

DELEGATION AND CABLE DISTRIBUTION SYSTEMS:
A NEGATIVE ASSESSMENT

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Discussion Paper No. 11

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ISSN 0706-1242

Preface

One of the most contentious of the issues concerning the division of powers in the recent constitutional discussions has been communications, especially radio and television broadcasting and cable distribution. In few areas is the debate so complicated by technical complexity and by rapid technological change. In few are cultural and economic dimensions so intertwined. Clarification of the issues and alternatives is essential, and in this paper, Richard Schultz attempts to do so. He makes a strong argument for federal dominance in the area, while at the same time seeing an important role for provincial influence.

This is a revised version of a paper originally commissioned by the Canadian Cable Television Association for presentation to their Annual Convention in Vancouver on May 28, 1980.

Institute Discussion Papers are designed to provide an opportunity for informed comment and discussion on important issues in federalism and intergovernmental relations. The views expressed are those of the author.

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Richard Simeon
February 1981

Technological change has reached a fast and furious pace and is rapidly becoming faster. Most of society's institutions, on the other hand, can only change slowly, and in most cases avert their eyes from the frightening onrush of science.¹

In the last decade of constitutional reform discussions and negotiations, including those during the summer of 1980, communications has been one of the central issues. Under the general rubric of communications, responsibility for regulating cable distribution systems has been one of the more important concerns. After several years of stalemate in the negotiations, in the past four years there has been an emerging intergovernmental consensus that would resolve this particular conflict by having the federal government delegate regulatory responsibility, with a few qualifications, for cable to provincial governments. The argument of this paper is that such delegation is premature and possibly ill-advised. My opposition to delegation is based in part on principle and in part because I believe that very little, indeed inadequate, attention and concern has been paid to devising an efficient and effective regulatory system that will respect the needs and legitimate interests of all parties affected by any change in jurisdiction.

The present constitutional allocation of jurisdiction can be easily stated: the federal government has exclusive jurisdiction over cable television. Building on the Radio case decision of 1932, the Supreme Court of Canada in a 1977 decision declared that because the nature of the service provided by cable is reception of broadcast signals, regulatory authority over cable rests solely with the federal government.² Well before this decision the provinces had initiated their demands for some form of control over cable. The consensus in support of delegation is the product of lengthy negotiations that have occurred. For the first half of the past decade the Federal Government steadfastly refused to consider the possibility of a transfer of any responsibility and would only offer the provinces a consultative role on federal communications responsibilities. For their part, the provinces in 1974 and 1975 developed a provincial position which demanded a transfer of authority over "all aspects of cable distribution systems and services with the exception of federal broadcast services." The first break in the deadlock came with the Canada-Manitoba Agreement of 1976 wherein the federal government sought to trade provincial control over cable television hardware for provincial recognition of federal programming responsibilities including those over pay television, over which federal constitutional jurisdiction was thought to be questionable. This agreement became a precedent inasmuch as shortly after, the federal Minister of Communications offered the provinces, at a 1978 conference in Charlottetown, a compromise agreement wherein, in part, for provincial acceptance of federal jurisdiction over pay TV the federal government would transfer some of its responsibilities over cable television. The specific contents of the proposed agreement emerged at the First Ministers' Conference in February 1979 with the agreement, with Quebec and Alberta reserving their positions, on a draft constitutional position to effect concurrent authority with respect to cable

distribution systems. The provinces would be empowered to license and regulate cable systems within a federal framework covering technical standards, the availability of Canadian broadcast programs and services and Canadian content. The next development came at a November 1979 conference of Communications Ministers when a working group of officials was established to develop specific proposals "regarding means of delegating authority over cable distribution systems to the provinces." This decision reflected the position of the federal government and all the provinces, save Quebec which persisted in its demands for an almost total transfer of jurisdiction for communications matters and dismissed delegation as an unacceptable "administrative arrangement." The intergovernmental working group on delegation has not yet reported.

Before I turn to the reasons underlying my position, I will make two introductory comments. In far too many discussions of constitutional change, the emphasis is placed -- most inappropriately I believe -- on the needs of governments rather than on the needs of citizens. We far too often forget that governments are created and given powers to serve the public and not the reverse. Our objective in constitutional reform should be to divide powers and responsibilities and to create appropriate administrative and regulatory machinery that will maximize the capacity of governments collectively to satisfy citizen interests, needs and goals.³ Thus, I believe that the central issue in assessing the merits of the arguments for changing regulatory jurisdiction for cable distribution systems should be whether the interests of the cable subscriber, rather than the interests of governments, are better served by such a change.

My second prefatory comment is that I hope my negative response to the issue will not be misunderstood. I am not a knee-jerk defender of either the status quo or, particularly, the federal government. I believe that fundamental changes in our federal system are necessary.⁴ More specifically, in the area of telecommunications I believe that provinces have legitimate interests and concerns that must be respected and incorporated in developing and regulating national telecommunications policies and systems. Provinces, for a variety of economic, social and cultural reasons, must play a central role in the development and regulation not only of cable distribution systems but other sectors of telecommunications which can impact on them and their residents.

My contention is, however, that transferring jurisdiction is neither a necessary nor an appropriate means for accomplishing such a legitimate objective. In part a strong argument can be made that delegation is today unnecessary because it is a response to a problem that is diminishing in significance. When communications became a major issue in the 1970's, a major source of the intergovernmental tension was the widely-based perception that the division of responsibilities within the federal government for communications issues was inappropriate.⁵ The consensus was that the CRTC had been given far too much independence not only to implement but more importantly to make public policies. Consequently, it was felt that there was no basis for a meaningful intergovernmental relationship on communications policy matters because the federal

government possessed no effective means, other than amending the relevant statute, to implement intergovernmental agreements. Associated with this factor was the widespread provincial opinion, shared by many federal participants as well, that the insensitivity of senior CRTC officers during the first decade of its existence to provincial interests fostered a "corrosive adversary system" between the agency and the provinces and consequently between the federal and provincial governments.

These problems have been addressed, however, and to a very significant extent have been, or shortly will be, resolved. For its part, the CRTC has, in the past five years, shown a high degree of both sensitivity and resourcefulness in attempting to find means by which federal and provincial authorities could effectively collaborate on matters of mutual concern and interest. The Prince Rupert Committee of Inquiry, the TCTS Interregulatory Committee and the committee on extension of television services are three excellent examples of CRTC initiatives in this regard. Indeed, not only is the critical assessment of the CRTC's record on intergovernmental relations now badly dated but, as I have argued elsewhere, there is a very real danger that the CRTC may be going too far in its efforts to assuage provincial concerns.⁶ It may well sacrifice some of its regulatory legitimacy on the altar of intergovernmental relations.

The federal government has also addressed the major issue of the appropriate mix of responsibilities for political and regulatory authorities in its proposed Telecommunications Act. For our purposes, the most important provision in this Act is that which will empower the federal Cabinet to issue broad policy directives to the CRTC. By means of this power, the federal government will possess both the authority and the means to implement intergovernmental agreements and ensure that provincial interests will be accorded due weight in federal regulatory proceedings. In short, some of the major factors that gave rise to the provincial demand for delegation as a means of resolving some of the intergovernmental problems that had occurred are no longer significant and, therefore, to that extent the case for delegation is weakened.

The case against delegation is even stronger when, in addition to questioning its necessity, one challenges its appropriateness. Delegation should be seen as a 19th century solution to what I believe will turn out to be a 21st century problem in public policy. It is a solution which suggests issues can still be dealt with in discrete, if not watertight, constitutional compartments. Furthermore, and more importantly, it is a solution that is predicated on two assumptions that I contend are quickly becoming dated. Those assumptions are, first, that cable distribution systems are simply adjuncts to the traditional off-air broadcasting system. Hence, the debate is phrased usually in terms of the delegation of cable television, not in terms of cable distribution systems or cable telecommunications. The second questionable assumption is that cable is, and will continue to be, an essentially local and regional undertaking or, in constitutional terms a matter "of a merely local or private nature". If both these assumptions are erroneous, as I believe them to be, then delegation is objectionable in principle because, as presently contemplated, it does not offer sufficient protection for the inter-regional, national and international dimensions of what can become an important and vital component of our telecommunications system.

In advancing a case against delegation, my perspective on cable emphasizes the future. It is commonplace to assert that we are in the first stages of embarking on a fundamental transformation of our economy and society into what has been labelled an "information-based society". In such a society, telecommunications policies and systems will undoubtedly play the crucial role transportation policies and systems played in an earlier era. Only recently have we begun to appreciate and enjoy the technological advances that will provide for greatly enhanced transmission capacities, and, most importantly, transmission choices. But such advances will not be without mixed blessings. One commentator has noted "revolutionary changes in information technology, involving computers and telecommunications, will cause upheavals at the level of markets, institutions, laws and politics."⁷ Those upheavals, he suggested, will involve two basic sets of issues:

- 1) those relating to the arrangements of the information infrastructure itself, e.g. common carrier policy, competition of the related telecommunications markets and investment policies in new technologies, and 2) those relating to the application of information technologies across all sectors of the economy including the postal service, publishing, finance, media, education, manufacturing, transportation, medicine, energy and governance.⁸

These issues are directly relevant to the question of transferring jurisdiction over cable. If we are to give sufficient emphasis to the needs of cable subscribers - present and future - we must first define cable's role in the information society. What is cable? Can anyone today satisfactorily define it? Is it simply, or even primarily, as the CRTC 1971 statement defined it, "...a system for supplying to subscribers a variety of local and distant television signals of high technical quality"?⁹ I believe that few today accept such a confined role for cable. Yet in passing, I would suggest that a television-based view of cable, with its concomitant emphasis on programme content, has dominated the intergovernmental discussions on transferring jurisdiction. This is reflected in the almost single-minded preoccupation of the federal government to protect national broadcasting interests in agreements to transfer jurisdictions. Only last November, in the federal-provincial conference of communications ministers did we see the federal government suggest a more expansive view of cable by announcing that it was considering changing the proposed Telecommunications Act to make a number of the provisions of Part V of the Act to apply to cable undertakings when they are providing telecommunication services or facilities. The purpose of such a change was to clarify "the status of this industry from the point of view of regulation."¹⁰

The cable industry has argued for a broader definition of the roles and functions of cable, especially vis-à-vis other components of the telecommunications system. It has suggested that there should be "recognition of cable television as a distinct industry and technology with a separate character and purpose from those of broadcasting transmitting undertakings."¹¹

The industry's proposed definition states that

"Cable television undertaking" means a telecommunication undertaking which receives broadcast signals and distributes them to subscribers of the undertaking, and may originate and distribute programs and other services to such subscribers.¹²

The industry's call for a broader definition has been supported by others such as the Ontario Government which has argued that "it is imperative that cable be accorded legislative recognition of its status as a distinct industry, with its own special functions and with its considerable potential for development..."¹³ Ontario proposed that there be a separate part of the Telecommunications Act "which would incorporate certain sections relating to broadcasting transmitting undertakings as well as certain powers referable to cable as a non-broadcasting communications medium."¹⁴

The demand for a new definition of cable reflects the ambiguity and controversy that now exists about the roles and functions of cable in the wider telecommunications system. In its November 1979 "Submission Respecting New Telecommunications Legislation", the Canadian Cable Television Association raised a number of questions that further indicate such ambiguity. The more important of those questions were the following:

To what extent should telephone and cable systems compete for services? Should certain services be restricted exclusively to one industry or the other?

Should cable television properly be considered part of the broadcasting system and, in this respect, what obligations, if any, should it have to support the broadcasting system?

Should there be any control over the networking of cable systems?

What restrictions, if any, should there be on connections between satellites and cable systems?¹⁵

The cable industry is not alone in raising such questions. The Federal-Provincial Working Group on Competition/Industry Structure in the Telecommunications Industry raised similar questions in its report to the October 1979 Federal-Provincial Conference of Communications Ministers. Although it identified a number of policy options for dealing with the questions, the Working Group did not attempt to answer the questions because "little or no results-oriented data" were available and concluded that "further work would have to be done" in order "to develop further the policy issues and options".¹⁶

The presence of these questions and the absence of answers indicate that there is today and for the foreseeable future, no consensus, no agreement, on where and how cable fits in the telecommunications system or what its roles and functions should be. In itself, the absence of such a consensus may not be all that significant to the issue of which level of government should regulate the industry. I would contend, however, that what makes it vitally

significant is that just as cable is being transformed from being simply an adjunct to, and extension of, the broadcasting system, it is, or has the potential to be, more than simply a local or regional undertaking. We already see indications of the future with cable satellite connections and cable companies that cross provincial boundaries. In the information society, cable will transcend the local distribution characteristics that have come to dominate our perceptions of its roles and increasingly exhibit significant inter-regional, national and possibly international dimensions. These dimensions will relate to not only the transmission of home-related information, but also, according to one study, "the information and data handling capability of Canadian business".¹⁷

My opposition to transferring jurisdiction given the ambiguity of roles and the relentless technological change that now exists is that I do not believe that provincial regulation will be willing or able to give sufficient weight and emphasis to the extra-provincial dimensions of cable distribution systems. Indeed, I would suggest that not only will the extra-provincial dimensions not be given enough protection, but they will, in all likelihood, be frustrated and blocked. At a time when flexibility will be crucial, it is probable that provincial jurisdiction will inhibit rather than encourage the necessary change and development and the adaptive capacity of the telecommunications system. If, in the information society, communications policy will play such an integral economic and social role, to create artificial barriers, by means of provincial jurisdiction, to information mobility and to the development of the full potential of what promises to be one of the central components of the telecommunications system, would be most unfortunate. In this context, the conclusion of a study prepared for the 1959 Macpherson Royal Commission on Transportation is as relevant, I believe, to the issue of the cable industry today as it was to the trucking industry then:

In the long run, it seems no more likely that the provinces can carry the full responsibilities of developing and regulating large-scale inter-provincial trucking operations than it was possible for them to carry the burden of railway building and regulation they attempted 75 to 90 years ago.¹⁸

Critics of my position will no doubt suggest that, at best, I am dealing with a hypothetical situation and, at worst, I am being unfair to the provinces. I would respond in two ways. In the first place, there is more than ample evidence today of provincial governments employing their regulatory and other powers to achieve goals that conflict with and frustrate the goal of a national common market.¹⁹ There are already too many instances of regulatory impediments to the free flow of goods, services, labour and capital in Canada to permit us to be confident that such barriers cannot, or will not, be erected with respect to cable distribution systems and information mobility. Indeed, we have already seen one example of such impediments with the jamming of satellite signals to Saskatchewan cable companies which, ironically, were carrying House of Commons proceedings.

The possibility of provincial impediments to information transmission employing cable distribution systems seems, to me, to be increased when one considers the arguments advanced by provincial spokesmen to justify delegation. When one goes beyond the oft-invoked rationale for provincial regulation which is that provincial governments are closer to the people and, therefore, more sensitive to their needs and interests, (the logic of this should lead to the conclusion that the "best" regulators of cable would be municipalities), it is apparent that provinces are intent on introducing regulatory regimes to attempt a wide variety of economic and social public objectives. The objectives that the prairie provinces, especially Saskatchewan and Manitoba, intend to pursue, if they obtain jurisdiction over cable systems, pertain largely to the role of community-based groups and cooperatives and to the use of cable to encourage regional and local development. Central to these objectives are the employment of the provincially-owned telephone companies to facilitate cross-subsidization where necessary to provide cable services where they probably are not economically viable.²⁰

The Quebec government has also justified its case for delegation on its desire to attain cultural, linguistic and other social goals. In 1973, in perhaps the most definitive statement of the Quebec government's position, Quebec, Master Craftsman of its own Communications Policy, the Minister of Communications declared that "communications having a primary role to play ... as they constitute one of the principal guarantees of a society's special characteristics, its language and culture, its way of living and being. Moreover, they are an essential factor in economic progress as well as cultural and social development."²¹ More recently the present Deputy-Minister of Communications of Quebec was very explicit about these objectives as they pertain to cable systems:

...we must render audio-visual services more accessible to everyone, and these must correspond to Quebec's socio-cultural priorities; we must provide free access to local and community programming; we must guarantee individuals freedom of choice in terms of content, and more generally, guarantee their right to information, expression, training, and amusement; we must urge the cable distributors to serve specific territories when conditions so permit. While the list is incomplete, it is sufficiently full to make it clear that we cannot rely on the initiatives of private enterprise. Specific regulations must be made, in compensation for the grant of certain specific territory, which will enable us to reach our objectives.²²

Ontario, long a critic of what it calls "negative and control-oriented regulation" (i.e. that practised by the federal government and the CRTC) has suggested, nevertheless, that provincial regulation would be goal-oriented in that it would be expected that "the development of cable would be more sensitive to Ontario's regional economic development strategies."²³ Whether this would be accomplished by supportive or directive regulation remains unclear, although the record of regulation in most jurisdictions is replete with examples of governments substituting the "stick" when "carrots" fail.

It must be emphasized that, at issue here, is not the legitimacy of provincially imposed public policy objectives being substituted for federal objectives, although the efficacy of employing an essentially negative policy tool to pursue positive policy objectives is open to debate. The real issue concerns the possibility of provinces pursuing economic and social development goals in a manner that adversely impacts on national and inter-regional goals and in particular creates significant barriers to information mobility. If delegation is to take place, it would be imperative that before this occurs, any agreement provide for an effective and authoritative means for resolving inter-provincial and federal-provincial conflicts. To date, at least as far as the public record suggest, there is no indication that such a means has been designed, let alone suggested. Furthermore, at issue is a concern for conflicts that go beyond technical interconnections, as currently envisaged in federal position papers, to embrace substantive policy conflicts.

On this problem of how to deal with such intergovernmental conflicts, it should be noted that the Federal-Provincial Working Group referred to earlier was unable, after extended study, to come up with any concrete proposals. In its report, the Working Group acknowledged the possibility of such negative regulatory impacts and the need to develop means to reduce them. The Group could only recommend, however, that their "Ministers authorize members of the working group or other officials to assess the relative advantages of different approaches to minimizing negative inter-jurisdictional impacts."²⁴ Until such "approaches" are developed, the case against delegation would appear to be very strong indeed.

If the preceding argument is not persuasive, then the record in the only existing major example of delegation is instructive. In 1954, acting on the assumptions that extra-provincial trucking was an insignificant part of the trucking industry and that technological changes were not expected to challenge that assumption, the federal government delegated its responsibilities in this area to the provincial governments. This is what the Quebec Government has labelled the St. Laurent formula. Within five years the trucking industry were decrying what they called "an unworkable system of regulation," "a several-headed monster," which "recognized not a Canadian trucking industry²⁵ but ten individual trucking industries -- it cut the industry into ten parts". The following is a selection from a 1965 statement of the problem by the industry's national association:

...we...emphasize that as an efficient method of administering control over the extra-provincial trucking industry, the Motor Vehicle Transport Act is a failure. Instead of promoting orderly healthy development of ... industry the Act has actually fostered conflicting and inconsistent regulatory policies by the ten ... controlling bodies.... The Act has militated against uniform and long-run continuity in extra-provincial regulatory policy. It has encouraged, rather than removed, parochialism in a geographical sense. It is an Act which today is removed from the realities of extra-provincial trucking development of the past decade.²⁶

The provincial response to such criticisms should also be studied by advocates of delegation. Within five years, the trucking industry sought to persuade provincial regulators to cooperate among themselves to remove the burdens that had been created for extra-provincial trucking. I do not believe I exaggerate when I state that for the past 25 years the record of concern of provincial regulatory authorities and provincial governments for the extra-provincial dimensions of the trucking industry is virtually unblemished. Provincial authorities have done little to correct the problems or lessen the costs that result from lack of uniformity or interprovincial cooperation. The few times that they have suggested a willingness to do so came when the industry sought federal remedial action. Once the threat of such action abated, so did provincial willingness!

By way of one last comment on this point, advocates of transferring jurisdiction by way of delegation may base their position on the belief that a safety-valve will exist, namely the federal government can always cancel the delegation.²⁷ The record of trucking delegation is not very positive in this regard. After 1967, when the federal government sought to re acquire its constitutional powers in this area, its efforts met with no success.²⁸ It would appear that delegation is very much like a vasectomy: although theoretically possible, its reversability, at least to date, is practically impossible.

Thus far, I have been discussing the reason for objecting in principle to transferring jurisdiction, namely the concern that the growing inter-provincial and national dimensions of cable distribution systems will not be adequately respected in any system of provincial regulation. Let me now turn to the two more practical objections. The first practical objection relates to a concern that is widely and appropriately felt, not only in the cable industry, but in other groups, specifically a fear of double regulation. In my view, if one accepts the contention that cable distribution systems in the future will increasingly be characterized by significant extra-provincial dimensions, then jurisdiction, if it is to be transferred at all, should only be partially transferred. Partial transfer, however, will inevitably result in double or dual regulation of cable systems. By dual or double, I do not mean two-tier regulation, but joint regulation by both levels of government of individual systems.

In the future, it seems obvious that the most contentious cable regulatory issues will be pricing of services, extension of services, particularly non-broadcasting services, and interconnection both between licensees and with other telecommunications carriers. I find it difficult to envisage a division of regulatory responsibilities where one of the two levels of government will not be interested in having a major role with respect to these issues. Accordingly, I believe that, contrary to the OCTA recommendation, it will be extremely difficult, if not impossible, to develop a delegation arrangement which will "define a role for the federal and provincial regulatory agencies that is self-contained, non-duplicative, and non-conflicting."²⁹ The result can only be regulatory systems which will cause delays, add to the costs of regulated firms and, not unlikely, lead to regulatory "impossibilities", that is, conflicting directions and goals for cable firms. It is difficult to see the cable subscriber, who must ultimately bear all regulatory costs, benefitting from such developments.

The inherent difficulties in developing a "self-contained, non-duplicative and non-conflicting" regulatory system under a transfer of jurisdiction leads to my third and final objection to such a transfer. A transfer of jurisdiction, unless it is complete and total, an alternative which is neither desirable nor practical, will necessitate continual federal-provincial negotiations. Any extension of "government by federal-provincial conference" is, to me, most undesirable for it is a system of government dominated by excessive secrecy and in which neither Parliament nor provincial legislatures play effective meaningful roles.³⁰ It is a system in which the central participants are a few elected authorities and their respective vast corps of bureaucratic diplomats. I would suggest that today there are more public policies designed and ratified in the Holiday Inns of this country than in the House of Commons and provincial legislatures.

The cable industry has not been immune to such a development. The original Canada-Manitoba Agreement of 1976 was developed without any public input or parliamentary sanction. If I have been informed correctly, Manitoba and Federal officials met recently in a Winnipeg hotel to revise this Agreement, although again I would not expect such revisions to be subject to any form of parliamentary approval or even scrutiny. This type of agreement and the method by which it is developed will unfortunately become typical.

Such a system of decision-making is neither healthy nor the most effective means for resolving difficulties. It is a system which, perhaps more than any other factor, has undermined the accountability of governments in Canada; it is a system which can afford to be less responsive to legitimate interests for, in the words of one of my colleagues, paraphrasing Adam Smith, it is a system which permits governments "to sacrifice public interests for the varied interests of those who make the decisions."³¹ It is a system that reduces citizens to supplicants and victims. In short, I believe that a transfer of jurisdiction which not only encourages but requires extensive intergovernmental negotiation to determine the substantive nature and impact of that transfer, is not one in which the interests of the cable subscriber or of the general public will be a primary consideration.

Conclusion:

I realize that I have taken a very negative position on the question of cable delegation and, furthermore, given the apparent inexorable momentum behind the movement for delegation, that I run the risk of being dismissed as a cranky academic content with tilting at windmills. Nevertheless, I believe delegation at this time to be premature and possibly ill-advised.

We are entering a period of tremendous change and challenge. It is a period in which the roles and responsibilities of the various sectors of communications are in a state of flux and ambiguity. It is a period in which the policy issues surrounding the industry's structure and competition and, consequently, the alternatives and priorities are not clearly defined. No one, to date, has been able to delineate satisfactorily the appropriate functions and roles of cable distribution systems vis-à-vis other sectors in the communications system. We are entering a period in which cable distribution systems are in the process of being transformed from simply being "local

undertakings" which are adjuncts to the television system into integral components of a telecommunications sector with significant inter-regional, national and even international dimensions.

Neither the provincial governments' demands for delegation nor the federal government's qualified support for such demands give adequate recognition of this potential transformation. It should be incumbent upon the provincial governments to provide in substantial detail, before any agreement to delegate, their plans and objectives for regulating cable under any scheme of delegation. In particular, provincial governments should outline specifically how any future extra-provincial dimensions will be respected and conflicts will be resolved. For its part, the federal government will clearly be abdicating its responsibilities to protect the national interest if it agrees to any form of delegation which does not include both a guarantee and adequate enforcement mechanisms that will ensure due respect for inter-regional and national dimensions. A failure to incorporate such a guarantee and mechanisms may mean that a transfer of jurisdiction will inhibit or preclude the development of potentially integral components of the emerging information society. If this occurs Canada may lose important opportunities and be denied choices in that sector of our economy and society which is becoming integral to our well-being. If that happens, neither the cable subscriber nor the country at large will be well served.

Postscript

Since this paper was delivered in May 1980, the concern that delegation may lead to barriers to the free flow of information between provinces has emerged as a central issue in the intergovernmental negotiations. In late August, the provincial governments produced their "best efforts draft" for the section on communications in a new constitution. It emphasized that "no law enacted by the Legislature of a province ... shall in its pith and substance be directed to the disruption of the free flow of information."³² For its part, the federal government, responding to the provincial initiative, decided to move away from its one-dimensional concern for the effect of delegation on non-Canadian programming and to incorporate a similar emphasis on information mobility in its revised constitutional position. This new emphasis was linked to the recently articulated federal position on "powers over the economy".

During the First Ministers' Conference in September, the debate reflected the revised definition of the issue. Prime Minister Trudeau proposed that, in any scheme for delegation, federal jurisdiction would continue over cable undertakings serving subscribers in more than one province. He defended the new federal position on the basis of "the principle of interprovincial and international trade, ensuring the existence of the Canadian common market."³³

The provinces, having conceded the principle that with delegation there must continue to be a "free flow of information", had advanced their own proposal for resolving any conflicts relating to the implementation of that principle. The provincial "best efforts draft" proposed that "in the event that the laws of two or more provinces conflict so as to disrupt the free flow of information, one of the provinces may petition the Parliament of

Canada to enact a law to resolve the specific conflict and such law shall prevail."³⁴

In general, the recognition by the governments of the relationship between cable distribution systems and the free flow of information and the need to build adequate safeguards into any delegation scheme is to be applauded. Unfortunately, one must be somewhat less enthusiastic about the specifics of the proposals for such safeguards. The federal proposal is unsatisfactory because it is far too mechanistic. It would prevent the creation of provincial barriers by not giving provinces jurisdiction over systems that go beyond a province's boundaries. But while we are beginning to see the creation of trans-provincial cable concerns, e.g. Canadian Cablesystems, the provinces could easily frustrate any similar further developments, if they were delegated jurisdiction, by refusing to allow mergers and acquisitions by non-provincial residents. Similarly, any extra-provincial networking could be impeded by individual provincial decisions. In short, the federal proposal could have the result of "freezing" any extra-provincial cable activities at the time of delegation. Given that we are concerned primarily not with protecting what now exists but with ensuring an environment in which potential can be realized, the federal proposal is inadequate.

While the federal proposal is deficient in important respects, the provincial proposal is devoid of merit. Indeed, the provincial proposal only reinforces my fear that barriers not only will result but that they are intended. In the first part of this paper, I sought to emphasize that in constitutional negotiations it should be the interests of citizens, not governments, that are paramount. The provincial proposal has the exact opposite emphasis. Only provinces, not citizens, will be empowered to seek redress. In other words, if two provincial governments conspire to disrupt the free flow of information across their shared boundary, there will be little that any concerned citizen, even if vitally affected by such a conspiracy, can do to defend his or her interests.

Even if the provincial proposal was redrafted to emphasize the rights of citizens to defend their interests, it would still be woefully defective. Short of insisting on a constitutional amendment, one cannot conceive of a more cumbersome method for seeking redress than a petition to Parliament for, of all things, a law to resolve individual conflicts. This proposal does not merit serious consideration and suggests that, at best, provincial governments are prepared to pay lip service only to the principle of the free flow of information. What is required is a method that will allow for appeals from all affected parties and the expeditious resolution of conflicts. There is a variety of alternatives, including appeals to the courts or to the national regulatory agency.

With the failure of the September constitutional conference, the momentum towards delegation appears to have diminished considerably. Although discussions have continued, these have been primarily interprovincial rather than federal-provincial. If, in the future, serious negotiations ensue, one hopes that the recently-acquired concern for the free flow of information will be central to not only the intergovernmental debate but to its resolution. Anything less will mean that some of Canada's, and Canadians', vital interests and rights will have been sacrificed.

Footnotes

1. James Martin, Future Developments in Telecommunications (2nd ed.) Englewood Cliffs: Prentice-Hall, 1977, p. 347.
2. Public Service Board v. Dionne, 1978, 2 R.C.S. 191.
3. See Albert Breton and Anthony Scott, The Economic Constitution of Federal States. Toronto: University of Toronto Press, 1978.
4. I have advanced a number of proposals for such changes in the regulatory arena. See Richard Schultz, Federalism and the Regulatory Process. Montreal: Institute for Research on Public Policy, 1979.
5. Ibid., pp. 48-56 and 66-67.
6. Richard Schultz, "Recent Developments in Federal-Provincial Liaison" in Peter S. Grant, ed. Law and Policy on Canadian Communications. Toronto: Law Society of Upper Canada, 1980, pp. 22-28.
7. Marc U. Porat, "Communication Policy in an Information Society" in Communications for Tomorrow, ed. Glen O. Robinson. New York: Praeger, 1978, p. 55.
8. Ibid., p. 12.
9. Canadian Radio-Television Commission, "Policy Statement on Cable Television", CRTC Announcement, Ottawa: CRTC, July 16, 1971.
10. Minister of Communications, "Discussion Paper on Canada's Telecommunications Bill", Federal-Provincial Conference of Ministers responsible for Communications, Oct. 16-17, 1979, Toronto, p. 2.
11. Canadian Cable Television Association, "Submission Respecting New Telecommunications Legislation", November 1979, p. 1.
12. Ibid., "Submission on Delegation of Regulatory Authority over Cable Television", March 11, 1980, p. 14.
13. Government of Ontario, "Position Paper on Federal Telecommunications Legislation", September 1979, p. 18.
14. Ibid., p. 19.
15. See note 10 at p. 3.
16. Report of the Federal-Provincial Working Group on Competition/Industry Structure in the Telecommunications Industry, Federal-Provincial Conference of Communications Ministers, Toronto, October 16-17, 1979, pp. 18-19.

17. Canada Consulting Group Inc., World-Scale Competitive Positioning in Canada's Cable Industry, February 20, 1980, p. 1-7.
18. D.W. Carr, "Truck-Rail Competition in Canada" in MacPherson Royal Commission on Transportation, Report, III p. 90.
19. See, for example, the instances cited in M.J. Trebilcock et al., "Restrictions on the Interprovincial Mobility of Resources, Goods, Capital and Labour" in Ontario Economic Council, Intergovernmental Relations (Toronto: Ontario Economic Council, 1977. See also A.E. Safarian, Canadian Federalism and Economic Integration. Ottawa: Information Canada, 1974. John C. Pattison, "Dividing the Power to Regulate" in Michael Walker ed., Canadian Confederation at the Crossroads, Vancouver: Fraser Institute, 1978.
20. See Government of Saskatchewan, Cable Television in Saskatchewan. Regina, 1976, and Government of Manitoba, Broadcasting and Cable Television: A Manitoba Perspective, Winnipeg, 1979. See also Hon. Rene J. Toupin, "The Canada-Manitoba Agreement and the Future of Cable Telecommunications in Manitoba", Department of Consumer, Corporate and Internal Services, Manitoba, June 1977.
21. Jean-Paul L'Allier, Minister of Communications, Quebec, Mastercraftsman of its Own Communications Policy, November 1973.
22. Pierre-A. Deschênes, "Quebec and Cable Distribution", Paper presented to the Annual Convention, Canadian Cable Television Association, Vancouver, May 28, 1980, pp. 4-5.
23. Hon. James Snow, "Statement regarding Constitutional Discussions/Cable Delegation", Federal-Provincial Conference of Communications Ministers, Toronto, October 16-17, 1979, p. 2.
24. See note 15 at p. 21.
25. Canadian Trucking Associations, "The Need for New Federal Legislation to Control Extra-Provincial Highway Transport", December 1965, quoting its 1959 Submission, p. 2.
26. Ibid., p. 4.
27. Deschênes, for example, criticized delegation precisely because "the person delegating will have the right to revoke the delegation". See note 19 at p.3.
28. The negotiations are analyzed in Richard Schültz, Federalism, Bureaucracy and Public Policy: The Politics of Highway Transport Regulation, Montreal: McGill-Queen's Press, 1980.
29. Ontario Cable Telecommunications Association, Towards Delegation: The Transfer of Jurisdiction over Cable Television to the Provinces, January 1980, p. 24.

30. See, for example, Robert L. Stanfield, "The Present State of the Legislative Process in Canada: Myths and Realities" and Donald V. Smiley, "Federalism and the Legislative Process in Canada" in W.A.W. Neilson and J.C. MacPherson, eds., The Legislative Process in Canada, Montreal: Institute for Research on Public Policy, 1978,
31. Alan Cairns, "The Other Crisis of Canadian Federalism", Canadian Public Administration 22, 1979, p. 184.
32. Quebec, "Proposals for a Common Stand of the Provinces", Federal-Provincial Conference of First Ministers on the Constitution, Ottawa: September 8-12, 1980, Appendix B, s. 3.
33. Verbatim Transcript, Vol. I, Federal-Provincial Conference of First Ministers on the Constitution, Ottawa: September 8-12, 1980, p. 155.
34. "Proposal for a Common Stand of the Provinces", op. cit., Appendix B, s. 5.