistic.

Therefore the centralist strategy lies (without inviting political suicide) in slowly gaining federal control of delivery systems, slowly modifying the contents, and bringing the advertiser, the public, and even the consumer into making greater contributions toward funding the content sector. We cannot, as we have in the past, continue to deny services to a minority of Canadians (those most in need) "for the good of Canada" and to protect the viability of a system that isn't working for the majority.

That there are alternatives and strategies which are politically feasible and draw together all sources of funding can be demonstrated. These are dependent on the careful initiation of new technologies and the retention of jurisdictional power in the central authority. Such a strategy

would be applicable to Pay TV. Central buying of foreign content could likely achieve savings which could be used to either directly subsidize Canadian programming or better -- be used in some system of leveraging the direct returns to Canadian producers pro rata with their success with the consumer. This strategy may be found in various models proposed, e.g. DOC, Clyne Commission, Edmunds, etc. and attempts to reward the producer rather than the delivery system which takes no "creative" risk.

### 3. Extension of Services

Canada is a small nation economically with only limited financial resources to cover a huge geographical area. Much of the expenditure in broadcasting and the priority in telecommunications has been to extend services. Our broadcasting structure of public and private elements is a recognition of this fact. But, as distance insensitive delivery systems evolve, a new reality emerges. This should be fundamental to our future plans. The exact applications are not important now. It is important that the ability to exercise various options in the future remains, and that these technologies be directed toward the capability to best realize the advantages.

### 4. Program Production

In the program area, much has been made of underfunded Canadian programs and cheap imports. This is a reality

that won't disappear no matter how much we might wish for the producer who, through sheer imagination and ingenuity, can gather huge audiences at little expense. (It has happened, of course, but not on a sustaining basis.) And as our audience is more and more trained in the Hollywood conventions of what values constitute a "professional" production, the task becomes more difficult. We not only have to imitate the commercial gloss but aspire to some content of Canadian substance which is in all likelihood "foreign" to ourselves.

Then questions of program production efficiency arise. There are a number of options which suggest the separation of delivery from production. These anticipate a much freer, diverse, and stimulating content more efficiently produced in a competitive climate. It is noted that most of the U.S. network's content is independently produced and therefore this must be the good businesslike approach. It is not quite so simple. Most of the U.S. approach perpetuates the homogeneity of content through absolute network control over the shaping and funding of the program ideas as they progress to pilot form, while leaving the independent producer to find his profits in syndication and foreign markets.

In the U.S., financial control is centered in New York and practically all production emanates from Los Angeles. In Canada, we have determined that production should to some extent be decentralized for political as well as social reasons. This no doubt is in conflict with the economic

advantages of economy of scale and centres of a "critical mass" of production excellence. The U.S. approach of "independent" production has not resulted in much diversity in program choice and certainly is not reflective of the spectrum of U.S. reality.

There is much merit in Canada examining production-delivery separation as a means to provide an entrepreneurial incentive to production and possibly make regulatory sanctions more easily applied (program contracting, etc.). This is an area which needs intense study, however, and is only workable if the delivery systems are rigidly amenable to central control. Otherwise, the objectives of the production sector would be antithetical to those of the delivery system owners. The "baby would go out with the bath water."

#### E. Technology

##### 1. Delivery Systems

There is a mystique that Canada has produced something of national pride in being the most cabled country per capita in the world and the rush to become a "wired nation" should be further propelled. Yet this has been the greatest single contributor to the destruction of the national service and economically the most unlikely technology in view of our geographical spread. It is simply the consequence of permitting the consumer to support the access to foreign transmitters via a form of Pay TV. This is not to say it could be prevented or even regulated better under the existing

Act. It is simply to point out that the almost unfettered industrial exploitation of a new technology in our environment can have disastrous cultural results. It also questions, in view of the economics of cable, whether when extension of this service becomes unprofitable, money and effort (either through cross-subsidization or the public purse) should be lavished on it. Even the future economic savings inherent in optic fibre will still not permit universal cable.

Much more attention should be given to the satellite delivery of broadcast signals. Ways of having the consumer support this system are quite possible. Regard should be given to separate frequencies and standards from the U.S. (like Europe) rather than being compelled to be a part of the U.S. communications infrastructure as is now the case.

Fortunately the U.S. has not yet embarked on a 14/12 GHz program delivery service and with the reduced "footprint" in this technology it may be that the DBS role will not be as subject to "spill over" as was suspected. Certainly the existing program satellites, e.g. Satcom III will soon go into sophisticated scrambling as the piracy mounts. The costs of individual earth stations plus descrambling (in 6/4 GHz) will probably remain quite high and beyond the capability of the average home for many many years. Entry into MATV systems and local closed circuit systems is, however, a significant threat.

All this suggests:

- a) Not assisting the proliferation of cable.
- b) Accelerated DBS program-hardware and most particularly a content package.
- c) Control of importation of earth stations and their siting by the central authority.

Videoplayers, mini-computers and microprocessor technology, etc. all are leading to removing the economic incentives that would assist the development of two-way cable. They are also leading to the further proliferation of cheaply replicated foreign content. This area needs much study and some protective dikes in place before the flood commences.

d) Immediate interconnection of cable by satellite with cable or federally owned earth stations at reasonable rates. This again enlarges the options, provides muscle in negotiations, and more authoritatively stamps cable as part of a national system crossing provincial boundaries and definitely places it in the realm of radio communication to the general public, i.e. broadcasting. These earth stations should be rapidly limited to 16/12 GHz.

e) Development of DBS with an appropriate "content" package. Cable should receive Pay-TV, etc., through this system only.

## 2. Standards and Spectrum Management

Obviously since spectrum allocations are an international matter the primacy of the central government in this matter should be unquestioned. However, the central government should



be taking active steps to ensure:

a) Greater incompatibility with U.S. broadcast standards - because they are inferior to most international standards, e.g. NTSC vs CCIR and as a means to limit the free flow of content and technology to the detriment of our electronic and software industries. Obviously little can be undone but future technological standards, e.g. satellite could be determined to safeguard Canadian interests.

b) Such areas as the Radio Act and B.P. 23 must remain in the hands of the central authority so that nationwide compatibility is maintained.

c) Questions of terminal and system interconnection should be central concerns in so far as they are questions of universality of services throughout the nation. System interconnection strikes at the present capability of some provinces to subsidize local rates, extend services, and assist general revenues. However, excessive rates for long distance impede binding the nation and only support carrier profits. Terminal interconnection involves vertical integration, anti-competitive, and system integrity problems. These are complex issues and must be of central concern.

#### F. Conclusion

The various segments in this scenario have only been described in the most general terms. Only a few of the problems have been alluded to, but no scenario or even the status quo is without deep and cogent difficulties. However, most of the topics touched on could be worked through in

detail. Given the will and the patience to pursue a determined strategy, then, the individual problems can be properly assessed in terms of their contribution or necessity to the ultimate goal. On this basis, only, can the day-to-day compromises and appeasements be made with any intelligent appreciation of the consequences. So far in the power-broking, the provinces and the vested interests have displayed a much shrewder sense of what is really important for the achievement of their own goals -- and often at the expense of the national interest. The scenario then directs attention toward those areas most meaningful in the long term and is predicated on the assumption that a nation without a cultural integrity is simply not a nation. There is the assumption, too, that broadcasting and communications are essential to cultural integrity. The present destruction of national broadcasting and cultural expression has been instrumental in the present problems of regional alienation and indifference toward the larger concept of Canada.

CHAPTER III  
A SCENARIO FOR A SHARED DIVISION OF  
POWERS OVER BROADCASTING/COMMUNICATIONS

Technological developments on a number of fronts threaten the federal government's ability to exercise control over mass communications programming in the country. Hotel Pay-TV operations, while serving relatively small audiences, give the federal government some cause for concern because they are beyond the reach of federal regulation. Direct Broadcast Satellite (DBS) transmissions from American "super stations" are received by Canadian homeowners and MATV operators who have purchased "satellite kits" (mass produced for approximately \$500). The technical quality of this receiving equipment is not perfect, but compares favourably with off-air broadcast signals available outside many Canadian centres (e.g., grade B contour service). (Cf., "Implications of Direct Broadcast Satellites" in Volume 4 of this study).

The number of U.S. "super stations" increases. Many of these -- perhaps a majority -- make specific arrangements with U.S. cable system operators regarding the carriage of such signals. Generally, a situation evolves in which cable system operators pay the "super station" operator for content, which is then in turn provided to subscribers for some sort

of a fee. For this reason, the "super stations" start to use a variety of "scrambling" devices in order to prevent unauthorized reception, and this limits the degree of U.S. DBS penetration in Canada since the government is successful in enacting regulations which ensure Canadians do not purchase descramblers and pay U.S. program suppliers directly.

But while the majority of U.S. "super stations" scramble their signals, a significant minority continue to thrive solely on broadcast advertising revenue, and for this reason are willing to allow anyone to receive their signals (and in fact encourage this). Individual homeowners in northern and rural areas begin to install their own satellite receive undertakings. The Canadian government responds initially by attempting to ban "unauthorized" earth receive stations, but gets such a hostile response that it retracts its proposed rules (involving a ban on the sale of all receive equipment and stiff fines for individuals operating such equipment without authorization). The federal government does, however, go through with enacting a rule prohibiting MATV operators from distributing non-Canadian satellite signals to tenants, but is somewhat lax in enforcing this rule -- especially in areas where regular CATV is not available. Many situations of illegal reception of U.S. signals are simply "ignored" by federal authorities.

Despite these developments, the proportion of the Canadian population receiving American satellite signals remains somewhat low: individuals in areas already served

by CATV systems offering a wide variety of stations (including many U.S. stations) can see little advantage in purchasing satellite receive equipment to receive four or five extra commercial TV channels whose programming consists of material often duplicated elsewhere. Reruns are very popular on the "super-stations" running on commercial advertising revenue. Ironically, one of the U.S. super-stations attracts American audiences on the basis of a mixture of CBC and BBC programming.

The impact, then, of U.S. program importation via satellite is not really felt by conventional broadcast undertakings, except for a few economically marginal affiliates. In the face of audience declines, one or two of these operations shut(s) down local studios and is(are) absorbed by larger affiliates or -- in the case of CBC affiliates -- are reluctantly bought out by the Corporation.

Meanwhile, the federal government is unable or unwilling to convince the American government that the latter should not "push" its case regarding U.S. border TV stations. Canadian public opinion, normally quite "nationalistic" on matters related to Canadian culture, is somewhat ambivalent, as the U.S. stations make public their argument that their signals are being "stolen." In the face of a series of editorials in an influential Ontario newspaper condemning the "theft" of TV signals, the government feels it has little option but to back down on commercial deletion once again, and pledges never to lift the "freeze" on the former CRTC policy. Further pressure is put on the Canadian government to repeal those sections of

Bill C-58 dealing with the purchase of advertising on U.S. border TV stations, but the government refuses to relent on this issue. Still, federal policy-makers feel they are "under the gun" and that there is a need to develop alternative distribution methods which would "pre-empt" the (suspected) outflow of Canadian advertising dollars.

These developments form the backdrop for a series of events in the area of federal-provincial negotiations. A rough "content/carriage" distinction is worked out by the federal government and presented to the provinces as a means of distributing power in the communications field. This pleases very few of the provinces, who have (minimally) argued for complete control over cable (or at least any area of cable extending beyond the reception of off-air broadcasting). The provinces, in short, refuse to sign any agreements regarding the "acceptance" of a content/carriage division; Manitoba, in fact, comes close to suggesting it will no longer honour the Canada/Manitoba agreement, but ultimately agrees to abide by it. The Maritime provinces are willing to accept a "content/carriage" agreement, but only on an "interim" basis (for a short, and definable, period of time). Ontario indicates a willingness to accept, if this acceptance would be "without prejudice" to future claims it would have in the area of content.

Using these highly qualified acceptances, the Government of Canada forges an agreement with some of the provinces to transfer limited control over cable to them. Ultimately,

even Quebec accepts this offer, but only after the federal government agrees not to compel any province to sign an "unconditional acceptance" of the total arrangement (that is, to accept as legitimate federal authority over all content aspects).

The new arrangement sees the provincial regulatory bodies handling matters of "local" concern: (i) rates, (ii) the granting of franchises and (iii) non-programming services. The federal government, despite the objection of its regulatory commission, also agrees to hand over authority over community programming on an "interim" basis to the provincial regulatory agencies, but retains for itself the right to make certain "general rules." One of these rules is a prohibition on advertising of any sort. In the absence of a new constitution, the federal government makes this transfer of powers through a delegation mechanism incorporated in new broadcasting legislation. While this mechanism does not please the provinces -- which all assert an ability to pass their own legislation -- it is accepted as a pragmatic solution to the problem.

The federal legislation "adopts" all provincial legislation regarding telecommunications carrier service (cf., discussion regarding "Proposals for Constitutional Reform" in Volume 3 of this study), and thereby gives the provinces the ability to apply their legislation to federal undertakings. The federal government further suggests that should a new constitution be agreed upon, it would give to the provinces power over all intra-provincial aspects of telecommunications



carriage (including, in Ontario and Quebec, control over Bell Canada -- with some possibility of this company reforming into two provincial subsidiaries -- but excluding TCTS). But in the area of "local" or "community" programming, the federal government merely delegates the administration of its policies to provincial regulatory agencies, and insists that because such programming is a "content" matter, it ought to be within the purview of the federal government (which needs to make policies for the broadcast system as a whole).

If the idea that any "content" area must be delegated to the provinces proves somewhat upsetting to them, it is the actual implementation of this "delegation" scheme which upsets them most. The federal government, through a somewhat less important CRTC, proposes that it will issue "certificates of compliance" for all provincially-licensed cable systems which meet federal requirements vis-a-vis the carriage of content. Many of the provinces object strenuously to this "double licensing." One of the provinces, Ontario, decides to take issue with the extension of federal control over content on the community channel, and creates a conflict when its regulatory agency permits the carriage of advertising on one such community channel in the province (contrary to federal regulations). Under a federal threat that a "certificate of compliance" will be withdrawn, the cable operator stops advertising on his(her) community channel. But the Ontario government persuades him(her) to push the issue, suggesting that it will act as co-defendant in any action and will cover

any legal expenses involved. So a court case of major importance in Canadian communications shapes up. The case eventually reaches the Supreme Court of Canada, which affirms the paramountcy of any federal rule and reasserts the fact that the federal government has sole jurisdiction over broadcasting. The previously-used arguments that the "broadcast" and "closed-circuit" aspects of existing cable systems are inseparable are also reiterated by the Court. But the Court makes one further step of major significance: it rules that advertising on community channels must be under federal control because of the effect of such advertising (or potential effect) on broadcasting, a federal concern. The provinces are (understandably) upset, and certain remarks are made by a provincial cabinet minister impugning the dignity of the court. The court (judiciously) avoids citing this individual for contempt. In general, the provincial governments complain that the Supreme Court, composed entirely of federal government appointees, cannot properly adjudicate constitutional matters, and ought to be changed or abolished. A number of newspapers print lead editorials supporting this provincial stand.

But the Court does leave open some areas for provincial jurisdiction. The Court indicates, in much the same fashion as it had done in previous decisions, that the "inseparability" of closed-circuit cable from broadcasting stems from (i) the fact that all signals are carried together on a single cable operated by a single carriage agency or (ii) the provision

of some closed-circuit services could detrimentally affect broadcasting (this latter point being a new rationale). The court, however, envisages some legitimate areas of provincial activity relating to laws of general applicability designed for non-commercial (that is, non-advertising) closed-circuit undertakings, such as hotel pay-TV systems and movie theatres. The Court went further to suggest the provinces might even apply some of these rules to local aspects of cable, providing the rules did not contradict or defeat the purpose of federal laws covering those aspects of legitimate concern to the federal government.

Concurrent with these activities in the legal domain, a number of developments take place in the area of pay television. With the CRTC initially as the adjudicator, a battle ensues between cable operators and broadcasters respecting the emergence of a national Pay-TV network. The CRTC, initially prepared to "move quickly" on the issue of Pay-TV, stalls for a considerable length of time. The federal Department of Communications, after initially releasing a policy document favouring a co-operative venture involving joint public and private funding (much like Telesat), "down peddles" the proposal because of increasing pressures (from federal Treasury Board officials) for the government not to involve itself in any ventures involving government capital expenditures of any magnitude.

The Cable Satellite Network (CSN) has, meanwhile, developed a series of "ancilliary" cable services which it

offers to its member companies. These include a parliamentary debates channel (the CBC previously attempted to provide such a service, but under pressure from both the CRTC and the Secretary of State backed down). The Cable Satellite Network has also made an application to the C.R.T.C. for the operation of a U.S. network "gateway" scheme whereby all U.S. network signals would be made available across Canada. The proposal is that a modest fee be paid to U.S. networks for their programs (ultimately, U.S. program producers argue for and receive additional royalty payments in this regard) and that Canadian commercials be inserted. The Cable Satellite Network also proposes to insert some Canadian programming (including Canadian movies) during the times in which U.S. networks are not programming (i.e., "local" programming times). This "central gateway" concept attracts considerable attention as the solution to the U.S. border TV station problem. And, while some U.S. border stations attempt to apply pressure on U.S. network operators, the latter ultimately agree to sign an "offer" with CSN, subject to federal (CRTC) approval.

Initially, the CRTC reacts by denying CSN permission to run any commercials (other than public service announcements) during any period of time other than those scheduled with (entirely) Canadian programming. The cable network operators are not pleased with this arrangement, and insist that the "gateway" concept is dead unless the CRTC permits more commercials. Finally, a compromise is reached: the cable network will be allowed a small quota of commercials during

U.S. network time, and the regular amount (i.e., that amount applicable to regular television) during the Canadian programming hours, in exchange for which CSN will pay a "compensating fee" -- 33-1/3% of all commercial revenue -- to a number of broadcasters as well as the broadcasting networks.

With an in-place distribution system and the extensive rental of satellite channels arranged, CSN proceeds to attempt to "ice the cake" with the establishment of a national Pay-TV network. It initiates an unprecedented public relations campaign which advertises the past achievements of the cable industry in the area of providing new services to Canadians and also its recent achievements in promoting Canadian content (including the development of the "gateway" system). But the federal government -- that is, the CRTC -- finally displays reservations about the unrestrained expansion of CSN (cf., "Ownership Patterns in the Private Sector" in Volume 4 of this study). The CRTC once again stalls the development of Pay-TV, while federal plans for a joint broadcast-cable-government venture are quickly retrieved from the files.

The cable industry is, however, impatient. A large Ontario operator branches out and regroups his company into three affiliates: (i) a broadcast receiving entity, (ii) a local carrier system and (iii) a closed-circuit programming entity. The two "content" organizations rent channel space from the carrier system. The closed-circuit programming organization then proceeds to offer extensive Pay-TV services, both on a per-channel and per-program basis. These services

are based primarily on the importation of U.S. films and other material. The federal government at first initiates a court action for the operator's failure to "certify" the new content services, but then drops the action on the advice of legal staff (who suggest the action would probably not be successful).

The federal government's immediate response to the problem is to issue a press statement indicating that it will not be willing to tolerate new programming services without significant amounts of Canadian content; this statement called upon the provincial regulatory agencies to create rules which would ensure that this objective would be met. The Province of Ontario indicates a willingness to enact such rules, but in the meantime is pre-empted by the cable operator's voluntary offer to increase Canadian content to equal that found on "any other communications undertaking in the country in the private sector." The Province of Ontario therefore makes no further moves to bring the operation under its control, preferring to "study the issue further." The federal government is not, of course, pleased with this outcome because the Canadian content issue was only a minor reason for its felt need to intervene: basically, the federal government was afraid of losing control over communications content.

While these developments have been taking place, the Canadian Broadcasting Corporation has been pursuing plans for the implementation of a second CBC service, CBC-2, to be distributed exclusively via cable (cf., "A Restructured CBC"

in Volume 4 of this study). The Corporation is successful in convincing most CATV operators to pay a \$1 per month fee in exchange for receiving a second CBC channel consisting of (i) special productions (of minority interest), (ii) reruns of certain CBC features, (iii) some additional BBC programming and (iv) some Canadian independent productions. This plan establishes an independent funding source for the Corporation, and obviates (temporarily) the need of the Corporation to apply to an unwilling (and financially cautious) Parliament for a greater appropriation to cover expansion. A minority of cable operators, however, refuse to pay for the proposed CBC-2 service. These operators consist mostly of those with small, marginally profitable (or even unprofitable) systems. The CBC does not "push" the issue by asking the CRTC to compel operators to carry CBC-2, preferring to leave the matter for negotiations. By generously offering to cover the cost of earth-receive stations for remote area cable systems, the CBC is able to convince almost all cable operators to carry CBC-2.

Some provincial regulatory authorities, however, object to the determination of the appropriate fee (\$1 per subscriber per month) without their involvement. These regulators argue, basically, that any form of rate-setting is subject to provincial regulatory approval, and that cable operators do not have the power to make any agreement with the CBC without their approval. Using an argument based on the existence of regional disparities, the provincial agencies in Newfoundland



and Nova Scotia deny cable operators permission to pay the CBC \$1 per subscriber. They argue that the cable operators are "free" to carry the service, but that, as part of their rate-setting function, the specific one dollar fee cannot be approved. The actual mechanism by which this denial takes place is the refusal of regulators to consider rate increases to cover the cost of CBC service. Being tightly rate regulated, the cable operators have little in the way of excess profits from which the CBC fee could be paid (a situation which did not exist prior to provincial regulation), and are thus compelled to drop the CBC-2 service.

Saskatchewan then follows suit. It argues the the CBC is not sufficiently receptive to the problems of the province and that until basic CBC service is improved (in such areas as local reporting), it would be nonsensical to attempt to offer a second CBC service. Hence, rate increases in support of CBC-2 are denied.

These developments force the federal government to reconsider the division of power along content/carriage lines. Although appearing to be an uncomplicated (and parsimonious) method for handling concurrent jurisdiction (or, in the absence of provincial jurisdiction, at least concurrent authority in conjunction with delegation mechanisms), the content/carriage division creates severe problems for the federal government, which has discovered (somewhat painfully) that in some senses "carriage" decisions have content implications, and vice versa. The federal government becomes

increasingly concerned about the ability of private operators to play one level of government off against the other, and to find loopholes to enter what become essentially unregulated areas. The need for overall policies in the area of culture/communications is recognized, yet the development of closed-circuit undertakings solely under provincial control seems to suggest that no one level of government can achieve complete jurisdiction in the field (and that a co-operative approach is necessary).

The focus turns to cable television once again. There is a severe shortage of spectrum space, but in light of the development of CBC-2 and Pay-TV, there is little initial pressure for adding more broadcast signals (cf., section on "Reduction in Over-the-air Broadcasting Through the Use of Universal Cable" in Volume 4 of this study). Furthermore, federal (CRTC) policies compelling each licensee to provide "balanced programming" and licensing norms weighing against applications by certain types of groups restrict further pressure for over-the-air broadcasting licenses (for a further discussion of the notion of "balance" in the licensing of broadcasting undertakings, see "Federal and Provincial Objectives in Communications," section E, "The Policy-Making Activity of the CRTC" in Volume 2 of this study). Some such groups then attempt to establish services on a cable-only basis. These include: (i) a group of entrepreneurs wanting to sell air time to religious groups, and (ii) a group which wants to air ethnic programming. (When the first over-the-

air multicultural stations were licensed, the CRTC began to discourage cable systems in the same area from carrying closed-circuit multicultural programming on the grounds that it would detract from the over-the-air broadcast services.) Some Ontario cable operators propose to provide these services (and others), but they are warned by the provincial regulatory board that prior approval must be sought or they would be considered in violation of their franchise agreement. The operators therefore make formal applications to the provincial government for permission to carry these "local" services.

At this point, the federal government convenes a conference to discuss matters relating to mass communications content with the provinces. The federal government concedes that it is no longer practical to speak of complete federal jurisdiction in the field, but insists that neither is it feasible, within the existing scheme, to talk of significant provincial control over content given the wide jurisdictional range granted the federal government by the courts. At the conference, the provinces propose that the already-established provincial (regulatory) boards be given complete regulatory authority over content, with some policies to be the responsibility of the federal government and others the responsibility of the provinces. The federal government, however, would delegate the implementation of all its policies to the provincial regulatory board. The federal government, in response to this proposal, expresses two concerns: under the

proposal, it has no clear ability to overrule regulatory decisions which refused to take into account its policies and priorities; secondly, to set up 10 separate agencies to implement national aspects of broadcast policy would be to reduce substantially the degree of continuity (in policy implementation) between and among provinces. One final argument advanced by the federal government is that such a fragmentation of regulatory control would render the government less powerful and would fail to make use of the (valuable) accumulated regulatory experience of the CRTC. Provincial reactions to this claim are mixed: some accept the importance and usefulness of the CRTC, while others decry the commission for having callously disregarded the interests and aspirations of the provinces, having made grossly inconsistent rulings, and having failed to properly project the future role of cable (and, in doing so, having created enormous franchises which would be hard to regulate).

Accepting the fact that "concurrent" jurisdiction did not work very well when it implied separate regulatory agencies and (sometimes) competing policies, a cumbersome but politically acceptable set of mechanisms is proposed. First, there is to be a division of primary responsibilities in policy setting. The federal government is, for example, to have paramount responsibility for national policies pertaining to (i) Canadian content (ii) Canadian ownership, (iii) the development of national public broadcasting systems such as the CBC, (iv) the provision of second (minority)

language service across Canada, and (v) broadcast spectrum management. The provinces, likewise, are to have community programming and commercial regulation as primary areas. But even within these "primary areas," it is recognized that each party (the federal government and the provinces) has a stake, and it is therefore agreed in principle that no policy would be devised by one party without active consultation with the other party.

For their part, the provinces agree to no longer consider rate-setting and revenue flows within their exclusive domain; in other words, they agree that there might be some revenue control implications to areas of federal responsibility. Aside from the "principle areas" designated for each level of government, the vast majority of concerns -- for example, "freedom of expression" and "balance and diversity" -- outlined in previous federal legislation is deemed to be of equal federal and provincial concern. It is agreed that either party could initiate policies in general areas, but that both parties would have to agree on the policy before it could be implemented (proclaimed). The federal government feels uneasy about the prospect of irreconcilable disputes, but acknowledges that a consensual approach is the only feasible solution to the problem.

Each level of government is thus to be free to make policy, but the critical matter of adjudication would, of course, be left to a regulatory tribunal. Both levels of government agree that, whatever powers each should have (or

whatever powers they should jointly hold), no level of government should be capable of compelling the regulatory agency to licence a particular applicant, or to interfere with "freedom of expression" in general terms. The "arm's length" tradition established with the operation of the CRTC is to be preserved, even though the Commission as it had been previously known is to be disbanded. Both levels of government also agree that a single body should be established to deal with content matters, and that this body would sort out disputes regarding the relative importance of provincial and federal objectives. The federal government wishes this single body concept to extend to telephony as well, but some provinces express strong opposition and the matter is deferred temporarily.

The constitution of the regulatory tribunal proves to be a matter of initial contention, but is ultimately resolved. The federal government seeks initially to have a single national tribunal with 10 federal and 10 provincial appointees, each with equal voting powers. This proposal is unanimously vetoed by the provinces. A suggestion is made that a federally-appointed "panel" would join the federal panel for matters pertaining to the province in question. There would, in effect, be 10 separate regulatory commissions, but they would have in common a "federal panel" of 5 members (appointed by the federal government). In each province, the provincial government would appoint five additional members, and finally, a chairman and vice-chairman for each respective province is

to be appointed by joint nomination. Each level of government is to determine the term of office and the nature of appointment for its own appointees; for the most part, provinces choose to follow the federal lead of 4-year renewable terms.

Some problems are created, such as matters affecting more than one province. An initial mechanism is established whereby a "special panel" consisting of representatives of all of the affected provinces would sit. Some of the panels which are thus created, however, turn out to be unwieldy. It is agreed, as a matter of practice, that should more than one province be involved, each province would send as many delegates as necessary to create a 1:1 balance between federal provincial representation. A special problem is created with panels discussing "national" issues applicable to all provinces (e.g., the licensing of national networks). It is agreed wherever possible to leave these matters to individual decisions (to be reached by the respective provincial agencies), but that in those instances in which a "national" hearing is absolutely essential, a special panel consisting of the five federal members and the 10 provincial chairpersons is to convene. This group, though, is also to meet regularly as a "national co-ordinating group" for purposes of facilitating communication among the component agencies.

The resultant mechanism proves to be awkward for the federal government, but provincial governments -- with the notable exception of Quebec -- seem to be content with its



operation. Separate provincial bodies dealing with carriage (cable rates, franchises, telephone rates, etc.) continue to exist, but they are under instructions from their respective provincial governments to defer to the provincial Communications Commission should any of the latter's decisions have any carriage (or rate-setting) implications (with some adjudication by provincial ministers if necessary). In one instance (Manitoba), the government telephone agency fails to respond to a request from the Manitoba Communications Commission to force cable operators to provide free community access channels and to provide funds for community development (communications). This, argues the Manitoba carrier, is against the consumer interest and is a bad practice. The Manitoba Public Utilities Board concurs, and the dispute is resolved, ultimately, by the intervention of the provincial minister.

In this environment, the federal government convenes more conferences. The Prairie provinces, and to a lesser extent the Maritimes, are reticent to see the amalgamation of Public Utilities Commissions with the Communications Commissions for fear of losing to the federal government some power over telephony which was hitherto entirely theirs. On the other hand, the federal government offers to dissolve the Canadian Telephone Communications Commission, the agency handling inter-provincial telephone rates. Ultimately, all provinces agree to amalgamation, which is, after all, to occur mainly within individual provinces.

The provinces increasingly exercise their new-found

policy-making abilities in broadcasting but, for the most part, these policies are consistent with federal goals. Quebec adopts a 60% Quebec content rule, which merely furthers already existing Canadian content rules and is not deemed problematic by the federal government. Ontario enacts stiff advertising rules, following work done by its consumer affairs department (involving a registration procedure far stiffer than the former CRTC's). Alberta, on the other hand, seeks to relax commercial limitations imposed on FM broadcasters (former CRTC rules are "carried over" until specifically revoked or replaced by the newly-formed Communications Commissions). These developments prompt the federal government to seek regular consultations with the provinces, and as a result, a long series of annual meetings are planned to forge "joint policies." This mechanism proves to be very cumbersome: often, "joint policies" pertain only to one or two provinces, as all provinces cannot agree on policies to be adopted. Still, it is argued that there are specific needs in each of the provinces, and that complete consistency is not really required -- providing certain overriding federal concerns (e.g., Canadian content) are met.

CHAPTER IV  
A SCENARIO FOR A SEPARATED DIVISION OF POWERS  
OVER BROADCASTING/COMMUNICATIONS

The federal government becomes increasingly concerned about three major problems facing the Canadian nation: the continuing demise of national identity and national unity, the increasing erosion of Canadian values and lifestyles as a result of the exposure to American culture, and the persistent rift between the two major linguistic communities. At the same time, however, they weigh these nationalist concerns against issues and problems arising in the various regions of Canada and concede the need to balance the former with the question of provincial powers and regional inequities. It is within this content, then, that the federal government perceives that the broadcasting/communications system can make some contribution to both national and provincial/local development. Given that recognition, the federal government acknowledges that broadcasting/communications must be a joint federal-provincial responsibility.

While accepting the need for divided control or jurisdiction, the federal government is nonetheless concerned about the problems which such a division of powers can create. Overlapping jurisdictions could lead to conflict between the two levels of government, as each pursued its own possibly div-

urgent ends, and could create duplication which would reduce efficiency and increase the costs of government policy making and regulation, as well as industry operations. There is also a desire to achieve a uniformity of approach to all provinces which is not considered likely if a series of bilateral agreements are negotiated. To implement a joint responsibility while at the same time avoiding the pitfalls of "entanglement" (Simeon, 1977a) and the lack of uniformity of bilateral agreements, then, the federal government opts for a separated approach to the division of powers.

This separated (also referred to as "coordinate") division of powers involves the application of the classical federalist approach normally used to assign all powers to one or the other level of government, but confines it to the field of broadcasting/communications. In doing so, the federal government adopts an approach (within the existing constitutional framework) that approximates the Task Force on National Unity's (1979a) "systematic functional approach" to such a division under a new constitution (albeit without the recourse to concurrent powers):

We therefore advocate the grouping of subject matters in terms of general domains of government activities. Such broad policy areas might include: . . . communications . . . Within each of these domains would be listed the more specific subject matters arranged in related groups.

. . .  
Once activities are divided in this way, it should be possible to distribute specific responsibilities within a given general domain exclusively or concurrently to the order of government best suited to carry them out.  
. . . (emphasis added)

Such a method of assignment, it is hoped, will eliminate (or

at least minimize) the troublesome problems created by entanglements.

Initially, an attempt is made to base the primary division of the field of communications on the differences between entertainment-oriented enterprises (broadcasters) and what are commonly referred to as "common carriers" (telephone companies, etc.). With the rapid development of non-program services and their introduction by cable operators, however, this distinction is destroyed by the ambiguous status of the cable industry. No longer "simply" the purveyor of broadcast signals, "the cable industry would be in competition with the telephone companies and CN/CP for the provision of different kinds of data service" (Clyne Committee, 1979).

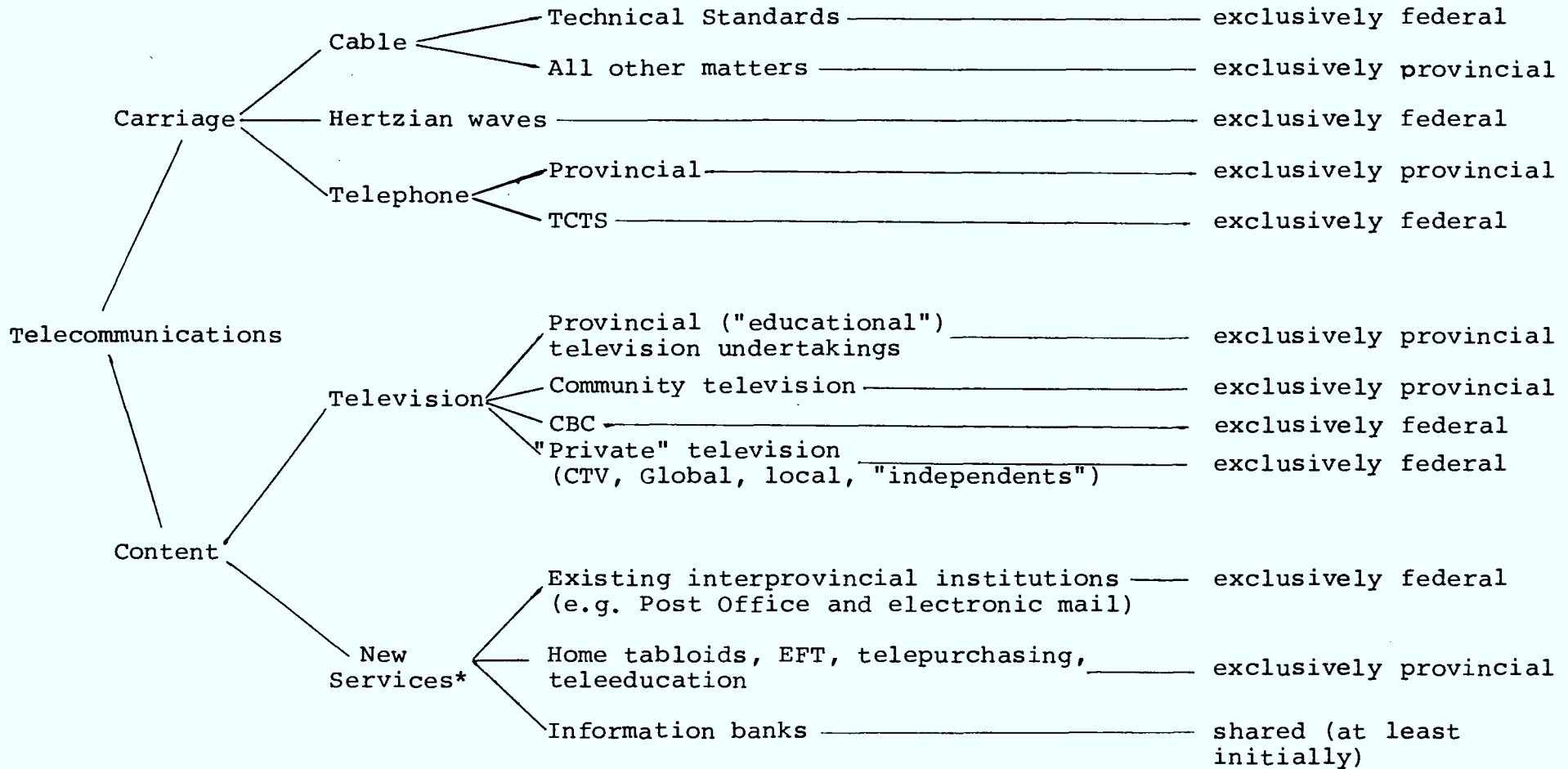
Thwarted by this development, the federal government reluctantly embraces the "content/carriage separation" notion as the primary dividing principle for the field of communications. Such an approach was advocated in some quarters to avoid raising questions of conflict of interest (Science Council of Canada, 1978), to preclude competitive advantage for carriers (Clyne Committee, 1979), and to protect freedom of expression and assure that programming did not fall into the hands least suited to produce it -- i.e. the cable industry (Ouimet, 1978). The federal government resisted the idea when it was first advanced, however, because the example of other countries indicated that the approach was more frequently employed in unitary states than federal ones, and probably more importantly, the cable industry lobbied effectively to

continue to have themselves regarded as "multi-casters." Given the importance which the federal government now attaches to a "separating out" of the communications field and the difficulty that ensuring lack of entanglement entails (not to mention the fact that the other segments of the telecommunications industry are generally favourable to the plan as outlined below), the (in all likelihood temporary) alienation of the cable industry seems a worthwhile, although not insignificant, price to pay.

Following the Pepin-Robarts approach, the content-carriage separation principle is not utilized to assign one entire aspect (i.e. content or carriage) to the exclusive jurisdiction of either level of government. Rather this distinction is employed as an initial step in generating possible subdivisions within each of the general areas so that each level of government would be afforded responsibilities in both the content and carriage sectors. Such an arrangement is felt to be more politically acceptable (in addition to satisfying the disentanglement requirement). The reason for this attitude would seem to be that, although the provinces' main concern seems to be in the area of control of carriage, there are perceived to be provincial concerns in the area of content control as well, especially on the part of Quebec and Saskatchewan. Alphonse J. Ouimet (1978) had presented a scheme that is felt to provide a framework for the necessary separations within the basic content/carriage distinction (Figure 1) and is adopted (or some variant thereof) as the

FIGURE 1

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.



operative approach.

In developing his jurisdictional arrangements, Ouimet contends that the allocation of powers is considerably easier in the carriage than in the content sector. Cable technical standards are obviously interprovincial in their implications and therefore a federal responsibility, while all other questions related to cable as a public utility monopoly should be a provincial concern since province-size units are the most logical and "have already proven their suitability in the case of telephony and electricity." Similar reasons are advanced for assigning telephone companies to the provinces and TCTS to the federal government.

Television content activities, which include "the choice, appropriation (including off air pick-up), production, procurement, packaging, programming, networking or selling of content of any kind, including messages and advertising," prove somewhat more troublesome. Attempts to differentiate content on the basis of its nature "would necessarily involve two-tier regulation and accountability." To avoid this duplication the alternate approach is to divide the content undertakings somewhat arbitrarily into federal and provincial undertakings. Those entities whose operations have any semblance of a national dimension (virtually all conventional broadcasters) are designated as federal undertakings, while those basically regional and local in orientation (i.e. provincial educational undertakings and community television undertakings) are provincial ones. (It should be borne in mind that Hertzian broadcasting, because

of its fundamental nature, is not subject to the content/carriage separation principle as cable operations are.)

The same approach is employed when dealing the the "new services." Interprovincial operations are "the responsibility of existing institutions over which jurisdictions are clearly established, e.g., the Post Office for electronic mail." Much other content is of an intraprovincial nature (local home tabloids, EFT, telepurchasing and teleeducation) and consequently falls within provincial jurisdiction. And data/information banks are mainly (although apparently not exclusively) a federal responsibility since "[o]nly the federal government is really in a position to take early initiatives in cooperation with the Provinces to ensure that the new information services on our screens are not, like our television, saturated with foreign material." It should be noted, however, that ultimately these "new service content undertakings should be as free of regulations as possible." Finally, channel allocation (for both television and new services content) is the responsibility of neither level of government, since any duly licensed undertaking which can afford the rates is guaranteed carriage.

After considerable discussion and negotiation, the scheme as outlined is acceded to by all the provincial governments, with Quebec and Saskatchewan being the last to agree -- contending that the provinces should be given jurisdiction over all conventional television content undertakings except the CBC. The conclusion of an agreement involves a number of concessions, or at least clarifications, on the part of both sides. The

federal government acknowledges provincial responsibility for the previously contentious areas of closed-circuit cable, educational content and provincial telephony, as well as community television content and essentially intraprovincial new services. The provinces, for their part, have fewer concessions to make -- basically private television content and perhaps information banks. The other areas assigned to federal jurisdiction have a decidedly national dimension to them, Hertzian broadcasting having already been decided by the Supreme Court, and cable technical standards, CBC content, TCTS, and new services under existing interprovincial institutions being decisively national in purview.

A number of institutional changes are introduced in order for the scheme to be realized. In order for the intraprovincial telephone systems to become the exclusive responsibility of the provinces, the anomolous situation of federal control over the phone systems in British Columbia, Ontario and Quebec must be eliminated. This is a rather straightforward matter in the case of the B.C. system with the federal government issuing a declaration that the system is no longer considered a work for the general advantage of Canada, the claim that had placed the B.C. operation under federal jurisdiction in the first place. The mechanism for ceding control of the phone system in Ontario and Quebec is more indirect and complicated, however, since Bell operates in both provinces and therefore is effectively an interprovincial undertaking. The procedure for creating provincial control in these two provinces, then, involves federal

adoption of provincial legislation dealing with telephones and delegating the administration of that legislation to the appropriate provincial bodies in Ontario and Quebec. The effective rationalization of the telephone sector is completed by the introduction of federal regulations governing the operations of TCTS.

Each of the provincial governments enters into negotiations with the cable companies within its boundaries to effect the transition of cable carriage to a provincial public utility monopoly. It becomes evident rather quickly that the cable interests do not intend to cooperate in seeing their operations transformed into closed-circuit entities (such a restriction being necessary to ensure provincial control under present constitutional arrangements) which have no control over or, more importantly, no possibility of directly producing content to be transmitted via the cable distribution system. Feeling that there is sufficient doubt about the constitutionality of the proposed arrangements, the major cable groups proceed with a challenge in the courts. The case eventually reaches the Supreme Court for ultimate decision.

The cable companies argue that, according to past decisions in broadcasting cases, the judiciary has held that control over content is inseparable from control over carriage. In other words, they contend that content and carriage are constitutionally inseparable and the proposed federal-provincial scheme should be ruled invalid. The federal and provincial governments (in a rare unified position on broadcasting consti-

tutionality) counter that the content/carriage separation is limited to only closed-circuit cable systems (as opposed to broadcast-connected ones, which remain within exclusive federal jurisdiction given federal paramountcy wherever Hertzian transmissions are concerned). The provinces would maintain control over both carriage and content in closed-circuit cable with the exception of exclusive federal jurisdiction over cable technical standards, TCTS, CBC and private television content undertaking, and interprovincial new services and information banks, which are all manifestly national in scope and should therefore be considered as matters of national concern.

In a near unanimous decision, the Supreme Court rules that broadcasting must be considered at a systemic level when examining the issue of content/carriage separation. In general, the principle that control of carriage implies control of content holds; that does not mean, however, that the carriage and content functions cannot be severed. In such circumstances, the principle would be still adhered to if the authority which controlled carriage also controlled content. Telephone systems and other common carriers have never provided or regulated content and would seem to be fundamentally different from broadcast-related entities. Consequently, a content/carriage separation would appear to be irrelevant since one half of the equation is absent. Nonetheless, the division of powers over telephony between the two levels of government is considered valid since the provincial systems are intraprovincial undertakings and TCTS is an interprovincial undertaking. Similarly,

Hertzian broadcasting presents no problems since it is acknowledged that the content/carriage separation does not apply to it and in line with previous broadcasting decisions, the federal government maintains exclusive jurisdiction over such undertakings, including broadcast-connected cable.

The problematic area is closed-circuit cable. Given that closed-circuit cable systems do not involve Hertzian waves and are "guided," their transmissions can be confined within a single province (or even smaller territories) and consequently are essentially local in nature and subject to provincial jurisdiction. Since, the provinces control closed-circuit cable carriage, they are also responsible for the control of its content, but this requirement would not seem to be met in the proposed federal-provincial scheme. The provinces must licence all television content and new service undertakings with the exception of the CBC, new services provided by existing interprovincial institutions and information banks. The reasons for the exceptions are as follows: the CBC is a distinct entity that is a matter of national concern; the new services provided by existing interprovincial institutions are obviously interprovincial in nature and require federal purview; and information banks have an international dimension that necessitates federal jurisdiction. The dissenting Supreme Court opinion agrees with the basic thrust of the majority opinion, but holds that the control-of-carriage-means-control-of-content principle must be strictly adhered to and that as a result, these particular exceptions should not be permitted since their rationales are

not compelling.

In weighing the Supreme Court decision, the federal government is disappointed in losing jurisdiction over private television content undertakings, but is gratified that the basic principle of content/carriage separation has not been so completely circumscribed that the entire scheme has to be abandoned. The fact that control over the national broadcasting service (CBC) has been upheld, combined with their exclusive control over Hertzian waves (bringing Direct Broadcast Satellite, international satellite communications and interprovincial networking within federal purview), assures the federal government that a sufficient national presence will be maintained to ensure the realization of federal objectives. The provinces, for their part, are delighted with the decision since it affords them even more powers than they had originally anticipated. The implementation of the original plan proceeds, then, in a somewhat modified form.

Several provinces already have well developed telecommunications-related regulatory boards which are easily adapted to handle closed-circuit cable carriage, television and new services content undertakings -- and where not already regulated, provincial telephony. Others have only a minimal regulatory framework and are unable to react as quickly as the former governments due to the need to establish enabling legislation, expand existing structures and recruit personnel (who are either from out of province or lack pertinent experience). The latter provinces, then, are at an initial disadvantage and in addition, are required to devote a greater proportionate amount



to telecommunications regulatory expenses than are the former. (An overall net increase of such expenses, of course, has been transferred from the federal government to the provinces under the revised federal-provincial division of powers.)

Other differences also make themselves felt. Some provinces in which individual cable companies or groups own very large percentages of the entire cable industry (such as B.C.) have a much easier time negotiating the transfer to a cable carriage public utility monopoly than do those in which cable ownership is more diversified. Above and beyond this, however, even before such negotiations have been concluded in all provinces, it becomes readily apparent that some form of fairly formal interprovincial structure or institution (perhaps a combination of the Committee on Communications Policy and the Association of Communications Regulatory Bodies proposed by the federal government in 1975) must be established so a certain uniformity of rates, operating requirements and so on can be maintained since a number of carriage and content undertakings will be operating in more than one province. Lack of uniformity would create the kinds of duplications (with their attendant increases in bureaucratic complexities and costs) which the separated division of powers had been designed to eliminate in the first place.

Active federal participation on this body is also required since it becomes clear that the "universal cable" environment upon which Ouimet's scheme seems to have been premised is not readily achievable. Conventional off-air broadcasting plus

Direct Broadcast Satellites are still necessary to service significant segments of the Canadian populace. Broadcast-connected cable systems are also common. Since many of these "broadcasters" are also potential television content providers for closed-circuit cable systems, some uniformity between federal and provincial content undertaking requirements and standards must be obtained so further duplications are not created. This arrangement seems to have created real incentives for meaningful federal-provincial and interprovincial cooperation in the broadcasting/communications field.

As Ouimet (1978) had suggested would happen, there is a great pressure to bring about the integration of telephone and cable carriage operations, such pressure originating in the provinces where the telephone companies are operated by the provincial governments (Alberta, Saskatchewan and Manitoba). Given the technical and economic benefits to be gained by such a move, all of the provinces adopt this approach, with the Prairie provinces doing so first and most easily due to their operation of the provincial phone systems. While the provincial phone systems absorb the cable interests in these three provinces, the pattern is reversed in the others. The situation is particularly complex in Ontario and Quebec since Bell Canada operates as an interprovincial undertaking and is regulated by the provinces under a scheme of legislative adoption and administrative delegation. Similar arrangements are required with regard to closed-circuit cable so that the fully integrated Bell telecommunications operation can come under provincial

control in both provinces.

In this important area of television content, the move to provincial regulation of content providers to closed-circuit cable systems stimulates Canadian production. With the prospect of as many as ten Canadian markets for productions, independent producers are induced to engage in record levels of activity. In addition to general appeal programming, producers are encouraged to create material with more specialized provincial appeal since access is guaranteed to province-wide (or close to province-wide) audiences. Such programming is "bicycled" to content undertakings in the various provinces (based on agreements worked out by the newly-created inter-provincial organization) and makes a useful contribution to greater interprovincial understanding. (There is one sour note at first, however. Quebec initially objects to a further increase in English-language programming on its television screens, but a negotiated agreement provides for English-French and French-English translations in Quebec which stimulates the Quebec dubbing industry.)

Developments are not so heartening in the areas of community television and educational television content. Educational television continues apace in the three provinces in which educational television organizations existed before the new agreement was instituted (i.e. Ontario, Quebec and Alberta). Saskatchewan, B.C. and Manitoba implement such content undertakings at some considerable expense, while different circumstances and priorities do not allow any of the Atlantic provinces

to become involved in such activities. Any such materials made available in the latter provinces are completely lacking in indigenous content. Some talk begins to emerge about inter-provincial initiatives among the Atlantic provinces to remedy this situation. In addition, the trend toward the blurring of the distinction between "educational" and "entertainment" programming continues, in the larger provinces at least, and becomes somewhat of a source of friction between the provinces and the federal government (and is intensified by the fact that the CBC seems to be moving into the educational television field as it pursues more specialized programming formats). Community television experiences very little development and those initiatives that are taken are confined to the provinces which are already rich in television content (e.g. Ontario) or are ideologically oriented toward this form of programming (e.g. Saskatchewan and possibly Newfoundland) and are therefore willing to invest rather heavily in their financing.

Another difficulty appears, this one being related to U.S. programming on the provincial closed-circuit cable systems. Given that such systems are precluded, by definition, from "capturing" U.S. signals off-air (and possibly microwaving them to their ultimate destination), television content undertakings are required to enter into direct negotiations with U.S. producers and networks for the rights to attractive U.S. programs for showing in their jurisdictions. Such competition tends to push up the costs of purchasing this abundant, but ultimately finite number of programs, and either raises overall costs or reduces

the amount of money available for indigenous productions.

(This tendency, of course, was already apparent under the pre-separated broadcasting structure, but the new arrangements have raised the costs to an entirely new level.) While co-ordinated licensing of such content undertakings can reduce these cost pressures somewhat, programming directives or restrictions cannot be so specific as to make a substantial impact. Effective control of the problem involves the development of a truly cooperative federal-provincial "gateway" agency which acts as a monopoly for negotiating the rights for such U.S. programs and allocating them to the various content undertakings concerned. Such an agency is established as an arm of the new federal-provincial communications organization.

(Ouimet [1978] had suggested that such an agency "should, like the CBC, be an independent public service non-profit organization with a clear national [i.e. federal] mandate" and would perhaps later be merged with the CBC if "this duplication of Crown agencies operating in fields so closely related is [not] in the public interest." Such an arrangement is not feasible, however, given the configuration of forces that has developed in the broadcasting/communications field.)

Given the reorganization of jurisdictions and the attendant changes that have occurred in the provision of television content, the CBC remains as the only truly national television content undertaking. Prior to the structural alterations of the communications system, proponents of the CBC had been afraid that significant provincial control could jeopardize its func-

tioning if any province decided that the CBC should be denied access to cable systems. This fear was based on the assumption that all of cable -- broadcast-connected as well as closed-circuit -- might be handed over to the provinces under a revised division of powers in a new constitution. Since that possibility never materialized and provincial control of cable was limited to most carriage and content aspects of closed-circuit cable, excluding the CBC, those fears were reduced considerably. Moreover, the method of allocation of channels eliminated that fear altogether: carriage is to be granted to any content undertaking that has been duly licensed.

While this arrangement is satisfactory for the initial period, as the success of the new broadcasting/communications configuration increases, a growing number of the 35 available channels are occupied. Each content undertaking (television plus new services) exhibits an increased demand for spectrum. In this situation, the prospect exists that the demand for channels will outstrip the available supply. That possibility necessitates that the federal-provincial organization devise some alternate mechanism for the allocation of channels (which could create some considerable friction among the various parties) or that fibre optic technology be introduced much more quickly than simply system replacement would allow -- at a considerable expense to the provincial cable carriage public utility monopolies.

As to the operations of the CBC itself, the Corporation has finally implemented the CBC-2 concept, long touted as the

mechanism for supplying specialized, quality programming. While CBC-1 does not utilize a simple lowest common denominator approach, it does offer a good deal of popular light entertainment programming combined with news, public affairs and documentaries. Much of the popular light entertainment, of course, continues to be American in origin, but with less of an eye to overall audience numbers, a more conscious attempt is made to place Canadian productions in the prime time and peak viewing hours. A reduced reliance on advertising and more diversified programming approach strengthens the Corporation's case for an increased financial commitment from Parliament. After initial hesitancy and considerable debate, Parliament agrees to implement the five-year appropriations approach to financing the CBC, thus allowing it to plan its long run activities with much more certainty.

In the area of "new services," there is a desire to leave developments to the "forces of the marketplace" as much as possible. The need to take quick action to preclude foreign domination (especially of information banks) is acknowledged, however. Such foreign domination could undermine Canadian cultural sovereignty and reduce (or fail to increase) Canadian employment in allied electronics manufacturing fields. Although the control of the content undertakings in this field has been fairly clearly sorted out (with perhaps the exception of information banks, where there is a primarily federal responsibility with provincial cooperation), the need for highly coordinated action is readily apparent. Rather than pursue



separate, uncoordinated policies, then, the federal and provincial governments undertake an overall joint "new services" program through the recently created federal-provincial communications body. These policies (also involving the participation of the private sector) involve the vigorous promotion of "the development of plans for the manufacture and marketing of the Telidon information system and ancillary equipment" and the stimulation of "the development of plans for the creation of Canadian-owned private databanks, as well as others funded by governments . . . [through] tax and other incentives . . . devised for that purpose" (Clyne Committee, 1979). They also entail actions "to regulate transborder data flows to ensure that we do not lose control of information vital to the maintenance of national sovereignty" (Clyne Committee, 1979). Such policies provide the groundwork for the establishment of "informatics self-sufficiency" in Canada.

The one final area that presents difficulties for the re-configured broadcasting/communications system is pay TV. Agreement on a moratorium on the introduction of pay TV had been a precondition for the realization of the reorganization of broadcasting/communications and the realignment of federal and provincial responsibilities. While it was commonly accepted that there was not an immediate demand for the introduction of pay TV, it was also recognized that pay TV, as method of payment rather than a special type of TV content, was inevitable. The technology at that point would have limited pay TV to the pay-per-channel variety and that meant that its introduction would

have created a system based on a lowest common denominator approach, replicating existing program types (basically movies and sports), further fragmenting audiences and delaying the showing of carried programs to non-subscribers, and 90% American in content (Ouimet, 1978). Since these features were diametrically opposed to the objectives for Pay TV of virtually all the provinces, there was little trouble in obtaining agreement on delaying its implementation and studying more suitable models. This is one more matter that is handed to the new federal-provincial body for disposition. The basic agreement on a pay-for-program approach implies that the cable carriage public utility monopolies will invest in system's hardware which will allow such a method to be instituted. In addition, since carriage and content are to be separated and Pay TV is to be utilized for what it is -- a method of paying for and financing TV programs -- there is no thought of creating a monopoly over Pay TV. In other words, the commitment is made "to let any television program undertaking use Pay-TV within certain regulations, once it is ready to serve the common good" (Ouimet, 1978). The federal-provincial body, then, addresses itself to the task of devising those "certain regulations."

CHAPTER V

A SCENARIO FOR A HIGHLY DECENTRALIZED DIVISION OF  
POWERS OVER BROADCASTING/COMMUNICATIONS

After considerable study and reflection, the federal government concludes that, while the problems of national unity, American cultural influence and linguistic tensions are of major consequence for the Canadian state, these problems are secondary to (and perhaps a consequence of) regional alienation and frustrations. That conclusion, combined with the belief that broadcasting/communications can provide only a marginal integrative role at the national level but a major one at the regional and local levels, induces the federal government to cede power over all areas of broadcasting/communications to the provinces except the ones with an obvious interprovincial and international dimension. This stance is also based on acceptance of the belief that broadcasting/communications is essentially a cultural and socio-economic matter and as such is more appropriately a provincial than a federal responsibility (Hartle, 1978; Lortie, 1978). While retaining control over clearly interprovincial and international facets of the field, the federal government concedes exclusive provincial control over all other aspects so that an inefficient and costly two-tiered regulatory scheme can be avoided (or at least that such overlaps can be

minimized).

The first communications sphere which is rationalized is the control of telephones. The mixed federal-provincial system of regulation of intraprovincial telephone systems is abandoned in favour of complete provincial control. This result is achieved by the federal government's withdrawal of its declaration of B.C. Tel as a work to the general advantage of Canada and by a legislative adoption/administrative delegation approach toward the regulation of Bell Canada in Ontario and Quebec. The control of interprovincial aspects of telephone are a federal responsibility, however, and is implemented via federal regulation of TCTS.

Earlier Supreme Court decisions had solidified federal control over conventional (Hertzian) broadcasting and over broadcasting receiving undertakings (cable systems) which utilized over-the-air signals. It could be inferred from the obiter dicta arguments that closed-circuit cable would fall within the exclusive jurisdiction of the provinces since it was a guided form of transmission which could be confined within a single province. Conceding that the provinces do have such powers, the federal government plans to embark upon a scheme of legislative adoption and administrative delegation whereby Parliament would adopt all pertinent provincial laws which are enacted for closed-circuit cablecasters and apply them to all broadcast-connected cablecasters and broadcasters, and then delegate the administration of those laws to the appropriate provincial boards. This federal action would be

best achieved by the prior establishment of uniform provincial laws in this area, such uniformity being achieved by an inter-provincial communications body created for that purpose.

(The federal government is included in the deliberations of this body, but given its desire to minimize its input into decision-making, the federal government maintains an advisory or consultative role. There is an understanding, nonetheless, that since the federal government is still ultimately responsible for off-air broadcasting and broadcast-connected cable that it may exercise a "veto" should arrangements evolve that are completely inimical to national interests and objectives. The likelihood of this happening is considered remote, however.) While there is a certain level of initial agreement among the provinces about such policies, given the large number of topics involved in the field and a certain difference in emphasis among various provinces, complete agreement requires considerable time to achieve.

As these developments unfold, the cable interests become increasingly nervous. They had welcomed the earlier Supreme Court decisions concerning cable "largely on the basis that one set of federal rules were preferable to ten sets of provincial rules all potentially different" (Hartle, 1978). While the uniform law approach would seem to eliminate the worries about unnecessary regulatory variation, the cable-casters and other broadcast interests are still concerned that the parcelling out of this regulatory function to the various provincial governments would increase still further the already

"extremely high direct costs of regulation" (Hartle, 1978). Believing that such powers are the sole prerogative of the federal government and should remain such, the cable interests challenge this scheme in the Supreme Court once the inter-provincial agreement has been achieved and the federal adoption and delegation effected. In previous instances, private interests had pitted the federal and provincial governments against each other on broadcasting matters to the ultimate detriment of federal-provincial relations in this field and beyond (McWhinney, 1979). In this particular case, however, the private interests are challenging both the provinces and the federal government.

The Supreme Court decides that the scheme is in fact constitutional. Invoking the reasoning with regard to closed-circuit cable that can be inferred from the obiter dicta of the earlier cable case, the court observes that closed-circuit cable is a guided form of signal transmission which can be effectively confined to a single province (or even smaller territory). As such, it does not experience the spillover effects to which over-the-air Hertzian broadcasting is subject and consequently does not require federal intervention to sort out potential interprovincial overlaps. Given the acceptance of that fact, the legislative adoption/administrative delegation scheme is also ruled to be valid. The provincial laws which have been adopted are valid in their own right and the federal legislature could have enacted the laws with respect to broadcast-connected cable systems and broadcasters if it

had so desired.

The vindication of the proposed scheme is hailed by the two levels of government, but its implementation creates hardships for provinces without well-developed regulatory agencies to assume the increased regulatory workload (mainly the Atlantic provinces). These provinces are initially disadvantaged, then, and in comparison to the more regulatory advanced provinces, are required to invest more resources in establishing and/or expanding regulatory machinery and staffing it (such personnel being inexperienced provincial residents or experienced individuals who have worked for other provinces or the federal government). To compensate for this lack of resources the federal government has to give serious consideration to subsidizing these provinces for assuming the costs of regulation, otherwise the function may not be carried out adequately.

This transfer of the burden of the regulation of intra-provincial broadcasting/communications to the provinces increases the overall direct costs of regulation in Canada. Some suggestion is made that the cost of regulation could be reduced by deregulating certain aspects of broadcasting/communications (e.g. broadcast licensing). It is also pointed out that, even failing such a move toward deregulation, with a transfer to the provinces "at least the responsibilities would rest where they should rest and the regulatory costs would be borne where they should be borne -- by the residents of the particular province to which the regulations apply"

(Hartle, 1978).

Another major federal concession to provincial needs and prerogatives concerns the national broadcasting service. The federal government has been thoroughly disheartened with the performance of the CBC: commercial imperatives have caused it to largely follow the lowest common denominator approach to programming and have made it a pale imitation of the U.S. networks; viewership continues to decline; the bilingual structure has contributed to the continuation rather than the diminution of the two solitudes; centralized production has increased regional alienation; bureaucratic rot has stifled creativity; and so on. Given a general discontent, then, both among politicians and the general public, the federal government moves to dismantle the CBC and open the field of public broadcasting to the provinces. A portion of the federal funds formerly allocated to the CBC is then utilized to "subsidize the distribution of private Canadian radio-TV broadcasts in remote areas" and "encourage Canadian creative talent involved in the production of audio-visual material suitable for broadcasting in Canada and abroad" (Hartle, 1978).

Difficulties similar to the ones which appeared in the case of provincial regulatory activity emerge in this area as well: namely, some provinces start from an advantaged position. Ontario, Quebec and Alberta switch their existing educational broadcasting enterprises to general broadcasting operations (a change which the more cynical claim to be



unable to recognize, given the rather broad approach to "education" taken by the earlier organizations). Such a change requires a considerable investment in production and broadcasting hardware, but far less than is required for the start up activities in Saskatchewan, Manitoba and British Columbia. (Much of this hardware is purchased from the now defunct CBC.) This level of investment is particularly prohibitive for the individual Atlantic provinces so no such activity is undertaken there. Discussions are begun, however, concerning the possibility of establishing an Atlantic inter-provincial network. In addition, given differences in geographic size and population dispersion, some provinces are also required to spend considerably more in extending services to remote areas or consider the possibility of not undertaking such extension.

Interprovincial negotiations provide for the establishment of a networking agreement and agency somewhat similar to those in Switzerland, West Germany and Yugoslavia. Quebec is somewhat reluctant to accept such an arrangement since it entails an additional influx of English-language material. Indeed, the whole area of the provision of second language service becomes somewhat problematic. While a national mandate for such a process has been removed, there is still some pressure to serve areas of individual provinces where there is a significant proportion of the population who speak the minority official language (i.e. English in Quebec and French in the rest of Canada). The provincial public broadcasting

networks fulfill this need to a certain extent with individual programs within the overall programming of a single channel, not by providing a complete channel in the second language. There is also no problem of the ill feeling created by the imposition of second language service in centres such as Vancouver under earlier federal policies. There are questions, however, about the long term effects of further isolating the two major linguistic communities.

When the other provinces propose a Quebec-centred translation policy (the cost of which will be shared among the provinces), Quebec is more amenable to the interprovincial networking proposal since the English threat is reduced somewhat (it is still perceived as foreign cultural material to a certain extent) and the approach advocated will stimulate the Quebec dubbing industry. The final obstacle to this type of arrangement is removed when the provinces agree to an "opting-out" clause (any province can decide not to carry any program it finds "disagreeable"), a stipulation that Quebec as well as a few other provinces had requested. There is some fear that, if this form of veto is exercised to any great extent, it could very likely create a round of such activity, leading to an erosion of the interprovincial cooperation that is necessary to make the networking arrangements work.

Such production arrangements work fairly well. While the overall level of Canadian production by public television is no greater than it had been under the CBC, the range and diversity does tend to be somewhat greater given the increased

provincial and local orientation of the provincial broadcasting bodies. In addition, the arrangements for interprovincial networking do seem to make some advances in interprovincial understanding and contribute to an increased tolerance of regional cultural differences. Not much of what is produced has appeal beyond Canada, however, and international sales of provincial productions are insignificant.

The additional funds (formerly granted to the CBC) made available by the federal government for private Canadian production stimulate a fairly high level of activity in the independent production sector. In order to maximize investments, however, producers attempt to generate programming formulas that ensure sales in foreign markets as well as domestic ones (in which they are having to compete with comparatively low-priced, popular U.S. programs anyway). The entry of additional broadcasters, in the form of provincial networks, means that even more parties are bidding for the relatively fixed supply of U.S. light entertainment. This has the end result of further inflating the costs of such programs (a trend that was evident in the late 1970s) and reducing the amount of money that broadcasters have available to invest in indigenous products (thereby offsetting at the macro-level the effects of the increased federal incentives referred to above).

To circumvent or at least minimize this problem, serious consideration is given to establishing some form of "gateway" agency which would have a monopoly over the importation and

allocation of U.S. programs. While the idea of such a rationalized and less expensive approach is attractive on the surface to both public and private "broadcasters," the private sector is somewhat suspicious of complete government control. This suspicion is based on the fact that the provincial public networks are effectively in competition with the private operators and would gain an advantage from such an arrangement. In addition, it is pointed out that the international nature and national scope of such an endeavour requires that the federal government carry out this function. In the end, the gateway approach is implemented, but its introduction and administration are entrusted to the federal government. The policies of this agency, however, are established by a board composed of representatives of the federal and provincial governments and the private sector.

Since the provinces have effective control over cable and intraprovincial telephone systems, their policies affect the rate and nature of the introduction of non programming or new services since cable systems and telephone companies are the dominant means whereby such services are introduced. The exact mechanics of this matter are somewhat unclear, however, since some argue that such services by their very nature are local and hence a provincial responsibility; others contend that they are no different from program services and cannot be divorced from the nature of the cable system (i.e. whether it is a broadcast-connected or closed-circuit one) when determining jurisdictional control. Consequently, in order to

avoid challenges to the legality of these powers, these services are also to be covered by a process of legislative adoption and administrative delegation, after an interprovincial uniform communications law conference (again with federal consultation).

In these deliberations, however, it becomes clear that a "simple" adoption/delegation scheme is not wise nor perhaps even possible. Certain new services involve activities, such as electronic mail delivery, that are performed by existing interprovincial organizations. These are activities, then, that obviously are and should continue to be a federal responsibility. In addition, information or data banks have quickly become international businesses whose operations in Canada have definite implications for national sovereignty. This international dimension and the national concern that it engenders makes this particular facet of the new services a logical responsibility of the federal government, with a high degree of provincial cooperation required as well. The other aspects of these nonprogramming services (EFT, teleeducation, etc.) are essentially local in nature and consequently do not require federal intervention. They can be controlled by the provinces, but via the adoption/delegation route (for the reason noted above). In this entire field, however, it is agreed that the arrangements described above will only be adhered to for as long as is necessary to ensure Canadian sovereignty. Once that is achieved, the control of the new services will be released to the forces of the marketplace,

and the limited degree of two-tiered regulation that the scheme (just described) engenders will be eliminated.

There is some resistance to this strategy toward the new services on the part of Manitoba, Saskatchewan and Alberta -- where the telephone systems are controlled by the provincial governments and are also involved in the delivery of new services. The competition with cable companies is viewed as a drain on the revenues of the provincial telephone system, reducing the system's ability to extend service to remote areas -- or increasing the costs thereof. Since the alternative is a mixed federal-provincial jurisdiction, however, the provinces opt for the "free market" approach with the idea that ultimately the province will establish a comprehensive telecommunications system by absorbing the existing cable operations.

As regards Pay TV, there has been a certain degree of consistency among provincial objectives for this service. The provinces had generally advocated that Pay TV should:

- 1) offer non-duplicative and diverse programs and services;
- 2) contribute to regional (and by extension Canadian) production;
- 3) be available to as many citizens as possible and at reasonable rates; and 4) be offered in a form which allows subscribers to pay only for those programs he/she chooses to watch (i.e. pay-per-program). While such basic agreement makes it relatively easy to achieve uniform policy and regulatory approaches (for eventual federal adoption and delegation), the objectives are at odds with the plans of the

principal proponents of a Pay TV scheme (i.e. the cable operators), who are advocating a pay-per-channel approach. Such an approach would mean programming would be more of the lowest-common denominator type rather than diverse and complementary forms and that 90% would be American content, with little overall contribution to Canadian (let alone regional) production (Ouimet, 1978). Consequently, the struggle over Pay TV, which had formerly operated at the federal-provincial level in terms of jurisdiction (now solved) and at the federal (CRTC)-industry level in terms of system configuration, shifts to the provincial-industry level. With the exception of the two official language provision and the national scope one (which perhaps could be accomplished by having the inter-provincial gateway agency operate in tandem with provincial pay TV agencies), the provinces would seem to be articulating the same objectives as the federal government (CRTC) in its dealings with the industry interests.

CHAPTER VI

POLICY ISSUES AND POLICY CHOICES IN CANADIAN BROADCASTING/  
COMMUNICATIONS, AND THEIR ASSOCIATED RISKS UNDER THE  
FOUR DIFFERENT DISTRIBUTIONS OF POWER

In examining the scenarios developed in the four preceding chapters, a number of key broadcasting/communications policy issues can be extracted. Twenty such issues have been identified (and grouped by basic feature: control, socio-political/cultural, economic and technological) and are presented in Table 4. The possible choices for each issue and the associated risks for each such choice have also been presented in a fashion similar to Edmunds' (1979) treatment of the 13 major policy issues on which every major society must take some position. While it is obvious, of course, that many of these issues are intertwined or otherwise related, the initial task is to examine each separately, leaving consideration of their interactions or cross-impact to a later time.

Each of the major policy approaches toward the distribution of powers over broadcasting/communications in Canada, then, would be forced to address these issues (or would have them decided by default). The choices with regard to each of the specific broadcasting/communications policy issues required to maintain the integrity of the original basic



policy approach concerning the distribution of powers are presented in Tables 5 to 8. These tables also indicate the degree of flexibility that exists with regard to the choices on the issues (i.e. the extent to which options are open or closed). The risks connected to the configuration of choices involved in each of the four basic distributions of power can be determined by referring to the appropriate choices in Table 4.

TABLE 4

## MAJOR BROADCASTING/COMMUNICATIONS POLICY CHOICES AND THEIR RISKS

<u>Policy Issue</u>	<u>Choices</u>	<u>Risks</u>
A. <u>CONTROL</u>		
1. Regulatory Involvement	Regulated	Stifles initiative. Inefficient use of resources. Increases overhead.
	Unregulated	Lack of control by public. Inequality. Lack of Canadian development. Americanization of content.
2. Ownership	Public	Bureaucracy. Control of information. Insensitivity to majority interests.
	Private	Control of information. Insensitivity to minority interests.
	Mixed	Increased overhead. Public assumes responsibility where private won't. Increased overhead. Conflict, ambiguity re goals, objectives of public element.
3. Controls on Profits	Controlled	Stifles innovation. Restrains efficiency. Tendencies to lateral expansion.
	Uncontrolled	Transfers wealth to media controllers. Costlier services. Lack of subsidization of Canadian talent. System motive is greed (spillover effects).
4. Content/Carriage Relationship	Integrated	Vertical integration of industry.
	Separated	Control by carriers.
5. Balance of Political Control	Federal dominance	Lack of flexibility. Remoteness. Inappropriate standards in some cases. Hostility in provinces and regions.

Table 4 (continued)

<u>Policy Issue</u>	<u>Choices</u>	<u>Risks</u>
	Provincial dominance	Disparity of services. Proliferation of varying standards. Balkanization of the country. Absence of international liaison.
	Equality	Increasing complexity for the operators. Increasing costs of regulation. Confusion of accountability.
6. Federal Policy Direction	Political	Susceptibility to lobby by interests. Less visibility of decision making.
	Regulatory	Lack of coherent and consistent policy ( <u>ad hoc</u> decisions). Capture by regulated interests.
7. Number of Federal Control Agencies	One	Blind spots. Generalized policies where not appropriate.
	Several	Differing standards. Increased cost of regulation.
8. Provincial General Broadcasting Systems	Existent	Tensions with federal government. Fragmentation of production resources. Redundancy. Balkanization of country.
	Non-existent	Greater demands on/expectations of CBC. Lack of outlet for provincial/regional input. Less opportunity for local talent.

Table 4 (continued)

<u>Policy Issue</u>	<u>Choices</u>	<u>Risks</u>
<b>B. <u>SOCIO-POLITICAL/CULTURAL</u></b>		
9. Locus of Production	Centralized	Deemphasis of local/regional concerns.
	Decentralized	Lack of "critical mass." Non competitive internationally. Imitative programming formats.
10. Channels of Information	Many	More of the same programming. Less Canadian. Less ability for government to exercise control.
	Few	Less temporal flexibility. More limited areas of programming. Tendency to censor.
11. Balance of Federal Priorities	Culture over Economics	Not politically popular. Expensive.
	Economics over Culture	Weakens cultural fabric (national identity and unity), increases likelihood of assimilation. Denial of services. Increasing emphasis of consumerism.
12. Openness of Cultural Market	Common Market	Americanization of content. Unfair economies of scale. Ultimate demise of Canadian industry. Weakening of socio-political identity.
	Trade Barrier	Continued necessity to plough resources into maintaining Canadian content.
13. Emphasis on Cultural Pluralism	High	National cultural identity weakened. Hobble decision making process (satisfying interests not meeting substantive needs).
	Low	Alienation of various interests.

Table 4 (continued)

<u>Policy Issue</u>	<u>Choices</u>	<u>Risks</u>
14. Linguistic Integration of National Broadcasting Service	Integrated	Friction in the network. Provokes "rednecks." Hostilities in audience.
	Non-integrated	Fosters separation. Precludes familiarization; cross fertilization of ideas.
C. <u>ECONOMIC</u>		
15. Economic Base	Audience payment	Increased fragmentation of audience. Increased foreign content. Exacerbate disparities in distribution system.
	Advertising	Homogeneity of content. Lack of audience control. Increasing consumer orientation.
	Public funds	Funding uncertain and variable since subject to political whims of Parliament. Money diverted to administration rather than programming. Lack of drive to maximize audience.
16. Availability of Services	Universal	Money goes to hardware not software.
	Non-universal	Disparity of services. Cream skinning and lack of cross-subsidization.
17. Private Program Funding	Subsidy	Increasing cost to public purse in time of restraint. Inefficient allocation of resources.
	Laissez-faire	Insensitive to minority interests. Import foreign rather than produce indigenous content. Talent drain to U.S. due to lack of work.

TABLE 4 (continued)

<u>Policy Issue</u>	<u>Choices</u>	<u>Risks</u>
18. Foreign Content Purchasing	Monopsomy (single purchaser)	Bureaucracy increases overhead costs and lessens flexibility. Conflict over who controls it.
	Many purchasers	More money expended. Unfair to local producers.
D. <u>TECHNOLOGICAL</u>		
19. Delivery System	Broadcast/Satellite	Fragmentation. Foreign content. Not as amenable to government control. Centralized but lacks two-way capability. Uses up broadcast spectrum (shortage of channels). Limited by international agreements. Lacks ability to proliferate services as wired (cable) can. Can't meet local/regional needs.
	Wired	Economic constraints of services (disparity of services). More amenable to political control. Foreign content. Audience fragmentation.
	Mixed	Inefficient use of spectrum. Technological redundancy. System complexity.
20. Technical Standards and Spectrum Management	Universal	Lack of flexibility to meet local needs. Impediment to technological innovation.
	Non-universal	Lack of national standards. Redundancy.

TABLE 5

POLICY CHOICES NECESSARY TO MAINTAIN THE INTEGRITY OF A  
HIGHLY CENTRALIZED DIVISION OF POWERS OVER BROADCASTING/COMMUNICATIONS

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>
<b>A. <u>CONTROL</u></b>		
1. Regulatory Involvement	Regulated	Low
2. Ownership	Public, Mixed	*Private ownership of delivery systems precluded.
3. Controls on Profits	Controlled	Moderate
4. Content/Carriage Relationship	Integrated	Low
5. Balance of Political Control	Federal	Low
6. Federal Policy Direction	Regulatory	Moderate
7. Number of Federal Control Agencies	One	Moderate
8. Provincial General Broadcasting Systems	Non-existent	Low
<b>B. <u>SOCIO-POLITICAL/CULTURAL</u></b>		
9. Locus of Production	Centralized	Moderate
10. Channels of Information	Few	Low

\*Options are closed

TABLE 5 (continued)

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>
11. Balance of Federal Priorities	Culture over Economics	Moderate
12. Openness of Cultural Market	Trade Barrier	Low
13. Emphasis on Cultural Pluralism	Low	Moderate
14. Linguistic Integration of National Broadcasting Services	Integrated	Moderate

C. ECONOMIC

15. Economic Base	Public Funds	High
16. Availability of Service	Universal	Low
17. Private Program Funding	Subsidy	Moderate
18. Foreign Control Purchasing	Monopsomy	Moderate

D. TECHNOLOGICAL

19. Delivery Systems	Mixed	Low
20. Technical standards and Spectrum Management	Universal	Low



TABLE 6

POLICY CHOICES NECESSARY TO MAINTAIN THE INTEGRITY OF A SHARED  
DIVISION OF POWERS OVER BROADCASTING/COMMUNICATIONS

Note: A "shared" division of powers entails the allocation of all powers over broadcasting/communications to both levels of government, with conflicts being sorted out according to a principle of paramountcy.

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
A. <u>CONTROL</u>			
1. Regulatory Involvement	Regulated	High	
2. Ownership	Mixed; or Private	*Public-only precluded	
3. Controls on Profits	Controlled; or uncontrolled	High	
4. Content/Carriage Relationship	Integrated or Separated	High	
5. Balance of Political Control	Equality	*Low/Moderate	Complete federal or complete provincial control precluded.
6. Federal Policy Direction	Political	Moderate	
7. Number of Federal Control Agencies	One	Moderate	Could have multiple agencies corresponding with varying levels of sharing.
8. Provincial General Broadcasting Systems	Non-existent	High	Likely <u>shared</u> control over broadcast systems.
*options are closed			

TABLE 6 (continued)

	<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
B.	<u>SOCIO-POLITICAL/CULTURAL</u>			
	9. Locus of Production	Decentralized	Moderate	
	10. Channels of Information	Few	High	
	11. Balance of Federal Priorities	Culture over economics; Economics over culture	High	
	12. Openness of Cultural Market	Trade Barrier	High	
	13. Emphasis on Cultural Pluralism	High	High	
	14. Linguistic Integration of National Broadcast Service	Non-integrated; integrated	High	
C.	<u>ECONOMIC</u>			
	15. Economic Base	Audience payment; advertising	Moderate	
	16. Availability of Service	Universal	High	Non-universal possible
	17. Privage Program Funding	Laissez faire	High	Subsidy not precluded
	18. Foreign Content purchasing	Many purchasers	High	Monopsomy possible.

TABLE 6 (continued)

<u>Policy</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
D. <u>TECHNOLOGICAL</u>			
19. Delivery System	Mixed	High	Broadcast/satellite; or wired possible and consistent with division of powers (technological and social desirability determines decision)
20. Technical Standards Universal and Spectrum Management		*Low	

\*options are closed

TABLE 7

POLICY CHOICES NECESSARY TO MAINTAIN THE INTEGRITY OF A  
SEPARATED DIVISION OF POWERS OVER BROADCASTING/COMMUNICATIONS

Note: A "separated" division of powers entails the allocation of different aspects (or sub-fields) of broadcasting/communications to each level of government, the delineation of the aspects or sub-fields being such that no overlaps or conflicts result.

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
<b>A. <u>CONTROL</u></b>			
1. Regulatory Involvement	Unregulated	Moderate/low	
2. Ownership	Mixed; or Private	*Public-only precluded	
3. Controls on Profits	Uncontrolled	Moderate/low	Control possible in some sectors but not entire arena (selective control).
4. Content/Carriage Relationship	Separated	*Low	Integrated possible if each government level responsible for one type of system (broadcast vs. cable).
5. Balance of Political Control	Equality	*Low	
6. Federal Policy Direction	Political; or Regulatory	High	

\*options are closed

TABLE 7 (continued)

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
7. Number of Federal Control Agencies	Several; or one	High	
8. Provincial General Broadcasting Systems	Existent; or non-existent	Moderate/high	Depends on whether division is based on content/carriage or not.

B. SOCIO-POLITICAL/CULTURAL

9. Locus of Production	Decentralized	Moderate	
10. Channels of Information	Many	*Low	
11. Balance of Federal Priorities	Economic over culture	Moderate	
12. Openness of Cultural Market	Common market	Moderate	
13. Emphasis on Cultural Pluralism	High	Moderate	
14. Linguistic Integration of National Broadcasting Service	Non-integrated	Moderate	

\*Options are closed

TABLE 7 (continued)

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
C. <u>ECONOMIC</u>			
15. Economic Base	Audience payment; advertising	Moderate	
16. Availability of Service	Non-universal	*Low	
17. Private Program Funding	Laissez faire	Moderate/low	Subsidy would involve federal entry into provincial area.
18. Foreign Content Purchasing	Many purchasers	*Low	Monopsomy precluded if division of power is not content/carriage.
D. <u>TECHNOLOGICAL</u>			
19. Delivery System	Mixed	*Low	
20. Technical Standards and Spectrum Manage- ment	Non-universal or universal	Moderate/high	

\*options are closed

TABLE 8

POLICY CHOICES NECESSARY TO MAINTAIN THE INTEGRITY OF A  
HIGHLY DECENTRALIZED DIVISION OF POWERS OVER BROADCASTING/COMMUNICATIONS

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
A. <u>CONTROL</u>			
1. Regulatory Involvement	Unregulated	Moderate/high	Under an adoption/delegation scheme, the federal government may have a regulatory involvement in some provinces.
2. Ownership	Private;mixed	*Nation-wide public ownership precluded	
3. Control on Profits	Controlled	High	Controls more likely in provinces in which provinces exercise power.
4. Content/Carriage Relationship	Separated	*Low/moderate	
5. Balance of Political Control	Provincial dominance	*Low	
6. Federal Policy Direction	Political	Low	
7. Number of Federal Control Agencies	Several	High	None of the agencies would have much power.
8. General Provincial Broadcasting Systems	Existent	High	
*options are closed			

TABLE 8 (continued)

<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
9. Locus of Production	Decentralized	Low	
10. Channels of Information	Many	Moderate	
11. Balance of Federal Priorities	Culture over economics	High	
12. Openness of Cultural Market	Common market	High	
13. Emphasis on Cultural Pluralism	High	Low/moderate	
14. Linguistic Integration of National Broadcasting Service	Non-integrated	Moderate/high	

C. ECONOMIC

15. Economic Base	Audience payment, advertising and/or public funds	High	
16. Availability of service	Non-universal	Low	
17. Private Program Funding	Laissez faire	High	
18. Foreign Content Purchasing	Many purchasers	Low/moderate	



TABLE 8 (continued)

	<u>Policy Issue</u>	<u>Logical Choice</u>	<u>Degree of Flexibility</u>	<u>Notes</u>
D.	<u>TECHNOLOGICAL</u>			
	19. Delivery System	Wired	Moderate	
	20. Technical Standards and Spectrum Management	Non-universal	Low	

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