THE EFFECTS OF FEDERAL-PROVINCIAL NEGOTIATIONS ON REGULATION: CASE STUDIES IN MANITOBA AND SASKATCHEWAN

by

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B.J. (Hons.), Carleton University, 1981

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in the Department

of

Communication

SIMON FRASER UNIVERSITY

June 7, 1984

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Degree: Master of Arts (Communication)

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The Effects of Federal-Provincial Negotiations Upon Cable Regulation in Manitoba and Saskatchewan.

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ABSTRACT

Federal-provincial negotiations over jurisdiction have a direct impact on communication regulation. Similarly, decisions within the regulatory arena play into and affect jurisdictional disputes. The thesis examines the interplay of regulation and federal-provincial negotiations in the field of communication policy. Two case studies are used to identify the dynamics and relationships involved: the disputes over cable regulation in Manitoba and Saskatchewan in the years 1968 through early 1984. Documentary research and interviews are used to develop a chronology of the conflicts and their differing outcomes in Manitoba and Saskatchewan.

The federal Department of Communications, the Canadian Radio-television and Telecommunications Commission (CRTC) and the two provincial governments each had different regulatory agendas. Negotiations occurred because of overlaps and conflicts in federal and provincial objectives and in the use of regulatory instruments. The case study material indicates that neither the federal nor provincial governments can be viewed as cohesive and indivisible units in the negotiation process; intragovernmental organization and activity precludes such an approach. The case studies also indicate that Manitoba and Saskatchewan entered into negotiations for different reasons; this was a significant factor affecting the way in which federal-provincial negotiations occurred.

In both Manitoba and Saskatchewan, the federal regulatory body (CRTC) was forced to make a major policy compromise on the issue of hardware ownership as a result of federal-provincial negotiations. The CRTC's policy that cable licensees own a minimum portion of the external cable distribution equipment to ensure licensee compliance with federal regulation is no longer applied in Manitoba and Saskatchewan. Instead, the provincial telephone companies own and control the entire distribution system. Yet even with that compromise jurisdictional conflict remains.

The thesis argues that because negotiations centred on the issue of hardware ownership, the CRTC's compromise addressed only a symptom and not the cause of interjurisdictional conflict. Basic differences in federal and provincial perspectives of and objectives for communication regulation must be addressed in policy-making in order to resolve any jurisdictional conflict.

ACKNOWLEDGEMENTS

My appreciation is extended to the many people from whom I have received help and support. Special acknowledgement must go to my parents, Phil and Doreen Walker, and to Keith, Viv, Jude, Jim and Jill for their continuing love and support. Danny, who six years ago encouraged me to pursue my academic goals, I thank for his love, friendship, patience and endurance as I continue to do so. Thanks also go to my friends and classmates Jean McNulty, Lynda Drury, Marguerite Vogel and Regina Costa for their support and assistance. Special appreciation is extended to Lynne Hissey with whom I have developed a lasting friendship over the last few years. A specific thank you is expressed to Lynne for the countless hours she spent typing and proofing the thesis. Finally, I would like to thank my senior supervisor, Liora Salter, who has encouraged my devotion to research and helped me to focus my enquiries.

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I. INTRODUCTION

BACKGROUND

The Canadian state is organized under a federal system where the powers to govern are allocated between the central government and the provinces under the British North America Act. Despite the jurisdictional allocation of powers in the Constitution, however, overlaps in federal and provincial activities are historically and presently a characteristic of Canada's federal system. These overlaps in federal and provincial policy-making activities have often caused intergovernmental conflict as each level of government seeks to achieve their respective objectives in a particular policy area. At times the courts are used to resolve conflicts through judicial review or interpretation of federal and provincial jurisdiction set out in the BNA Act. Often, however, the two levels of government by-pass the courts and look for political means to resolve interjurisdictional disputes. Thus, federal-provincial negotiation over jurisdiction is used as an alternative to judicial review. This thesis examines federal-provincial negotiation in a specific area of governmental activity, communication policy.

Constitutional jurisdiction over communication is not clearly defined in the BNA Act. When the Act was drawn up in 1867, modern communications technology was not envisioned. The Act simply states that the federal government has jurisdiction over "telegraph lines" which, at the time, were the only means to transmit signals through electronic impulse. Constitutional jurisdiction over subsequent developments in technology such as telephone, radio, television, cable and satellite communication are not addressed in the Act. Uncertainty regarding constitutional jurisdiction to make policy in the area of communication has helped to promote overlaps and conflicts in federal and provincial activities in the area.

Since the early 1970s, federal and provincial governments have sought political compromises to the question of communication jurisdiction. Political tools such as constitutional reform and interdelegation schemes have been discussed, most visibly at federal-provincial conferences, as ways to resolve interjurisdictional overlaps and conflicts in the field of communication policy. To date, however, federal-provincial negotiation has failed to provide an answer to the question of how powers to regulate communication should be allocated. Overlaps in federal and provincial policy-making in the area of communication remain. Assuming negotiation related to communication jurisdiction will continue, it is important to understand the process of federal-provincial negotiation and its effects on communication regulation.

AN APPROACH

The thesis asks a particular question: what are the effects of federal-provincial negotiation on communication regulation? The approach used to answer this question was formulated to address what appeared to be a vacuum in Canadian public policy literature, which has not made regulation the central question in the study of federal-provincial relations. Second, the approach was formulated to address the dearth of literature considering the question of federal-provincial relations and regulation simultaneously.

For instance, the subject of federal-provincial relations has been considered extensively in Canadian public policy literature but there has been a tendency to view federal-provincial relations as a process of federalism and to assess the process in terms of its effects upon or its representation of Canada's institutional and political/economic structure.[1] Other studies have addressed the federal-provincial relations process in terms of its effects upon the overall policy-making process of the executive bureaucratic arena in Canada's cabinet-parliamentary system of government.[2] These approaches, it seems, preclude an examination of how federal-provincial relations affect the daily practice of communication regulation.

The subject of regulation has also been considered extensively in Canada during the last decade. Many or most of the regulatory studies are reform oriented and contain various assumptions about the nature and function of regulation.[3] This, in turn, has produced studies which focus on the theory and practice of the regulatory process in the interest of reform but which make questions of jurisdiction and intergovernmental interaction peripheral.[4] Moreover, there has been a tendency in some regulatory literature to separate the theory and practice of regulation as a government function from the theory and behaviour of regulatory bodies.[5] Such an approach is useful for those who wish to comment on regulation as a government instrument common to most states. However, viewing regulation in this fashion masks the fact that regulation, as an instrument, may appear in many forms. Furthermore, the separation of regulatory theory from regulatory practice or administration may be useful in an analytic sense if one wants to consider why governments choose to regulate. However, in order to understand how federal-provincial negotiation affects communication regulation, one must relate the practice of regulation to government choices. By asking the question of how federal-provincial negotiation has affected the day-to-day practice of regulation, one can begin to question regulatory theories and their applicability to practice.

Very few studies have been undertaken that relate federal-provincial relations to regulation. An exception is the

work done by Richard Schultz. But again, Schultz asks questions about the effects of regulation on the federal-provincial relations process.[6] The approach taken in the thesis has been to reverse this question. Schultz has avoided questions pertaining to jurisdictional conflict between governments "...because at the heart such questions are not questions about the regulatory process."[7] However, the fact that these jurisdictional conflicts exist demands the questions of why and to what effect. The approach taken in the thesis addresses these questions and suggests that regulatory questions should be central to studies in federal-provincial relations.

METHODOLOGY

The purpose of the thesis is to identify the process of federal-provincial negotiation over communication jurisdiction, to examine how negotiation occurs and to analyse the effects of negotiation on communication regulation. In dealing with these questions it was necessary to find cases where federal-provincial negotiation over communication jurisdiction had occurred and where the effects of negotiation could be assessed. Case studies of disputes over cable regulation in Manitoba and Saskatchewan in the years 1968 through early 1984 were chosen to address these questions. The Manitoba and Saskatchewan cases were selected for a number of reasons.

First, the case of Manitoba provides the single example where a province and the federal government have reached a formalized agreement recognizing their respective boundaries for communication jurisdiction. The agreement recognizes provincial jurisdiction over non-programming aspects of cable services and federal jurisdiction over programming aspects. In addition, the Canada-Manitoba Agreement recognizes the rights of the provincially-owned telephone company to own the basic hardware through which cable services are distributed.

The Saskatchewan case was chosen because negotiation in that province, like Manitoba, centred on the issue of cable hardware ownership. But Saskatchewan was able to achieve its objective of sole ownership of the cable distribution system without signing an agreement with the federal government. In both provinces, the Canadian Radio-television and Telecommunications Commission (the federal regulatory body) no longer applies its policy that cable licensees own a minimum portion of cable distribution equipment.

Another difference was apparent in the Manitoba and Saskatchewan cases. Manitoba gave up claim to provincial jurisdiction over pay television in its agreement with the federal government. By contrast, Saskatchewan laid claim to jurisdiction by introducing a closed circuit pay television network during the period under study.

At this point it is necessary to outline a number of definitions that guided research in the Manitoba and

Saskatchewan case studies. First, "negotiation" in the provinces of Manitoba and Saskatchewan occurred, for the most part, on a bilateral basis. Unlike negotiation on a multilateral basis at federal-provincial conferences there was no set agenda, time-frame or established "rules" for negotiation. Moreover, because negotiation took place over a period of time, other actors in the regulatory area were apparent in the negotiation process. For the purposes of this thesis, therefore, "negotiation" can be defined as dialogue between federal and provincial authorities intended to bring about compromise and agreement. Negotiation also includes actions or decisions taken at either the federal or provincial levels that influence the process or outcomes of federal-provincial dialogue.

The term "framework(s)" is used in the thesis to encompass factors in the regulatory environment that shaped federal and provincial agendas for communication policy and/or regulation and which set the context for federal-provincial negotiations.

For the purposes of the thesis "policy" is defined as an ongoing process of decision-making in the area of communication. The policy process reflects past decisions in the area and the institutional, social, economic and political environment in which decisions are made. "Policies" that emerge from the process may be stated or implicit.

"Regulation" is defined broadly in the thesis as government activity or "intervention" intended to influence development in the area of communication. Thus, as an instrument of policy,

regulation may appear in many forms. In the thesis, regulatory agencies, crown corporations, government-sponsored co-operatives and grants or subsidies are all identified as forms of regulation. It is assumed that regulation, as government intervention, may be introduced for social, economic and/or political reasons.

Finally, the term "jurisdiction" is used in two ways. First, constitutional jurisdiction represents the formal or legal boundaries for federal and provincial policy-making set out in the BNA Act or determined through judicial review. However, jurisdiction on a practical level means the areas in which federal and provincial governments are actually making policy or perceive a right to make policy.

The primary method of gathering data for the Manitoba and Saskatchewan cases was documentary research. Relevant government documents, newspapers and archival materials were examined. Selected interviews were conducted to obtain information considered important but not available in the documents examined.

Research was undertaken with two perspectives in mind:

1. To identify the methods of federal-provincial negotiation. Why has negotiation occurred, how has it occurred and to what factors in the environment has it been responsive?

2. To analyse the effects of federal-provincial negotiation. What happens when a particular mode of negotiation is used? Can one identify patterns or changes in patterns in communication policy and/or regulation attributable to federal-provincial negotiation?

In chapters two and three a chronology of the jurisdictional conflicts and their outcomes in Manitoba and Saskatchewan is developed. The process of federal-provincial negotiation is identified by examining factors in the regulatory environment which led to negotiations and by examining how negotiation occurred in each province. The outcomes and consequences of federal-provincial negotiation are then assessed in light of post-negotiation regulatory environments in each province.

Chapters four and five provide a broader analysis of the effects of federal-provincial negotiation on cable regulation. Insights drawn from Canadian public policy literature are used in an attempt to explain why and how federal-provincial negotiation in Manitoba and Saskatchewan occurred and how it affected regulation in the two provinces. The analysis also provided an opportunity to compare and contrast the Manitoba and Saskatchewan cases. The central concern in the final two chapters is to assess the effects of federal-provincial negotiation on disputes over regulatory jurisdiction.

The analysis does not claim to be a comprehensive review of the literature because certain approaches to the study of federal-provincial relations and regulation could not be applied to the questions addressed in the case studies. Instead, the literature is addressed in terms of its applicability to the Manitoba and Saskatchewan cases, to suggest what approaches might be useful for further investigation of the effects of

federal-provincial negotiation on regulation. On occasion, however, suggestions are offered as to why certain approaches do not apply or why they have limited use.

ENDNOTES

1. See: Richard Simeon and Jeffery Evenson, "The Roots of Discontent," in The Political Economy of Confederation Proceedings. (Ottawa: Economic Council of Canada and the Institute of Intergovernmental Relations, 1979), pp. 165-195 for an overview of approaches. For an example of a study within political economy framework incorporating class analysis, see: Garth Stevenson, "Federalism and the Political Economy of the Canadian State," in Leo Panich (ed.). The Canadian State: Political Economy and Political Power. (Toronto: University of Toronto Press, 1977), pp. 77-100.

2. See for example: Audrey D. Doerr, The Machinery of Government in Canada. (Toronto: Methuen, 1981), especially Chapter 7 and V. Seymour Wilson, "Federal-Provincial Relations and Federal-Policy Processes," in G. Bruce Doern and Peter Aucoin (eds.), Public Policy in Canada. (Toronto: Macmillan of Canada, 1979), pp. 190-212.

3. These assumption usually reflect the author's relative emphasis on either the role of the market or the role of government with respect to regulation. See, for example: William T. Stanbury (ed.), Government Regulation: Scope, Growth and Process. (Montreal: Institute for Research on Public Policy, 1980); M.J. Trebilcock, R.S. Prichard, D.C. Hartle and D.N. Dewees, The Choice of Governing Instruments. (Ottawa: Ministry of Supply and Services, 1982); Richard Schultz, "Regulation as Maginot Line: Confronting the Technological Revolution in Telecommunications," Canadian Public Administration, Vol. 26, No. 2, (Summer 1983), pp. 201-218; and G. Bruce Doern, "Regulatory Processes and Regulatory Agencies," in G. Bruce Doern and Peter Aucoin (eds.), Public Policy in Canada, pp. 158-189.

4. For a summary of reform-oriented studies on regulation see: Robert J. Prichard, "Regulatory Reform: An Introduction," Osgoode Hall Law Journal, Vol. 20, No. 3, (September 1982), pp. 427-432.

5. G. Bruce Doern, Ian Hunter, Don Swartz and V.S. Wilson, "The Structure and Behavior of Canadian Regulatory Boards and Commissions: Multi-Disciplinary Perspectives," Canadian Public Administration, Vol. XVII, No. 2, (Summer 1975), pp. 189-215.

6. See, for example: Richard J. Schultz, Federalism and the Regulatory Process. (Montreal: Institute for Research on Public Policy, 1979).

7. Ibid., p. 3.

II. THE CANADA-MANITOBA AGREEMENT: THE EFFECTS OF FEDERAL-PROVINCIAL NEGOTIATION ON CABLE REGULATION IN MANITOBA

INTRODUCTION

On November 10, 1976, the federal Minister of Communications and Manitoba's Minister of Consumer, Corporate and Internal Services signed an agreement which "delegated" certain aspects of regulatory authority over cable services to the province and which recognized the Manitoba Telephone System's policy to own the basic hardware through which cable services are delivered. The Canada-Manitoba Agreement is the single example in communication regulation where, through a bilateral agreement, the federal and provincial governments share authority. As a result, regulatory practices and circumstances affecting those practices in the province of Manitoba can provide interesting insights for the Canadian regulatory arena as a whole.

While the Manitoba situation is unique, an examination of the factors leading to the Agreement and the ensuing regulatory results is useful in at least three respects. First, the Agreement was the result of intergovernmental negotiation and provides insights into the federal-provincial relations process. Second, post-Agreement regulation in the province provides a

basis for a critique of divided regulatory authority. Finally, the Agreement accepts the goal of hardware ownership for telecommunications transmission, including cable, by the provincially incorporated telephone company. In this sense, the Manitoba case provides a basis for an assessment of the implications of the much-discussed single "electronic highway" concept where a common carrier has a monopoly of control on the "highway" hardware. At the outset it should be noted that, whereas common carrier monopoly over cable hardware and shared jurisdiction are often treated as separate issues, they are by no means dissociated in the Manitoba case. As the following overview and analysis will indicate, the competing interests in the question of cable regulation make the separation of the two issues impractical, if not impossible.

This case study examines the effects of federal-provincial negotiation upon cable regulation in Manitoba. The process of federal-provincial negotiation is identified by examining the policy agendas of the federal Department of Communications and the Manitoba government and the regulatory circumstances which framed the Canada-Manitoba Agreement. Second, the consequences of the Agreement are assessed in light of the post-Agreement environment which has affected the regulation of both conventional cable television services and non-programming services. Finally, evidence is offered to suggest that, despite the Agreement, the jurisdictional status of cable regulation in Manitoba continues to be questioned.

THE FRAMEWORK FOR AN AGREEMENT

i. Manitoba: An 'Electronic Highway'

The notion of an integrated telecommunication system in Manitoba has historic roots dating back to 1908 when the province purchased the system from Bell Telephone Company of Canada. Since that time, Manitoba governments have stated that the basic goal in telecommunications should be the availability of service to all citizens, regardless of their location, at a reasonable price.[1] Manitoba Telephone System (MTS) as a provincially-owned common carrier has been viewed as the instrument to achieve this goal.

In the late 1960s, however, the provincial telephone company's role was challenged with the introduction of cable television in Manitoba. The cable operators wanted to own their own distribution cable and rent pole space from the telephone company. The Manitoba government perceived this as a challenge to both MTS's historic role as the supplier of the telecommunications system and its future role as the provider of new telecommunications services such as home alarm systems and computer communications.[2] The Manitoba government's incentive to formulate a policy to protect the telephone company's role, therefore, was fuelled by a competition of interests between MTS

and the early cable companies in the province. The cable companies challenged the concept of an "electronic highway' with a single telecommunications utility to serve Manitoba.

Once the Manitoba government had established its policy, MTS's role was challenged from another source. In 1968, the Canadian Radio and Television Commission (CRTC) was given the authority to license and regulate cable television systems in Canada. The Commission's mandate, found in section 15 of the Broadcasting Act, R.S.C., 1970, c B-11, is to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act." Thus, operating under predetermined objectives, the CRTC licenses cable companies, sets regulations and establishes policy based on its interpretation of the objectives. In the case of Manitoba, certain aspects of the CRTC's policy and, eventually, its choice of licensees for the province, conflicted with the government's policy. The conflict between CRTC regulatory practices and the Manitoba government's policy framed the terms of the Agreement between the province and the federal Department of Communications.

The Structure and Regulation of MTS

When the government purchased the Bell system in 1908, "Manitoba Government Telephones" was established as a government department operated by a three-member commission which, subject

to ministerial direction, was empowered to "operate the system and build and construct additions to the system."[3] The telephone system remained a government department until 1933 when the Manitoba Telephone Act abolished the Department of Telephones and Telegraphs and set up a crown corporation, "The Manitoba Telephone Commission." In 1962, the corporation's name was officially changed to "The Manitoba Telephone System" (MTS).

The MTS, as a provincial crown corporation, reports to the government through the minister responsible for the Manitoba Telephone Act and Communications.[4] Under the Manitoba Telephone Act, R.S.M., c.T40, the telephone company is administered by a cabinet-appointed board of between three and seven members who are empowered to "...regulate the installation and maintenance of telephone service...."[5] While there is no provision for formal policy directives to the board, a member of the legislature other than the Minister responsible sits on the board.[6]

Until 1975, "system" was defined to mean only a telephone or telegraph system. MTS's scope was broadened in 1975, however, when "system" was redefined as:

> ...a telecommunication system and data processing system and includes all the works owned, held or used for the purposes thereof or in connection therewithin or with the operation thereof;..."telecommunication" means the transmission, emission or reception of signs, signals, writing, images, sound or intelligence of any nature by wire, radio, visual or other electromagnetic systems...[7]

The MTS thus owns and operates the hardware of the telecommunication system in the province and has a monopoly on

telephone services.

The MTS may also acquire, through purchase, lease or expropriation, any system in the province and may enter into any contracts or agreements "...as may be necessary to exercise and carry out the powers conferred on the Commission (MTS)."[8] The Manitoba Telephone Act also provides that the rates for telephone services supplied by MTS must be approved by the Manitoba Public Utilities Board (PUB).[9]

Since 1912, with the Public Utilities Act, a commission or board has regulated certain aspects of the telephone system.[10] Until 1955, the various boards and commisssions regulated MTS with respect to rates, services, depreciation reserves and had general supervisory roles. A revision of the Manitoba Telephone Act in 1955, however, removed the PUB's jurisdiction to regulate the economy of the system except with respect to rates.

Thus, the PUB's role under The Public Utilities Board Act, R.S.M., c. P280 is to regulate the rates of MTS with respect to the telephone company's "public utility" services which are defined as: "...any system, works, plant, pipe line, equipment or service...for the transmission of telegraph or telephone messages..."[11] The PUB's role is further defined by section 39 of the Manitoba Telephone Act which sets out factors to be considered by the Board when fixing or approving MTS rates. Section 107 of the Public Utilities Board Act suggests, however, the PUB's role may be expanded by performing duties assigned to it by order of the Lieutenant Governor in Council. The Public

Utilities Board, which must consist of at least three members, is appointed by cabinet and reports to the legislature through the Minister of Consumer, Corporate and Internal Services.

Early Cable Companies

The first cable system in Manitoba was established at Thompson in 1962 by CESM-TV.[12] In the late 1960s systems were licensed in the city of Winnipeg and a few small communities. By 1974 eight systems serving seven communities had been established.[13]

In addition to the Thompson system which had 3,100 subscribers, four other small communities were licensed. Two of these, in La Rivere and CBF Shilo, were community owned. The St. Lazare and Pine Falls systems were local enterprises. The four systems had a total of 777 subscribers. Two companies, Greater Winnipeg Cablevision Ltd. and Winnipeg Videon Ltd., had received licences to serve Winnipeg. Greater Winnipeg Cablevision was owned by Cablecasting (Manitoba) Ltd. (49.7 per cent) and Selkirk Holdings Ltd. (49.7 per cent) and served the west side of the city. Winnipeg Videon, whose shareholders were Moffat Communications Ltd. (80 per cent) and Vehicle Instruments Ltd. (20 per cent), held the licence for the east side. Videon also had a licence for the community of Pinawa where, with 585 subscribers, the company had reached 100 per cent saturation. In 1974 the two Winnipeg operators served 97 per cent of all cable

subscribers in the province.

The Manitoba Telephone System and the Winnipeg cable operators began their relationship with contract negotiations which took place between 1965 and 1967. On April 6, 1967, Coaxial Cable Distribution Agreements were signed. The Agreements were partial lease arrangements where the cable companies paid the cost of construction for the main cable distribution system and a 20 per cent fee to get MTS's signature on the companies' design. MTS then became the owner of the main distribution system. The cable companies lease 12 of the 20 available channels on the cable with the remaining channels reserved for MTS use.

The Winnipeg cable companies provide their own headends, amplifiers and house drops but the contract stipulates that MTS reserves the right to acquire the amplifiers and house drops at any time on the basis of their then depreciated value.[14] The contract gives MTS the right to enter into similar agreements with other parties in the same area in which the cable companies operate.[15] Finally, MTS reserves the right to supply cable services in Winnipeg with equipment other than the equipment leased to the operators under the contract.[16]

The leasing agreements call for a monthly basic structure charge which is set by MTS. Article 7 of the agreement states that:

> [t]he Telephone System shall have the right during the continuance of this agreement to adjust monthly rental as necessary at intervals of twenty-four (24) months commencing from the 8th day of May A.D., 1969.

> It is understood and agreed that the basis of any increase or decrease in monthly rental by the Telephone System will be increased or decreased cost of labour, material, overhead and other increases or decreases referred to in the Agreement.

There is no formula which defines the means of relating increased cost to increased rental rates. When the agreement was signed the basic structure charge was set at 60 cents per 100 feet of cable per month.[17]

Cable-MTS Conflict

Conflict of interest between the Winnipeg operators and MTS became apparent in the early 1970s. On one hand, the cable operators began to show an interest in expanding their presence both in the provision of cable television services and in the provision of the cable distribution system, to areas outside Winnipeg. On the other hand, the government and MTS moved to implement policies which would protect the telephone company's control of the distribution system and the provision of new telecommunication services. Control of the Winnipeg operators' expansion plans was an explicit objective of the government's policy.

Two related moves by the Winnipeg operators provided the basis of their conflict with the telephone company. First, Winnipeg Videon replied to a CRTC call for applications for licences to serve Brandon, Selkirk and Portage la Prairie. The three cities represented the largest population centres beyond Winnipeg and would therefore mean a significant expansion of

Videon's presence outside Winnipeg. Second, the cable companies applied to the CRTC in 1973 to install a remote headend at Tolstoi to receive and transmit three US networks via microwave. Reception of the signals at Tolstoi would replace and improve the quality of signals already received in the Winnipeg area. The establishment of the Tolstoi headends was viewed favourably by the Commission and the Manitoba government and the application was eventually approved. However, because the reception of distant signals was tied to the broader question of the extension of cable television services to rural areas of Manitoba, public hearings of the matter provided a forum for the Winnipeg operators to express their expansion plans.[18]

After a hearing in Vernon, B.C. in October 1973, the CRTC deferred its decision on the application by the Winnipeg operators to add the remote headend at Tolstoi pending another public hearing in May 1974.[19] Among the issues upon which the Commission requested views was the question of how the microwave system in Manitoba should be developed to deliver programming most effectively in the province.

In reply to the Commission's question, Moffat Communications, representing Winnipeg Videon and its other Manitoba broadcasting interests, submitted a $8.6 million proposal to provide the microwave system to extend service to 30 communities in the province.[20] An argument was made that broadcasting interests should own the microwave system for reasons of flexibility in service, planning and development of

the system. MTS, the submission suggested, intended to control cable television and to restrict its flexibility and expansion - an approach which did not reflect the Manitoba public's interest.

> Development should not be withheld because MTS wants to take over CATV. We must have total control over the CATV systems which requires that we have nothing more than a "pole attachment" agreement with the common carrier. We can afford neither the cost or the harassment of dealing on a lease back basis nor should the broadcasting industry be required to subsidize telephone rates. Excessive charges reduce the amounts broadcasters have available to spend on programming...[the]...microwave system must be adaptable to the varying needs of extending CATV and off-air broadcasting services. This requires broadcaster ownership of microwave facilities.[21]

While Moffat's proposal was not accepted by the CRTC, it clearly represented a challenge to MTS's partial lease relationship with the cable operators by suggesting the need for pole attachment arrangements. Second, the proposal challenged the concept of a single carrier in the province by suggesting that a microwave system for the extension of services to rural areas be established by broadcasters rather than by MTS.

By 1974, Manitoba's NDP government had begun to reconsider its policy on hardware ownership. While the cable operators were arguing for a limited relationship with MTS under pole attachment agreements, the government suggested that MTS's role in cable development should be expanded through full lease agreements for cable distribution. Under a full lease agreement all of the hardware, including amplifiers and service drops, would be supplied and owned by MTS and leased on a per

subscriber or per channel basis to cable operators. Moreover, based on full lease agreements with cable operators, plans were made for the establishment of a MTS microwave network to serve rural communities.[22]

The rationales for full lease arrangements were set out in a May 1974 discussion paper issued by the Department of Consumer Corporate and Internal Services whose minister was responsible for MTS. Threats to MTS by the cable industry in general, and the Winnipeg cable operators in particular, were explictly outlined.

The paper identified the cable industry's desire to expand its role from entertainment programming to the provision of non-programming services.[23] The source of conflict between MTS and the cable companies was identified.

> The essential issue at stake in the cable television-common carrier relations is the apparent desire of the cable television companies to use their monopoly position in importing American television as a base from which to provide a whole range of broadband services. Despite the obvious common carrier nature of many of these potential services, the cable television companies argue that the telephone utilities' monopoly should be limited to the regular telephone network, with competition allowed for all services.[24]

Aside from arguments that the cable companies should be restricted to the "entertainment function," the paper suggested that cable company ownership of hardware to supply the services would result in inefficiencies. In this respect, the partial lease arrangements with cable operators were "at best a short-term compromise between conflicting economic interest."[25] Full lease agreements would allow MTS to lay cable with a view

to future telecommunication services so that the expense of a second cable to provide the services would not be necessary.[26]

A second rationale for the full lease arrangement was that it would allow local groups in rural communities to provide cable services.

> Under a partial contract, or if a cable operator owns his own system [under a pole attachment agreement] large amounts of capital are required at the outset. This requirement for a large initial capital investment could effectively preclude entrepreneurs or community groups in smaller communities from applying for cable television licences, and result in the ownership of all cable systems in the province by one or two large Winnipeg-based organizations.[27]

The reference to "large Winnipeg-based organizations" was apparently directed at the two Winnipeg cable companies. The discussion paper went to great lengths to develop a prospectus for the growth of cable television in the city of Winnipeg. An estimation was offered that by the late 1970s, the two companies would have paid debts, including the construction of the cable system, and would have surplus profits of more than $1 million per year.[28] A suggestion was made that the Winnipeg operators, anticipating eventual rate of return regulation by the CRTC, were attempting to increase their rate base while maintaining their profits.[29]

The discussion paper also suggested that if the Winnipeg cable operators were allowed to expand into smaller communities, especially if MTS did not own the cable distribution system,

> ...[t]he potential would exist to establish another common carrier in the province, which would provide telecommunication services only in urbanized areas. This would have a negative effect on the Manitoba Telephone

> System, by reducing the revenue which makes possible the extension of telephone and other common carrier services to the sparsely-settled parts of the province.[30]

The Manitoba government's paper thus established a position which generally opposed the Winnipeg operators' expansion plans, including the application of Winnipeg Videon for cable licences to serve Brandon, Selkirk and Portage la Prairie.

One other aspect of the discussion paper is important to note. The paper did not challenge federal jurisdiction over broadcasting. A broadcasting undertaking was given a functional rather than a technical definition. Broadcasting was identified as a business activity licensed by the federal government. The paper suggests that federal jurisdiction over broadcast-related functions could be accomodated within the provincial policy if MTS leased channels to the cable operators.

> In such a case the coaxial cable could be seen as analagous to a provincial road (an "electronic highway" in this case). The federally-regulated undertaking would then be the broadcasting receiving business. And other traffic -- in this case functions of a common carrier -- could be carried on according to common carrier priorities of relevance to the particular province.[31]

With this statement, the Manitoba government established the position that while the broadcast functions were properly within federal jurisdiction, the province should have control of telecommunications services of a non-broadcast nature.[32]

Over the next two years, the Manitoba government and MTS began to implement the policies set out in the position paper. During 1975-76, MTS began construction of a Local Broadband Network (LBN) based on the assumption that cable licensees in the rural areas would enter full lease agreements with the

telephone company.[33] The first phase of the project extended to the Brandon, Selkirk and Portage la Prairie areas, presumably because these communities were next in line for CRTC cable licences. Second, in 1975, the Manitoba Telephone Act was amended to allow MTS to offer a broader range of telecommunications services.[34]

CRTC-MTS Conflict

While the conflict of economic interest between MTS and the Winnipeg cable companies helped to frame the Manitoba government's policy, CRTC activities made a federal-provincial agreement on jurisdiction necessary if provincial policy was to be implemented. The Commission's policies and regulations were in conflict with the provincial government's plans for cable television in Manitoba.

First, the Commission had established a policy which required cable licensees to own a minimum of the headends, amplifiers and drops of the cable distribution system to ensure cable company compliance with federal broadcasting policies and regulations.[35] The policy precluded a full lease agreement between MTS and the cable operators as suggested by provincial policy. Indeed, the Commission was at odds with MTS's partial lease agreement with the Winnipeg operators. In renewing licences for Greater Winnipeg Cablevision and Winnipeg Videon in August 1976, the Commission stated that any amendment, renewal,

extension or replacement of the MTS contract would be subject to the hardware ownership requirements and overall CRTC approval.[36]

In a September 1976 discussion paper, the Manitoba government suggested that the hardware ownership requirement was being imposed by the CRTC to expand the Commission's regulatory scope into non-broadcast areas.

> The CRTC is not simply attempting to preserve federal jurisdiction over broadcasting; rather, it is attempting to encroach on an area of provincial jurisdiction--closed circuit transmission unrelated to broadcasting--through the back door, without the authority of Parliament or the Courts....By putting all or part of the distribution plant for cable television in the hands of federally-regulated cable operators, the CRTC is attempting to extend its jurisdiction to matters which should be properly decided by the provinces.[37]

The paper conceded, however, that the CRTC should be concerned with one area of closed circuit services. Pay television, because of its potential to threaten the viability of broadcasters through competition for programming and audiences, should be a federal concern.[38] This concession is important to note because it came into play in the province's agreement with the federal government.

The second challenge to provincial policy was a regulation issued by the CRTC in 1976 which required cable operators to ask for the Commission's approval for use of excess channel capacity.[39] MTS's 1967 contract with the Winnipeg cable operators gave the telephone company the right to lease excess channel capacity for telecommunication services. In the spring of 1976, MTS exercised this right. A video channel for the transmission of medical information was leased to the University

of Manitoba Faculty of Medicine to link the Health Sciences Centre and St. Boniface General Hospital.[40] The CRTC, upon being informed of the project, asked that approval for the service be obtained from the Commission. MTS ignored the request, arguing that the link was not a broadcasting service but a closed circuit transmission over which the Commission had no authority. The Manitoba government characterized the CRTC's action as a threat to provincial authority over both closed circuit operations and education.[41]

The CRTC's decisions for the Brandon, Selkirk and Portage la Prairie cable licences were a final blow to provincial policy.[42] First, the licence for Selkirk and Portage la Prairie was awarded to Winnipeg Videon. Second, both Videon and Grand Valley Cable (the Brandon licensee) were asked, as a condition of licence, to own a minimum of the headend, drops and amplifiers of the cable system.

The provincial government's only recourse was an attempt to appeal the CRTC's decision. However, normal routes of appeal, through a petition to federal cabinet or through the federal court, were not utilized.[43] Instead, the Manitoba government negotiated an agreement with the Federal Minister of Communication for shared jurisdiction. The next section describes the circumstances that facilitated the bilateral negotiations with the DOC which eventually led to the Canada-Manitoba Agreement.

ii. The DOC: An Agenda for Delegation

Between 1973 and 1975, the federal Department of Communications attempted to establish a framework for federal-provincial co-operation in telecommunication.[44] Two position papers, Proposals for a Communication Policy for Canada (1973) and Communications: Some Federal Proposals (1975), suggested administrative mechanisms through which federal and provincial interests and objectives might be co-ordinated. Following the release of each paper, federal-provincial conferences of Communications Ministers were held. The content of the position papers and the outcomes of the conferences will be examined more closely later in the thesis.[45] An outline of the agenda established by the DOC and provincial reaction to the agenda is useful, however, because it suggests why the DOC was interested in entering negotiations with Manitoba for shared jurisdiction.

First, the DOC's two position papers offered administrative mechanisms rather than direct transfers of jurisdiction as a means of incorporating federal and provincial telecommunication policy and objectives. For instance, in 1973, the federal government suggested it was "willing" to consult with provincial telecommunication authorities about policy and regulation of telecommunications carriers which, in seven provinces, were subject to provincial jurisdiction.[46] In addition, "consultative arrangements," consisting of periodic meetings of ministers of

communications and continuing dialogue between the two levels of government were offered. These consultative mechanisms were formalized as the Committee for Communications Policy and the Association of Communications Regulatory Bodies in the 1975 proposal.[47] In 1975, an offer was also made to allow provincial regulatory bodies to take part in public hearings and to privately discuss matters concerning broadcasting undertakings before licensing decisions were made.[48] None of the proposals broached the question of a direct transfer of powers to the provinces. Indeed, the only instance where a proposal was made for a change in jurisdiction was in discussions of two-tier regulation of telecommunication carriers.[49] This suggests that the DOC was interested in increasing federal jurisdiction by assuming authority over the interprovincial and international aspects of provincially regulated telephone companies.

The provinces on the other hand, were not interested in administrative mechanisms and wanted recognition of jurisdiction in the area of closed circuit operations and a direct transfer of power in the area of cable.[50] Further, they were not willing to consent to federal encroachment on established authority of telecommunications carriers. At the 1975 conference, the provinces rejected the federal proposals for consultation charging that they would set up "...a complex structure which will perpetuate the already confused roles and responsibilites of both levels of government."[51] Instead, the provinces suggested direct measures which would define areas in which each

level of government had jurisdiction.[52]

By 1975, the provinces and the federal government had established contradictory stands on jurisdiction and on their respective roles in communication regulation. The federal government maintained that cable television was properly under federal jurisdiction because it was integral to the Canadian broadcasting system. However, they were willing to consult with the provinces about the development of cable systems. The provinces claimed a constitutional right to cable jurisdiction. They wanted effective control in the development of cable systems, not just consultation.

It is important to note that during this period, judicial review of jurisdiction over cable television had not addressed the question of closed circuit operations. Moreover, the question of the CRTC's authority to regulate cable television had not been addressed at the Supreme Court level. During the period of multilateral federal-provincial negotiations, the federal government was apparently basing the CRTC's jurisdiction over cable television on the B.C. Court of Appeal's 1965 decision which established that the federal government had constitutional jurisdiction over cable distribution systems which used broadcast signals.[53] The provinces, on the other hand, supported Quebec's challenge to federal jurisdiction which, during this period, was being considered in the courts.[54] While both the federal and provincial ministers suggested they would prefer political rather than legal solutions to

jurisdictional conflict, the courts framed their respective positions in negotiations. Following the 1975 Federal-Provincial Conference of Communications multilateral negotiations broke down. One might suggest that the two levels of government were awaiting the court's decision on Quebec's challenge before compromising their positions.

While multilateral negotiations broke down, bilateral negotiations between the Minister of Communications and provincial governments continued. In this respect, it is important to review two of the DOC's administrative proposals which came into play in the negotiations. One was that new telecommunications legislation would be introduced in which the federal minister would be given the power to give binding policy directives to the CRTC.[55] Under the Broadcasting Act, the federal Minister of Communications is given the authority to set aside CRTC licensing decisions for the Commission to review.[56] However, there are no formal mechanisms through which the Minister can direct the Commission on policy matters. Second, the 1975 position paper indicated that the federal government would consider "any practicable arrangements that the Provinces might suggest in order to give them a greater share in the process of licensing and regulating broadcast receiving undertakings."[57] The government would also discuss arrangements for common use of coaxial cable and other facilities "so as to ensure the orderly and economical development of broadband cable systems throughout Canada."[58] Thus, while the DOC was unwilling

to discuss a direct transfer of regulatory authority to a province, a suggestion was made that provincial input in regulation might be accommodated through administrative means.

With multilateral negotiations at an impasse, Communications Minister Jeanne Sauve embarked on a course of bilateral negotiations with the provinces on the subject of shared jurisdiction through administrative means. While rejecting the idea of a "massive transfer of power to all the provinces" which would treat conventional cable TV systems and broadcasting systems as separate entities, Sauve repeated the policy paper's proposal for a "practicable arrangement" to share in cable licensing authority so long as a province agreed to certain conditions pertaining to federal control over broadcasting.

> The provinces have rejected, somewhat too hastily in my opinion, what they have called a mere consultative power without any real possibility of asserting their priorities, particularly their cultural priorities. There has been no attempt to negotiate concrete agreements to see just how far the federal government is prepared to go in its offers. Perhaps it is time to do so.[59]

Following this March 1976 speech, Sauve began a tour of the provinces for discussions with provincial communications ministers. While the tour was unsuccessful in the other nine provinces, Sauve and Manitoba's Minister of Consumer, Corporate and Internal Services, Rene Toupin, negotiated an arrangement which became the Canada-Manitoba Agreement. The Agreement served the DOC by offering an example of administrative means to the accommodation of federal and provincial objectives. In

Manitoba's case, the agreement offered a means through which provincial policy could be implemented despite conflicting CRTC policy.

THE AGREEMENT

The Canada-Manitoba Agreement recognizes a federal concern about control over the broadcasting system. The Agreement gives exclusive federal authority to license, regulate and supervise all programming services regardless of the method of distribution. "Programming" or "programming service" is defined in the Agreement as:

> ...audio and/or visual matter...where such matter is directed to the public by means of telecommunication facilities and where such matter is designed to inform, enlighten, or entertain, or is similar in nature, character or substance to matter normally provided by television or radio broadcasting and may reasonably be expected to have an impact on the achievement of the Canadian broadcasting system. For greater clarity and without limiting the generality of the foregoing, programming services include broadcast programming, pay television programming, local or community programming, but do not include point to point services, teleconferencing or teleshopping services.[60]

Under the terms of the Agreement, therefore, the CRTC maintained its authority to regulate programming aspects of cable television undertakings in the province. Closed circuit operations, other than pay television, were allotted to the province.

The Canada-Manitoba Agreement recognizes provincial responsibility for the regulation and supervision of common

carrier services provided through MTS.[61] Most importantly, the Agreement permits MTS to own the basic hardware for cable distribution, including amplifiers and cable house drops in the system.

> For the purpose of providing authorized programming services to the public, a broadcasting receiving undertaking may lease from the Agency [MTS] all necessary facilities and apparatus excluding signal modification and studio equipment, channel modulators and the antenna and headend of a broadcasting receiving undertaking, the terms and conditions under which the Agency provides such facilities and apparatus being agreed between the Agency and the undertaking in accordance with applicable statutory provisions.[62]

Despite CRTC policy on hardware ownership, therefore, the Agreement satisfied the government policy of full lease agreements between MTS and cable licensees.

The Canada-Manitoba Agreement is an administrative document in the sense that constitutional jurisdiction as set out in the British North America Act remains unchanged. Instead, an "interdelegation" approach is employed as a means of assigning regulatory authority to the province. Interdelegation has been defined as "the giving over of administrative responsibility by means of bilateral agreements between the federal and individual provincial governments."[63] The reason for this approach is that according to judicial precedent the direct transfer of administrative powers is unconstitutional because such a transfer would make one level of government subordinate to the other. However, either level of government may delegate its power to a subordinate board of the other government.[64] The Agreement therefore states that:

> [i]n the event of a dispute as to terms, conditions or rates affecting the use of facilities and apparatus of the Agency for the purpose of providing authorized programming services, the province undertakes to take the necessary measures to ensure that such dispute will be adjudicated by its competent regulatory authority in order to ensure that such terms, conditions or rates are just, reasonable, and in the public interest.[65]

The Public Utilities Board was authorized under section 107 of the Public Utilities Board Act to become the adjudicatory authority under the Agreement. On March 18, 1978, Order-in-Council 223/78 was the first direction from the provincial government under section 107 for the PUB's adjudication.[66]

While the clauses noted above are most significant in an analysis of the regulatory structure for cable services in Manitoba, a few others should be mentioned. It was also agreed that only federally-licensed cable companies could lease MTS equipment for programming services. The federally-regulated programming would have priority over non-programming services on the provincially-owned distribution system. Finally, technical standards would remain a federal responsibility.

In theory, then, the Canada-Manitoba Agreement gives the CRTC the mandate to regulate the programming aspects of cable, the MTS ownership rights for facilities through which all cable services are delivered and the PUB authority to adjudicate disputes that arise between cable companies and MTS over rates charged to use the facilities. Finally, the provincial government regulates non-programming aspects of cable services, although there is no indication how that regulation will be

implemented.

While the Agreement and the statutory provision would seem to make the regulatory framework quite clear, an overview of events and regulatory circumstance following the Agreement show that there are many problems inherent in the arrangement.

At the outset, it should be mentioned that the Agreement was negotiated with the federal DOC's proposal for new telecommunications legislation in mind. According to a former Manitoba official who took part in the negotiations, the new legislation was essential for the Agreement to work. The legislation was introduced on March 22, 1977 as Bill C-43, An Act respecting telecommunications in Canada.[67] In terms of offering provincial participation in telecommunications, the proposed legislation expanded on the proposals set out in the DOC's second position paper. The Act would allow provinces to nominate part-time members to the CRTC although cabinet approval was necessary. More importantly, the "practicable arrangements" for provincial input in regulation and licensing of broadcasting undertaking was incorporated in the legislation.

The new Telecommunications Act would allow the federal government to delegate to a provincial agency, by agreement, certain regulatory responsibilities. The importance of this provision was that the DOC possessed authority under the Department of Communications Act to enter into agreements with the government of any province or their agencies respecting the carrying out of programs for which the Minister of

Communications was responsible.[68] However, there are no provisions to make the agreements binding on the CRTC.

Second, the proposed telecommunications legislation would give cabinet the power to issue binding directions to the CRTC "respecting the implementation of telecommunications policy in Canada."[69] This provision would allow the federal government to engage in delegation agreements with the provinces without the interference of conflicting CRTC policy.

The telecommunications bill did not become law. Indeed, new telecommunication legislation, in its latest form, was tabled in February 1984.[70] The problems created by the failure of the DOC to get the new legislation on the books becomes apparent in the next section.

REGULATORY CIRCUMSTANCES IN MANITOBA

i. Rural Cable Television Services

On the same day the Canada-Manitoba Agreement was signed, a federal Order-in-Council was issued which set aside licences awarded by the CRTC for cable services to Portage la Prairie, Selkirk and Brandon.[71] The licences, discussed previously, had been approved two months prior to the Agreement and contained the CRTC condition that the cable companies own a portion of the distribution hardware.[72] This was the first time a CRTC cable

decision had been cancelled by the federal Cabinet under section 23 of the Broadcasting Act but Communication Minister Jeanne Sauve said:

> [the Order-in-Council] was the only means available to allow the CRTC to start afresh and ensure the introduction of cable television into these communities taking into account the new federal-provincial agreement.[73]

Commenting on the situation, the CRTC noted that "[t]his Agreement...embodied an approach to ownership of cable facilities which differs from Commission policy" and stated that it was neither party to, nor bound by, the Agreement.[74] The CRTC explained that it had always been a condition of licence that a cable operator own a minimum of the headends, amplifiers and drops of the cable distribution system to ensure compliance with federal broadcasting legislation and regulations and to guarantee subscriber service by the licensee.[75]

> The Commission is not entitled to discharge its statutory responsibility in a permissive or selective way....The Commission cannot subject its authority to limitations imposed from any other source unless in conformity with the Broadcasting Act. It is not free to accept a cable television operator's argument of being frustrated from complying with Commission regulatory policy or regulations because of conditions imposed by other municipal, provincial or federal authority.[76]

In June 1977, the CRTC held a hearing for licences for rural communities in Manitoba, including Brandon, Selkirk and Portage la Prairie. Representatives from the Canadian Cable Television Association intervened on the question of hardware ownership. The opinion was offered that Manitoba's bid for sole cable hardware ownership was motivated by interest in revenue

potential and to "...effect the maximum possible control of communication services."[77] Fears that control of the distribution hardware might lead to a provincial takeover of cable TV were also expressed.[78] The cable companies argued that ownership of cable house drops was essential to the provision of proper service to subscribers, that rental fees to common carriers such as MTS were being used to subsidize telephone rates and that further encroachments by telephone companies could destroy or fragment the Canadian broadcasting system.

In rebuttal MTS officials argued that provincial ownership of most aspects of the cable system was both logical and in the public interest. They rejected claims that control of the medium naturally implied control of the message and, finally, they promised to give priority to distribution of programming licensed by the CRTC.[79]

The CRTC issued its decision to license 29 Manitoba communities in August 1977.[80] The Commission stated that it considered cable licensees should be afforded a range of options from minimum (i.e. under CRTC policy) to total plant ownership in order to exercise effective control of an undertaking so they could meet regulatory obligations.[81] However, "[i]n view of the relative lack of cable television outside the principal urban areas of Manitoba and the Commission's desire to avoid having potential viewers penalized by further undue delays, the normal minimum plant ownership policy in the special circumstances of Manitoba" would be modified.

Although the Commission decided the MTS could own the amplifiers (a deviation from past CRTC policy), it insisted that cable licensees provide, install and maintain the service drops through which the TV signal is delivered from the main cable to subscriber homes.

> It has been the Commission's experience that the inside wiring is an integral part and a natural extension of the service drop. The logical division between the facilities required for the general telecommunication purposes of the common carrier and the cable television licensee, would seem to be at the distribution line tap-off for the subscriber drop, the point at which common service is diverted for exclusive benefit of the individual cable subscriber.[82]

In exchange for cable company ownership of service drops, including the inside wiring, the Commission made a provision for MTS to apply to the CRTC for permission to utilize that portion of the equipment.

The decision noted that the cable companies were still accountable to the CRTC for rates charged to subscribers but recognized the PUB's role, through Order-in-Council, to adjudicate rates charged by MTS for the use of its hardware facilities.

A further point in the decision is important. In order to make extension of cable services to rural communities economically feasible, the Commission suggested licensees share in the ownership of the distant headend at Tolstoi and share in costs for distribution of the signals to the various licensed systems. In order to facilitate these cost-sharing agreements, the Commission asked that a consortium of cable licensees in the

province of Manitoba be established.

It is also important to note that neither of the two companies licensed originally by the CRTC for Brandon, Portage la Prairie and Selkirk received licences. The Brandon licence was awarded to Westman Media Co-operative, the Portage la Prairie licence to Portage Community Cablevision Ltd. and the Selkirk licence to Interlake Cable TV Ltd.

The CRTC's August 1977 decision had two implications for the extension of services to rural communities in Manitoba. The first implication was that rural services were delayed as the consortium, known as the Association of Manitoba Cable Operators (ACOM), attempted to come to a cost-sharing agreement among themselves for the distant headend and with MTS for the distribution leasing costs. Second, in requiring that the cable companies provide subscriber service drops, the CRTC repudiated the terms of the Canada-Manitoba Agreement. MTS reacted by refusing to lease any equipment to the cable operators under those terms.[83]

Cost-sharing formulas to enable cable distribution to areas where subscriber population would make distribution by individual companies economically unfeasible were introduced by the CRTC in 1973 for certain cable operators in Nova Scotia and New Brunswick.[84] At the time of the decision to licence rural communities in Manitoba the distant headend at Tolstoi was jointly owned by Winnipeg Cablevision and Winnipeg Videon. The CRTC had anticipated the use of the headend for intra- and

inter-provincial licensing so in granting the Winnipeg companies the right to install and operate the headend the Commission made it a condition of licence that:

> ...the licensees must enter into a mutual agreement to operate and share in the ownership and control of the distant headend which must also provide an opportunity on an equitable basis for future and existing licensees wishing to make use of the distant headend.[85]

Also, if it were deemed necessary in the future to make technical improvements to the headend in order to provide signals to locations beyond Winnipeg, the Winnipeg operators would be required to make those improvements. The cost of the improvement would then be calculated into the cost-sharing agreements with the other licensees. Thus, the Winnipeg cable companies became involved in ACOM and their somewhat uneasy relationship with MTS permeated the negotiations to facilitate cable distribution to rural areas.

The MTS began looking into the feasibility of rural distribution of cable in 1972.[86] By 1976, the telephone company had begun construction of a Broadband Network to Brandon, Portage la Praire and Selkirk and had plans to extend services to 29 Manitoba communities.[87] The Winnipeg cable operators opposed the idea of supplying signals to the rural communities through coaxial cable, arguing first that satellite distribution would be less costly, and eventually arguing that microwave would be most efficient.[88]

In the midst of negotiations for cost-sharing, it was discovered that MTS had signed a "secret pact" with three of the

ACOM members. The contracts, revealed at a MTS telephone rate hearing in August 1978, provided that the telephone system would deliver authorized signals to Selkirk, Carberry, Brandon and Portage la Prairie on an interim basis for a maximum two year period pending conclusion of the Tolstoi ownership agreement. In exchange, the three companies would allow MTS to own all the external cable hardware, including service drops.[89] Later that month, the three cable companies (Westman Media Cooperative Ltd., Portage Community Cable and Interlake Cable TV Ltd.) applied to the CRTC for amendments to their 1977 licences to allow MTS ownership of the outside portion of the service drops and to give the cable companies temporary relief from the requirement to share in the ownership of the Tolstoi headend.

In a September 1978 decision, the CRTC permitted interim relief from distant headend ownership, allowing the reception of authorized non-Canadian programming signals via MTS facilities, pending joint ownership arrangements.[90] The Commission, with heavy emphasis on the delay of services to the communities, also agreed to amend the licences to allow MTS ownership of the outside portion of the service drops. The CRTC noted, however, that:

> ...[t]his decision addresses the applications at hand to licenced areas of Brandon, Selkirk and Portage la Prairie. The decision should not be interpreted as a change in Commission policy and it is not intended to apply or serve as precedent for any other area in Manitoba or elsewhere. [91]

The day following the decision (September 28, 1978) cable television was available in the three areas.[92]

Still at issue was the agreement to share MTS costs for providing links to the communities and the cost-sharing agreement for ownership of the Tolstoi headend. In the spring of 1979, ACOM applied to the Public Utilities Board under Order-in-Council 841/78 for adjudication of the dispute with MTS over rates charged to ACOM for use of MTS facilities for rural distribution. This was the second Order-in-Council issued to the PUB under the terms of the Canada-Manitoba Agreement and the application by ACOM was the first received under the new order.[93] The PUB, therefore, had to define its adjudicatory boundaries. The Board ruled that:

> ...its terms of reference as handed down empowered it to consider alternative concepts of rate structures as well as different numerical levels of rate. Furthermore, the Board found that the Order-in-Council permitted adjudication only with respect to matters relating to facilities made available to ACOM by MTS....[94]

In other words, although the Winnipeg operators supplied evidence at the hearing to show cost for providing services through microwave would be more efficient, the Board did not feel it was within its jurisdiction to consider the evidence. In this sense, then, the Winnipeg operators were compelled to accept the telephone system's distribution plans despite the final cost to them.

On April 10,1980, after a three-year impasse, PUB ordered ACOM to pay $7.421 million of the total capital cost for the distribution system. MTS was directed to provide the service on a flat rate basis plus 17 per cent of annual costs. Finally, the rates were to be reviewed by the PUB within three years of the

system service availability to ACOM when the rates for the first three years would be calculated on the pro-rated allocated costs of the system constructed each year.[95] The rates established by MTS to be charged to ACOM were to be effective when existing contracts with MTS expired or on a mutually agreed date.[96]

Some aspects of the regulatory situation in Manitoba as it affects the extension of service to rural communities remain unsettled. Although the Commisssion stated that the Brandon, Selkirk and Portage la Prairie licences were amended as an exception to the CRTC's policy and should not be interpreted as precedent, other Manitoba cable companies have been licenced under the same condition.[97] MTS is still constructing distribution facilities in rural areas, however, so more debate on the question of MTS ownership of service drops and amplifiers may arise once other communities are licensed.

In addition to continued uncertainty with regard to the issue of cable hardware ownership, a number of other aspects of the rural services case should be stressed.

First, the CRTC has been caught in the middle of an essentially political situation. Theoretically, the Commission is obliged to apply its policies and regulations consistently to licensees across Canada. The Commission indicated this in its initial reaction to the Canada-Manitoba Agreement. However, provincial aspirations and apparent pressures from different interests in Manitoba, including the DOC, forced the CRTC to make Manitoba a special case in cable licensing. In view of

these pressures, one must question the manner in which the CRTC's theoretical "independence" is being diffused and how its previously experienced autonomy is being eroded. This is especially important when one considers the fact that the new telecommunications legislation which was designed partly to encourage ministerial direction to the Commission in policy matters was not, and has not been, enacted. On the other hand, the CRTC has been forced to deal with the "political" residuals of the Canada-Manitoba Agreement. Whereas the DOC was apparently willing to bargain away the rights to hardware ownership, the terms and implications of the bargain were not discussed with the federal regulatory body.[98] Because the DOC does not have the power to issue policy direction to the CRTC, the Commission was eventually compelled to compromise its established policy. In this instance, the question of political accountability arises. One must consider whether the repercussions of political agreements should be the responsibility of politicians or whether the responsibiility should be passed on to the regulatory body.[99]

A second point that becomes apparent in the rural sevices case is the corporate attitude of the provincial telephone company. MTS is operating in a rather peculiar situation. As a provincial corporation MTS has the support of its enabling legislation in extending equipment throughout the province in any manner it wishes. Since a coaxial cable distribution system means additional revenue to MTS through leasing, it is not

surprising that the Broadband Network was adopted. Moreover, the cable companies help to build and maintain the network even though other distribution systems would have served their purposes at a potentially lower cost. In addition, it is possible that telephone services in the province are being subsidized through cable services but, because of the regulatory circumstances in the province where only telephone rates are reviewed and cable distribution rates are "adjudicated" under different criteria, it is impossible to determine. Because of MTS ownership of cable distribution hardware, the telephone company is able to play the interests of the ACOM members against each other. Winnipeg cable operators form one camp within ACOM while rural operators form another camp. The rural operators, primarily community groups, are interested in getting their services into operation and are compelled to side with MTS since the telephone system holds the distribution power. As a result negotiations within ACOM are strained. The inability of consortium members to come to agreements has worked to MTS's advantage as illustrated by the interim contract with the rural companies. The contract, in effect, put the rural companies in a position to petition the CRTC for MTS ownership of service drops. The diverse interests of the Winnipeg and rural cable operators becomes more apparent in the following section where the case of non-programming services in Manitoba is considered.

ii. Non-Programming Services

Regulatory circumstances for non-programming services in the province of Manitoba further emphasize some of the problems evident in the previous example including conventional cable television. However, developments in the area of non-programming also illustrate the conflict of interests among the parties involved in the regulatory arena.

At the outset, the definitions of non-programming services provided by the various interests, including the CRTC, the DOC, the Manitoba government and MTS, provide a problem. While analysis of these definitions will be left aside for the purpose of this discussion, it is important to note their existence since they are the basis from which the various parties act.

What is more important is that the question of jurisdiction over non-programming aspects of cable service is unanswered. Both the CRTC and the Manitoba government are currently assuming authority.

The province of Manitoba argues that it has jurisdiction over services of a non-programming nature by virtue of the Canada-Manitoba Agreement. Although no regulatory mechanisms have been enacted, authority is being asserted through MTS's cable hardware monopoly and through non-programming service field trials.

The CRTC, on the other hand, has reiterated its opinion that the Canada-Manitoba Agreement has no legal force because it

was a bilateral agreement rather than legislation passed by Parliament.[100] The Commission has proceeded to issue experimental non-programming licences to cable operators throughout Canada, including licences to Greater Winnipeg Cablevision.[101]

The jurisdictional question is further muddied because, unlike the case of conventional cable television, the Supreme Court of Canada has not reviewed the constitutional jurisdiction of the provinces and the federal government in the area of closed circuit cable television. This puts non-programming services on a somewhat more uncertain ground with respect to jurisdiction than conventional cable television services where federal authority to regulate cable television has been confirmed by the courts.[102] Within this framework of uncertainty, the province of Manitoba, backed in principle by the DOC, is competing for regulatory control with the CRTC. Also within the framework, conflicting interests of the various parties, including cable companies and MTS, becomes apparent.

The CRTC's interests are reflected in its attempt to achieve the goals set out in its mandate. The Commission has argued that technical definitions of non-programming services are irrelevant and it is the effect of the services on the broadcasting system as a whole that should be considered.[103] This argument is based on the rationale that it is impossible to predict in advance whether a proposed or potential service is a legitimate form of programming integral to the success of the

operations of a broadcasting undertaking.

> ...it would not be possible in the abstract to determine whether the service could or would assist in contributing to "the achievement of the objectives of the Canadian Broadcasting System".... [104]

In addition, the CRTC has pointed out that under section 5 of the cable regulations, cable licensees must obtain the Commission's permission to use or permit use of its undertaking or any channel of its undertaking. Thus, in the Manitoba case, cable licensees who apply for permission to offer alarm services (e.g. fire, burgler and medical) are simply complying with established CRTC rules.[105] Moreover, the CRTC has argued that:

> [t]he fact that broadcasting receiving undertakings may distribute non-programming services does not, in the Commission's view alter its jurisdiction over the undertakings, so long as their reliance on television signals and on their ability to receive and transmit such signals to their subscribers is clear.[106]

The CRTC first granted Winnipeg Cablevision a licence to provide fire alarms, burgler protection and medical alert services on augmented channels on an experimental basis in January 1980.[107] One condition of the licence, however, was that the cable company had to make the necessary arrangements with MTS for additional channel capacity. By the end of the experimental period, September 1981, Cablevision had not proceeded with the service. The licence was re-issued for a two year period in 1981 but apparently the company has still not begun to install equipment.[108]

Two suggestions can be offered which might explain Winnipeg Cablevision's inactive stance in non-programming services. One

is that the company may feel that the service is not economically feasible at this point. The other is the cable company's tenuous relationship with MTS and the uncertainty of the regulatory environment in Manitoba for non-programming services.

Winnipeg Cablevision's interest in non-programming services is understandable as the services, especially alarm services, are a potential source of revenue for the company. Moreover, Selkirk Communications Ltd. has 49.7 per cent interest in Winnipeg Cablevision. The significance of this connection is that Selkirk Communications, in 1978, purchased 37.7 per cent of the Texas-based Tomac Ltd. which has been successfully marketing two-way home security systems in the United States for ten years.[109] Selkirk has set up and owns 100 per cent of a subsidiary of the American company, Tomac Canada Ltd., which has exclusive rights to market the system in Canada. Another Selkirk interest, Ottawa Cablevision, has initiated non-programming services with the Tomac system at significant capital cost which indicates that the corporate opinion is that the services are expected to be economically feasible.[110] The argument that the inactivity is based on a rationale of untested marketability loses its strength. However, the recession may have also played a role by changing the timing for the service's introduction.

Perhaps a stronger argument is that Winnipeg Cablevision has not initiated the services because of the regulatory climate in Manitoba. MTS, through its 1967 leasing contract with the

cable company, has the option to take over equipment, specifically the amplifiers and service drops, now provided by Winnipeg Cablevision. Thus, should new equipment to supply the alarm systems be installed, Winnipeg Cablevision risks it being expropriated by the telephone company. Another problem is that the cable company is restricted to the cable capacity under the agreement and must go to MTS for permission to use extra channels. Moreover, while the company is required to go to the CRTC for permission to offer non-programming services, the uncertainty with regard to the legality of the Canada-Manitoba Agreement leaves the question of actual regulatory jurisdiction unanswered. Should unquestionable jurisdiction eventually fall into provincial hands, Winnipeg Cablevision might be confronted with an entirely different regulatory environment in which the government decides to restrict cable companies to their role as program re-broadcasters.

The Manitoba Telephone System's active involvement in non-programming chronologically coincides with Winnipeg Cablevision's bid to offer the services. In December 1978, MTS vice-chairman and assistant general manager Glover Anderson announced a $1.5 million plan for a field trial which was eventually known as "Project Ida."[111] The initial plan was to install fire and burgler alarms in 100 Winnipeg homes. The service would then be expanded to provide 35 channel television and, by 1979, computer keyboards for electronic billing, library service and food information. MTS would act as the carrier of

the service and would use service drops owned by Winnipeg cable companies. By February 1978, MTS presented an economic and market survey which indicated plans to expand the service throughout Winnipeg over a 15 year period to an estimated 200,000 potential customers. Moreover, an additional market of 150,000 subscribers around the province was projected.[112]

Project Ida neither met MTS's projections nor was it offered in the city of Winnipeg. Following the announcement of the project, Winnipeg Videon appeared before a MTS telephone rate hearing and protested that the telephone company was attempting to set precedent in taking over home cable equipment which would, in turn, lead to control over future revenues for new home telecommunication services.[113] Although MTS had the right under the 1967 contract to expropriate the hardware in question, the company apparently did not want that right challenged. MTS approached the CRTC and, in December 1979, the Commission issued an announcement calling for licence applications to serve Headingly, a community about 5 miles west of Winnipeg.[114] This change in location plans may indicate an uncertainty on the part of MTS of its rights to hardware ownership in the existing regulatory framework in Manitoba.

Two further points should be made concerning the Ida trial. First, the licence for the Headingly operation shows another modification of CRTC policy. For the period of the trial, which ended in December 1981, MTS was allowed ownership of virtually all the distribution equipment, including inside wiring.[115]

Second, Project Ida was the first of several non-programming trials in the province supported in part by the Department of Communications. In the Ida experiment, 22 of the 100 homes were wired to Telidon terminals provided by the DOC. In this instance, however, it is important to point out that MTS was not solely committed to the Telidon technology. Another company, Interdiscom Ltd., was contracted to develop a second videotex system called Omnitel for the project.[116]

A second field trial, located at Elie-St. Eustache - about 20 miles west of Winnipeg - was announced by MTS in December 1978. The significance of the Elie trial is that fibre optics technology is being used to transmit single party digital telephone, cable TV, stereo FM and Telidon services to 150 homes. Touted as the world's first multimedia fibre optic experiment in a rural setting, the trial is sponsored by the DOC ($4.8 million), the Canadian Telecommunications Carriers Association ($2.5 million,), Infomart ($900,000) and Northern Telecom Canada Ltd. ($653,000).[117] While the interest of each of the parties involved deserves attention, analysis will be limited to DOC and MTS involvement.

In December 1976, one month after the Canada-Manitoba Agreement was signed, MTS submitted an unsolicited proposal to the DOC for an experimental field trial to:

> a)test the new technology of fibre optics in a Manitoba rural environment, and b)test an integrated network which would carry telephone, cable television, FM radio and Telidon services on the same facility.[118]

The DOC, through its Communications Research Centre, had been

experimenting with fibre optics technology since 1972 with at least two incentives. One, which has become the keynote in recent DOC policy, was potential for fibre optics sales in international markets. The 1978-79 DOC Research and Development report describes fibre optics technology as a "new frontier." Markets for electro-optical transmission equipment, under which fibre optics technology falls, "...could penetrate up to 12 per cent of the market [in developed countries] by 1985 and be worth about $670 million in sales within industrialized countries....Market estimates for 1990 predict an increase to $1.7 billion."[119] The federal government, through research and development contracts would help the Canadian suppliers "...achieve as large a competitive edge as possible."[120]

The second incentive was expounded by Jeanne Sauve, then federal Communications Minister, in a 1978 speech. Quoting the Department of Communications Act, Sauve said the DOC was mandated "...to promote the establishment and development of efficient communications systems and facilities for Canada..." Thus, improvement of communication to rural Canadians was a major aim of the Elie project.[121] The object of rural services through fibre optics transmission is further illustrated by the DOC's Rural Communications Program. The Program's concluding report states that:

> ...in areas where an integrated telephone and television rural distribution system is justifiable, it is likely that an optical fibre system will be preferable because of its higher future potential. Such a system is likely to be viable in areas having subscriber densities of 5 to 50 subscribers per kilometer where a new or

replacement television system is required.[122]

The report predicts that the Elie-St. Eustache trial will offer insights into the technical and operational problems, costs and opportunities.

Aside from the DOC's interests in the development of fibre optics technology, the Elie trial provides another testing ground for Telidon services. The DOC-commissioned report on Field Marketing Trial Strategy for Telidon states:

> [t]he Manitoba Telephone System has fibre optics trials underway in the rural community of Elie Manitoba, and is conducting other trials within its own plant which feature automatic alarm and metering systems. Both of these trials are peripheral to the Telidon product but may be related to the product's future. A number of services are being contemplate [sic] by MTS, but the serviceware development challenge does not seem to be fully addressed in the programs as they are currently defined. A one-way information or Teletext system is a likely candidate for the trials as they proceed, and these trials could provide an excellent testing ground for Telidon. This is particularly so because the cable systems are physically integrated with the telephone companies in Manitoba....The question of telephone and cable network compatibility might be effectively addressed in that market.[123]

Another point of interest in the report is that it proposes the DOC "...should seek to remove any legislative or regulatory impediments which make it difficult to deploy Telidon on all networks in Canada, including telephone and cable systems..." in order to achieve its market objectives for Telidon.[124]

MTS's interests in fibre optics can also be established. First, the telephone system has suggested that fibre optics may be a "...viable alternative to coaxial cable distribution systems..." in the 1980s.[125] With its vested interests in the cable distribution system because of its revenue potential, the

testing of fibre optics is a pragmatic move. In the short term, fibre optics hardware remains less economically efficient but more technologically sophisticated in terms of two-way interactive services. One might speculate future MTS investment in fibre optics will be limited to its use in the service drop and inside wiring portions of the distribution system. In other words, fibre optics could be used primarily by the MTS in its data processing endeavours directed at a largely urban business markets, rather than expensive rural distribution projects. Rural distribution systems with coaxial cable are still in the construction stages. Further MTS investment in rural distribution systems, therefore, is unlikely to involve fibre optics technology. If this scenario is played out, MTS's interest in the ownership of the service drop and inside wiring portion of the distribution system, in non-programming services and in fibre optics would be clearly represented. Finally, MTS awarded a $5 million contract to Northern Telecom Canada Ltd, to build the system for the Elie trial but the company decided to establish its Optical Systems plant and headquarters in Saskatchewan.[126] However, one of the other two fibre optics manufacturers in Canada, Canada Wire and Cable, recently established a cabling and component production plant in Winnipeg.[127] Thus fibre optics are a potential source for a manufacturing industry in the province of Manitoba.[128]

The Elie and Ida experiments represent instances where the DOC and the MTS have co-operated in field trials involving

non-programming services using systems licensed by the CRTC. However, the DOC's involvement in the province appears to be even more widespread. According to the Public Accounts of Canada, the DOC funnelled $969,000 in Telidon-related grants and contracts between 1978 and 1982.[129] In May 1982, Communication Minister Francis Fox announced another $959,000 grant from the department to expand the commercial Telidon information network, Grassroots, throughout Manitoba.[130] Thus, it seems that the province has become the chosen playground for Telidon to grow up in. While it is difficult to estimate the total worth of DOC and MTS co-operation, Public Accounts of Canada shows that the DOC contributed $1,692,000 to MTS for "professional and special services" in the past four years.[131] Finally, in the 1981/82 fiscal year, DOC research and development money to MTS totalled $343,000.[132]

While these statistics are incomplete, it is apparent that MTS has become a favoured company for DOC investments. One must ask if Manitoba's special relationship with the DOC through the Canada-Manitoba Agreement has influenced the federal department's support of MTS endeavours. Furthermore, the DOC's support of MTS in non-programming projects indicates a conflict of interest on the part of the department. On one hand, the DOC is mandated to support the role of the CRTC in its quest to rationalize the Canadian broadcasting system. On the other hand, the department is mandated to research and develop communications technology. In the case of non-programming

services, the DOC's support is with the MTS whose interests oppose those of the CRTC. If, indeed, trade-offs are being made in Manitoba as a result of the Canada-Manitoba Agreement, the CRTC is clearly the scapegoat in the situation.

iii. PUB Adjudication

The relationship between MTS and the Winnipeg operators reveals a rather anomalous characteristic possessed by the provincial telephone company. In the role of monopoly supplier of telephone services, MTS acts as a public utility, with its rates regulated by the Public Utilities Board. In its role as monopoly supplier of the cable distribution system, however, the MTS is more characteristic of an unregulated private corporation whose actions are supervised by a board of directors. Thus, the Canada-Manitoba Agreement was significant for the Winnipeg operators because, for the first time since they signed their signal delivery contract in 1967, they had access to the PUB for adjudication of rate disputes with the MTS.

The effectiveness of the PUB in its role as adjudicator became apparent beginning in 1977 when Winnipeg Cablevision approached the Board for adjudication of a proposed 25 per cent rate increase by the MTS. While the Canada-Manitoba Agreement provided for adjudication by the PUB, the mechanisms for that adjudication were not established.

Winnipeg Cablevision applied to the Public Utilities Board for adjudication of rates under section 45 of the Public Utilities Board Act which reads:

> [t]he Board may, if the special circumstances of any case so require, make an interim ex parte order authorizing, requiring, or forbidding, anything to be done that the board would be empowered on application, petition, notices, and hearing to authorize, require or forbid; but no such order shall be made for any longer time than the Board deems necessary to enable the matter to be heard and determined on such application, petition, notice or hearing.

The PUB denied jurisdiction over contracts between MTS and the cable operators. "Public utility" is defined in the Public Utilities Board Act as "...any system, works, plant, pipe line, equipment or service...for the transmission of telegraph or telephone messages...."[133] Neither the Court of Queen's Bench nor the Manitoba Court of Appeal considered MTS was operating within the definition of a "public utility" under the terms of the 1967 Coaxial Cable Distribution Agreement with the cable companies.[134] Both courts ruled that, while its enabling legislation gave the PUB control over telephone rates, control did not extend to services provided by the telephone system which did not carry telephone messages. It is interesting to note that while the Manitoba Telephone Act was amended in 1975 to change the definition of "system" to reflect the MTS's widening role in telecommunications services, the Public Utilities Board Act remained unchanged so that the MTS continued to be regulated only with respect to its traditional role as a monopoly supplier of telephone services.

But, while the PUB does not have inherent jurisdiction over cable rates, section 107 of the Public Utilities Board Act makes a provision for the Board to perform duties assigned to it by Cabinet order. On March 18, 1978, Order-in-Council 223/78 was issued to facilitate PUB's adjudication of the rate increase to the Winnipeg operators. On March 29 1979, MTS applied to the Board under the Orders-in-Council for adjudication of its proposed 20 cent rate increase.

In light of the court decision, the PUB interpreted its jurisdiction in the case to be bound by the terms of the Order-in-Council. "The Board is clothed with the jurisdiction to 'ensure that the proposed rate increase is just, reasonable and in the public interest'."[135]

In its adjudication the PUB, after arriving at a costing process to interpret article 7 of the 1967 agreement, decided that the cable leasing rate should be 11 cents per 100 feet of cable rather than the 20 cents per 100 feet proposed by MTS. The Board had to issue separate orders for the two cable companies, however, because Winnipeg Videon refused to appear and present evidence at the hearing, considering the matter to be improperly before the Board.[136]

The case of the rate increase hearings characterizes the ad hoc nature in which adjudication of disputes under the Canada-Manitoba Agreement have proceeded. First, the Manitoba government apparently assumed legislative jurisdiction for the PUB without confirming the legality of that jurisdiction.

Second, because of the apparent oversight, the PUB's jurisdiction had to be determined by the courts through action initiated by Winnipeg Cablevision. Third, the Order-in-Council was specific so PUB's role as adjudicator was limited to the case at hand.

In September 1978, Cabinet issued another Order-in-Council (841/78) designed to give both the Winnipeg cable operators and rural operators automatic access to the Board when rate disputes arose. The PUB's adjudication under that Order, discussed earlier, was again limited to the terms of the Order so the Board could not consider alternate proposals for the cable distribution system in the province.

Further problems have arisen with respect to the distribution of pay TV services. In November 1982, the PUB denied Greater Winnipeg Cablevision's application for adjudication over proposed MTS distribution rates for the new service because the cable company had not yet obtained permission from the CRTC to provide pay TV.[137] To complicate matters, both MTS and Greater Winnipeg Cablevision began to claim the need for, and the right to, own and control the encoding devices which comprise the security and control networks for pay television.

On December 15, 1982, Order-in-Council 841 was rescinded and replaced by another Order, 1470/82. The newest order attempts to resolve the PUB's jurisdictional quandary by identifying specific matters which the Board is required to take

into account in its adjudication. These include: value of service; financial requirements of all parties; MTS's requirements to renew and upgrade its capital facilities and apparatus to meet the demands of technological development and competition; and that rates be sufficient to contribute a reasonable financial basis for MTS's other telecommunication services which are regulated by the Board.[138] A final criterion should be stressed. The Order states that MTS must own or control all network security and control devices attached to its facilities and apparatus anywhere in the province, unless there is a mutual agreement, to ensure access to MTS facilities is available to all authorized operators on an equitable basis.

On January 13 1983, MTS filed an application with the Board pursuant to Order-in-Council 1470/82 with regard to rates and to ownership of network and security devices. On February 1 1983, Greater Winnipeg Cablevision filed an affidavit in the Court of Queen's Bench asking that the PUB be prohibited from proceeding with the MTS application. Winnipeg Cablevision cited the CRTC's August 1977 policy statement on ownership and control of cable equipment which stated that cable licensees were required to own and operate cable devices including studio equipment, antennas and service drops. The cable company suggested that MTS ownership of the network security devices would conflict with the CRTC's ownership policies specified in licence conditions. Therefore, Winnipeg Cablevision requested that Order-in-Council 1470/82 be declared invalid.[139]

The MTS application was subsequently withdrawn. The matter is currently in the courts. Apparently, the cable companies will not file an application to the Board pursuant to Order-in-Council 1470/82 because of the ownership issue. Winnipeg Videon attempted to file an application for an adjudication pursuant to a "Principles of Agreement" with the MTS. However, because no reference was made to Order-in-Council 1470/82, the Board felt it did not have jurisdiction and did not hear the application.[140]

As a result of the dispute, pay television is being provided only on the west side of Winnipeg by Videon. The east side of the city, served by Greater Winnipeg Cablevision, has not received any pay television since it was introduced on February 1, 1982.[141]

The MTS-cable company dispute is further complicated by a recent CRTC Public Notice.[142] The Commission's condition that Manitoba cable licensees own their own local headends was further defined to include all signal processing equipment. The Notice states that:

> ...the Commission considers that the licensees must own the encoder and computer facility to satisfy the condition of licence requiring ownership of the local head end.

The CRTC's rationale for the requirement is much the same as the one offered in its earlier hardware ownership policy. The security devices are integral to the broadcasting undertakings that deliver pay TV services. Therefore, control over the undertaking is best ensured by cable operator ownership of the

entire security system.

One can predict that if the province continues to set the PUB's role through Orders-in-Council, more time will be spent in courts interpreting the Board's jurisdiction under the Orders than time spent in actual adjudication. Moreover, the PUB is an adjudicator and does not have a policy role under the terms of the Canada-Manitoba Agreement. MTS can continue to direct the evolution of the "electronic highway" in the province under the supervision of its appointed board of directors.[143]

Legislation to amend The Manitoba Telephone Act and the Public Utilities Board Act was passed in 1980 but was not proclaimed. The legislation would have eliminated some of the problems inherent in the current situation by effectively making the PUB a regulator of cable systems and services.[144] In light of its experience as adjudicator, the PUB understandably endorsed this legislative authority.

> ...[T]he Board deems it advisable to observe that the determinant of the public interest in respect to communications in this province extends well beyond the definitions of such interest appropriate to this order of adjudication [223/78] relating to a specific dispute. Indeed, the Manitoba Legislative Assembly has now enacted legislation to provide for such wider determination. The Board notes in that connection, that a normalization of financial relations between Winnipeg Cable Operators and the Manitoba Telephone System, at the outset in the new era in communications, mandated by the Legislature would be a reasonable objective in the public interest.[145]

A change in government and problems with certain sections of the legislation prevented it from becoming law. In April 1983 the NDP Government introduced another piece of legislation, An

Act to amend the Manitoba Telephone Act.[146] The Act grants MTS exclusive ownership of all telecommunications delivery equipment from a cable company's local headend into cable subscribers' homes. The new Act addresses the current dispute over network security devices but problems remain with the PUB's somewhat uncertain role in cable regulation. Moreover, the legislation conflicts with the CRTC's policy on cable licence ownership of pay TV security and control equipment.

CONCLUSION

The Canada-Manitoba Agreement has resulted in a less than "practicable arrangement" for shared jurisdiction between the federal and Manitoba governments. Instead the Agreement has created an environment where regulation over cable services is in a state of jurisdictional disorder. Ineffective provincial regulatory mechanisms, confusion over the legality of the Agreement, inability to pass supporting legislation by both governments, a virtually unrestrained provincial telephone company and many competing interests have created a situation where priorities and actual jurisdiction are unclear.

As an essentially political arrangement, the Canada-Manitoba Agreement failed to broach the practical aspects of regulation by considering the roles of the regulatory bodies in question (the CRTC and the PUB). While the bilateral deal may have soothed federal-provincial relations, it did not consider

the implications of the federal and Manitoba relationship upon the CRTC. While the CRTC questions the legality of the Agreement, Manitoba cable operators have become a special licensing case. One must question how this has or will affect the legitimacy of the CRTC's policy role in relation to other cable operators in Canada. The question will become even more pronounced when CRTC policy for non-programming services is established. The non-programming issue can conceivably result in three ends. One is that the Commission will make another policy exception in the Manitoba case. Another is that additional compromises will be fashioned by the Manitoba government and the DOC. Finally, either the legality of the Canada-Manitoba Agreement or the CRTC's assumed jurisdiction over non-programming will be determined by the courts which, of course, does not preclude subsequent political negotiation for jurisdiction.

The PUB has also been put in a difficult position with respect to the Canada-Manitoba Agreement. Unlike the CRTC, however, the PUB has virtually no legislation to back its role. In effect, its mandate for dealing with cable has come from the various and changing Orders-in-Council. The Manitoba government has recognized the need to strengthen the PUB's role through legislation, but action in this direction appears to be at a standstill as problems of the moment are addressed. Certainly one lesson that can be learned from the Canada-Manitoba Agreement is that practical regulatory frameworks must be

considered when, not after, political arrangements are made.

The hardware ownership issue in Manitoba also remains in a somewhat confused state. First, as this case study has illustrated, ownership of the cable transmission facilities is integrally tied to jurisdictional questions. Thus, whereas MTS currently has control over the cable distribution system, either directly or indirectly through contract options, the control will be open to questions until the jurisdictional disorder is sorted out. Second, there is some difficulty assesssing the impact of the single "electronic highway" concept when the role of the telephone company remains unclear. The Manitoba government consistently refers to MTS's role in the transmission of cable services in the same breath as its role in the transmission of telephone service. Under the current statutory framework in Manitoba, cable services are not treated the same as telephone services and this is clearly represented by MTS's actions. Moreover, while the MTS is theoretically responsible to the legislature, its activities go largely unchecked. This phenomenon is aptly characterized by Douglas Hartle in a discussion of publicly owned utilities when he notes that:

> Perhaps the most successful tactic adopted by such organizations in dealing with their elected "masters" is to use their much vaunted technical expertise as a weapon in their perpetual fight for an ever larger share of collective resources. It is not simply a matter of father not knowing best but rather a situation where father knows virtually nothing at all.[147]

In the final analysis, the Manitoba government must decide whether the ownership of the electronic highway by the telephone

company will be used to encourage competition for the supply of software or whether the hardware monopoly will be translated into a monopoly over software. Uncertainty regarding the state of competition is the key to the decision.

Finally, post-Agreement circumstances in Manitoba have shown that competing interests among the parties involved in cable services act upon and influence the statutory framework under which they operate. Interaction among and between corporate, political and regulatory entities involved in Manitoba cable services have played a major role in the evolution of the current jurisdictional disorder.

ENDNOTES

1. See: Opening statement by Hon. Ian Turnbull, Minister Responsible for Communications, Government of Manitoba, to the Federal-Provincial Conference of Ministers of Communications. Ottawa, November 29 & 30, 1973. DOC No. COM 216, pp. 2-4 & 14.

2. Department of Consumer, Corporate and Internal Services, Government of Manitoba, The Canada-Manitoba Agreement and the Future of Cable Communications in Manitoba, June 1977, p. 3.

3. Trans-Canada Telephone System, "The History of Regulation and Current Regulatory Setting," Telecommission Study 1(b), (Department of Communications, March 1970), pp. 40-43.

4. Since 1973 the Minister responsible has been the Minister of Consumer, Corporate and Internal Services. Before that, however, the Ministers of: Highways; Tourism, Recreation and Cultural Affairs; Finance; and Public Utilities were at various times responsible for the MTS.

5. The Manitoba Telephone Act, R.S.M., c.T40, Section 21.

6. See: Manitoba Telephone System, Annual Reports, 1965-1983. Provision for M.L.A.'s or Cabinet members to be board members is found in Section 15 of The Manitoba Telephone Act.

7. The Manitoba Telephone Act, Section 2(1) & 2(1.1).

8. Ibid., Section 3.

9. Ibid., Section 39(1).

10. History of Regulation and Current Regulatory Setting, Telecommission Study 1(b), p.41.

11. The Public Utilities Board Act, R.M.S., c.P280, Section 2(1)(h)&(i).

12. CESM-TV has since had its licence revoked and, in 1982, Nortec Cable Inc. was awarded a licence for Thompson. See CRTC, Decision, 82-4.

13. Department of Consumer, Corporate and Internal Services, Government of Manitoba, Broadcasting and Cable Television: A Manitoba Perspective, May 1974, pp. 52 & 53.

14. Cited in Broadcasting and Cable Television: A Manitoba Perspective, p. 53 and "Government in Business-Cable Television in Manitoba," Winnipeg Free Press, 22 August 1978, p. 43.

15. Cited in Legislative Assembly of Manitoba Debates and Proceedings, Vol. XIII, no. 106, First Session, 28th Legislative, 13 April 1967, pp. 2518 & 2519. The right comes under Article 4 paragraph B of the Coaxial Cable Distribution Agreement(s).

16. Ibid., Article 13 of the Coaxial Cable Distribution Agreement(s). In drawing up the leasing agreements in 1967, MTS was likely anticipating a role in cable television programming. However, on 3 December 1969, the CRTC announced that common carriers could not hold cable TV licences. For a discussion of the effects of the 1967 agreement on cable companies' plans to provide non-programming services see pp.50-61 of this thesis.

17. Cited in Public Utilities Board of Manitoba, Order No. 157/80, 18 August 1980, p. 5.

18. The CRTC approved the headend in Decision 74-201. For a discussion of the decision see pp.43 & 44 of this thesis.

19. CRTC, Decision 74-30.

20. Moffat Communications Information Addressed to the CRTC Regarding the 1974 Public Hearing Concerning Additional Off-Air Television Service in Winnipeg and Extension of TV Broadcasting Services in the Province. See Correspondence addressed to Pierre Juneau, Chairman, CRTC from J.R. Mitchell, President, Moffat Communications Ltd., 27 March 1974, p. 5 and Exhibit 1, Winnipeg Videon Ltd., Manitoba, 30 Community Cable Proposal, Extension of Service.

21. Ibid., p. 4.

22. Broadcasting and Cable Television: A Manitoba Perspective, pp. 68-72.

23. Ibid., pp. 12-14.

24. Ibid., p.20.

25. Ibid., p. 20.

26. Ibid., pp. 74 & 5.

27. Ibid., p. 69.

28. Ibid., pp. 53-8.

29. Ibid., p. 58. The Manitoba government implictly suggested that the CRTC should be regulating urban cable operators on a rate of return basis.

30. Ibid., p. 75.

31. Ibid., p. 24.

32. The terms non-broadcast, closed circuit and non-programming services are used interchangably in this thesis in the sense that the services do not make use of the radio frequency spectrum. The terms non-broadcast and closed circuit services, however, appear to have lost favour recently and non-programming appears to be the most common term. The change in terminology might reflect the fact that under the Broadcasting Act the CRTC is authorized to regulate "broadcasting receiving undertakings" and the term non-broadcast implies the service is not part of a broadcasting receiving undertaking.

33. Manitoba Telephone System, Annual Report, 1975-76, p. 12.

34. Ibid., p 13. The amendment was the change in the definition of "system" cited earlier. The expansion of the definition allowed MTS to offer commercial data processing services. On September 1, 1975, the telephone company purchased the assets of the Manitoba Government Computer Centre for $1,800,000 as a nucleus for its data processing endeavours. A data processing section, Manitoba Data Service, was established. In April 1979, Manitoba Data Service was established as a separate crown corporation.

35. For a discussion of the development of the CRTC's hardware ownership policy see pp. 88-90 of this thesis.

36. CRTC, Decisions 76-544 and 76-545.

37. Department of Consumer, Corporate and Internal Services, Government of Manitoba, Background Paper on Cable Television Hardware Ownership, September 1976, p. 15.

38. Ibid., p. 18.

39. CRTC, Cable Television Regulations, c. 374, Section 5.

40. See: Background Paper on Cable Television Hardware Ownership, pp. 18-20.

41. Ibid., p. 19.

42. See: CRTC, Decisions 76-650 and 76-651.

43. Under Section 26 of the Broadcasting Act appeals can be made to the Federal Court on a question of law or jurisdiction. Section 23 of the Act provides for appeal to Federal Cabinet.

44. Unless otherwise indicated "DOC" refers to the federal Minister of Communication and senior Department officials.

45. See p. 114-124 of this thesis.

46. Department of Communications: Proposals for a Communications Policy for Canada, (Ottawa: Information Canada, 1973), pp. 29, 31, & 35.

47. Department of Communications, Communications: Some Federal Proposals, (Ottawa: Information Canada, 1975), pp. 7 & 8.

48. Ibid., p. 14.

49. Proposal for a Communications Policy for Canada, p. 30.

50. See: Statement delivered by the Hon. John Rhodes, Ontario Minister of Transportation and Communication, 14-15 May 1975. DOC No. COM-49.

51. Ibid., p. 7.

52. Ibid., p. 12.

53. Public Utilities Commission v. Victoria Cablevision et. al. (1965) 51 D.L.R. 2d, 716.

54. The case involved a jurisdictional dispute between the CRTC licensee, Francois Dionne, and the Quebec Public Services Board. Dionne was issued a licence by the CRTC but the Board, in awarding him a provincial licence, reduced his service so a second licence could be awarded. Dionne took the Public Services Board to court on the question of its jurisdiction. The case was eventually considered by the Supreme Court of Canada which ruled in favour of federal jurisdiction over cable services that make use of the radio frequency spectrum. See: Public Service Board v. Dionne, (1978) 2 S.C.R., 192.

55. Communications: Some Federal Proposals, p. 11.

56. Broadcasting Act, Section 23.

57. Communications: Some Federal Proposals, p. 14.

58. Ibid., p. 14.

59. Notes for a speech by the Hon. Jeanne Sauve, Minister of Communications, to the Luncheon Meeting of the Saint-Laurent Kiwanis Club in Montreal, 17 March 1976. "Federal Involvement in Communications and Cultural Security of Quebec," p. 10.

60. The Canada-Manitoba Agreement, 10 November 1976, Article I-Interpretation.

61. Ibid., Article III-Other Services.

62. Ibid., Article V-Cable-Carrier Hardware Arrangements.

63. R. Brian Woodrow, Kenneth Woodside, Henry Wiseman, and John B. Black, Conflict Over Communications Policy: A Study of Federal-Provincial Relations and Public Policy, (Montreal: C.D. Howe Institute, 1980), p. 63.

64. In Attorney-General for Nova Scotia v. Attorney-General for Canada, (1951) S.C.R. 31, the court prohibited Nova Scotia from delegating its jurisdiction over labour to the federal government. However, in Prince Edward Island Potato Marketing Board v. Willis and Attorney-General of Canada, (1952) 4 D.L.R. 146, the court said the federal government could delegate authority to a provincially-created body. See: R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada, (Toronto: McGraw-Hill Ryerson Ltd., 1976), p. 72.

65. The Canada-Manitoba Agreement, Article VI-Adjudication of Disputes in Manitoba.

66. For a discussion of changes in Orders-in-Council see pp. 61-68 of this thesis.

67. Bill C-43, An Act respecting telecommunications in Canada, First reading March 22, 1977, Second Session, Thirtieth Parliament, Elizabeth II, 1976-77.

68. Department of Communications Act, R.S.C., 1970,c.24, Section 5(2).

69. Bill C-43, Part I, Section 9.

70. Bill C-20, An Act respecting Bell Canada and to amend the Canadian Radio-television and Telecommunications Commission Act, the Broadcasting Act, the Canadian Film Development Corporation Act and the Radio Act, Second Session, Thirty-second Parliament, 32-33 Elizabeth II, 1983-84. First reading, 8 February 1984. See: Part II, Sections 14.1, 14.2, 14.3 and 14.4. This represents the

fourth time telecommunications legislation has been introduced since 1977.

71. Order-in-Council, 1976-2761, 10 November 1976.

72. The licences were awarded in CRTC, Decisions 76-650 and 76-651, 16 September 1976.

73. News Release, Government of Canada, Department of Communications, "Federal and Manitoba Governments Sign Communications Agreement," Ottawa, 10 November 1976, p.2.

74. CRTC, Annual Report, 1976-77, p. 11.

75. CRTC, Public Announcement, 8 August 1977.

76. Ibid., p. 4.

77. "A Report on Communications and Broadcasting (Special Report on Western Provinces)," Trade and Commerce, 72(9), (September 1977), p. 30.

78. "Manitoba Jurisdiction Still in Dispute," Broadcaster, 36(7), (July, 1977), p. 27.

79. Ibid., p. 27.

80. CRTC, Decisions 77-468 to 77-472.

81. CRTC, Public Announcement, 8 August 1977.

82. Ibid., p. 10.

83. The CRTC's refusal to submit to the terms of the Canada-Manitoba Agreement has probably influenced any negotiations with other provinces. In the 1978 report of The Western Premiers' Task Force on Constitutional Trends it was suggested that: "These kinds of agreements currently appear to be impractical in light of recent actions by the federal regulatory agency. As an independent regulatory agency, the CRTC is not bound by law to follow policy directives from the Government. Consequently, it has been responsible both for intruding into areas of provincial responsibility and for complicating the search for co-operative intergovernmental arrangements...." The CRTC's action in the Manitoba case may also have influenced the DOC's continuing quest for binding policy direction to the Commission suggested in the various proposals for new telecommunications legislation.

84. See: CRTC, Decision 73-395.

85. CRTC, Decision 74-201.

86. Broadcasting and Cable Television: A Manitoba Perspective, p. 15.

87. Manitoba Telephone System, Annual Report, 1975-76 and 1977-78.

88. See for example: "Winnipeg cable firms to try for satellite service," Winnipeg Free Press, 26 May 1978, p. 1 and "Satellite system superior to buried cable for Manitoba," Winnipeg Free Press, 27 December 1979, p. 6.

89. "Secret cable pacts signed by Manitoba companies," Winnipeg Free Press, 16 August 1978, p. 39 and "Private cable agreements made public," Winnipeg Free Press, 17 August 1978, p. 3.

90. CRTC, Decision 78-647.

91. Ibid.

92. Apparently the Winnipeg cable operators responded by interfering with the signals. Videon's general manager said the company felt it had no obligations to supply clear, strong signals for transfer to rural communities in the absence of serious cost-sharing negotiations. The interference, however, lasted only a short time. See: "Scrambled signal cuts rural Manitoba cable TV," Winnipeg Free Press, 30 September 1978, p. 1.

93. Public Utilities Board of Manitoba, Board Order No. 76/80, 8 April 1980, p. 1.

94. Ibid., p. 1.

95. Ibid., p. 16.

96. Public Utilities Board of Manitoba, Board Order No. 184/80, 8 October 1980.

97. See: CRTC, Decisions 82-2, 82-3 and 82-4.

98. CRTC, Annual Report, 1976-77, p. 11

99. For a discussion of the CRTC and political accountability see: H.N. Janish, "Policy-Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada," Osgoode Hall Law Journal, Vol. 17, No. 1, (1979), pp. 46-106.

100. "Manitoba disputes CRTC jurisdiction," Winnipeg Free Press, 3 October 1979, p. 3.

101. For CRTC statements on non-programming services see: CRTC, Public Announcement, "Non-programming Services by Cable Television Licensees," 6 June 1978; CRTC, Public Announcement, "Non-programming Services by Cable Licensees," 26 March 1979; Introductory Statement Relating to Decisions 81-919 to CRTC 81-922, 30 December 1981; CRTC, Annual Report 1981-1982, pp. 27 & 28; and CRTC, Public Notice 1983-232, "Postponement of Public Hearing Concerning the Cable Distribution of Non-Programming Services," 3 October 1983. Hearings on non-programming services have been postponed until late 1985.

102. While federal jurisdiction over cable distribution systems was upheld by the Supreme Court of Canada in Capital Cities Communications v. Canadian Radio-television Commission, 1978, 2 R.C.S. 141 and Public Services Board v. Dionne, 1978, 2 R.C.S. 191, the court did not offer an opinion on a closed circuit system which could theoretically contain signals within provincial boundaries. A challenge by the province of British Columbia relating to provincial jurisdiction over non-programming was recently referred to the court.

103. CRTC, Public Announcement, 8 August 1977. This statement was offered in reply to definition of non-programming suggested by the MTS.

104. Ibid.

105. "Manitoba Disputes CRTC Jurisdiction," Winnipeg Free Press, 3 October 1979, p. 17.

106. Introductory Statement Relating to Decisions CRTC 81-919 to 81-922, 30 December 1981.

107. CRTC, Decision 80-54.

108. CRTC, Decision 81-922.

109. "Someone to watch over you: Selkirk Pioneers two-way cable," Canadian Business, 53(2), (February 1980), p. 18.

110. "Ottawa Cablevision will be ready to start marketing security system next September," Broadcaster, 37 (12), (December 1978), p. 17.

111. "MTS to pave way for 'revolution'," Winnipeg Free Press, 15 December 1978, p. 7.

112. "MTS home computer program detailed," Winnipeg Free Press, 8 February 1979, p. 8.

113. "MTS delays selection of site for cable alarm

experiments," Winnipeg Free Press, 16 March 1979, p. 3.

114. CRTC, Decision 80-757.

115. Ibid.

116. Interdiscom developed a cash flow problem and borrowed $500,000 from MTS. When the telephone company decided to discontinue the project, Interdiscom was unable to pay back the loan and the accumulated interest so MTS decided to write off the $650,000 owed. Subsequently, a deal was made with Nabu of Kanata which gave the Ontario company rights to market the Omnitel system. In return, MTS was given royalty rights on the use of the system and discounts on Nabu equipment. Interdiscom president, John Coyne, is now working for MTS.

117. Press release, Elie-St. Eustache fibre optics field trial, "World's first fibre optics project in rural environment inaugurated today," 13 October 1981, p. 2.

118. Elie-St. Eustache fibre optics field trial, Background Paper, 3 October 1981, p. 1.

119. Department of Communications, Research and Development, 1977-78, p. 13.

120. Ibid.

121. "New programs in Communications," Notes for a speech by the Hon. Jeanne Sauve, Minister of Communications at the Canadian Telecommunications Carriers Association, Quebec City, 19 June 1978, p. 3.

122. Y.F. Yum and B. Ho, Concluding Report: Rural Communications Program, (Department of Communications, Communications Systems Research and Development Branch, April 1981), p. 29.

123. Hicking-Johnston Limited, Field Marketing Trial Strategy for Telidon, Report for the Department of Communications, February 1979, p. 27.

124. Ibid., p. 31.

125. Manitoba Telephone System, Annual Report, 1977-78, p. 16.

126. Sask. Tel. awarded Northern Telecom Canada Ltd. a $22 million contract to supply a 3200 km fibre optics transmission system in the province.

127. "Fibre optics: The new thin lines of communication," Globe and Mail, 7 March 1981, p. B1.

128. "Telephone experiment: fibre optics technology could end party lines," Winnipeg Free Press, 22 December 1978, p. 2.

129. Department of Finance, Public Accounts of Canada, Vol. II, Details of Expenditures and Revenues, "Grants and Contributions," for years ending 31 March 1978 to 1982.

130. "MTS expanding Telidon information network to cover Manitoba," Winnipeg Free Press, 4 May 1982, p. 9.

131. Public Accounts of Canada, Vol. II, "Grants and Contributions," and "Professional and Special Services," for years ending 31 March 1978 to 1982.

132. Department of Communications, Research and Development Bulletin, April 1981/82.

133. Public Utilities Board Act, Section 2(1)(h).

134. Cited in Public Utilities Board of Manitoba, Order No. 157/80, 18 August 1980, p. 5.

135. Ibid, p. 6. Greater Winnipeg Cablevision again applied to the Court of Queen's Bench for an order declaring its right pursuant to the provisions and construction of Order-in-Council 223/78. The application was heard December 3, 1979 but the matter was adjourned sine die without an order being given.

136. See: Public Utilities Board of Manitoba, Order No. 158/80, 18 August 1980.

137. Public Utilities Board, Annual Report for year ending December 31, 1982.

138. Order-in-Council no. 1470, 15 December 1982. Cited in C.R.R., Vol. 3, 1982, 2-125.

139. See: "Cablevision seeks court order to quash MTS pay-TV tariff," Winnipeg Free Press, 2 February 1983, p. 3 and "Cablevision closer to forcing a hearing," Winnipeg Free Press, 21 April 1983, p. 3.

140. Correspondence from G.O. Barron, Secretary of Manitoba Public Utilities Board, 2 March 1984, p. 2.

141. Apparently MTS receives the highest monthly rate for pay TV distribution in Canada. The telephone company collects an average of $2.00 per customer per channel per month for pay TV. See: "Obstacles to Pay TV," Winnipeg Free Press, 29 July 1983, p. 6.

142. CRTC, Public Notice 1983-2, "The Ownership of Equipment

for the Delivery of Pay Television Services by Licensed Cable Television Undertakings," 22 April 1983.

143. This is because the PUB's role, in the case of telephone regulation, is confined to rate regulation. Moreover, the Manitoba Telephone Act does not enunciate the rate and mandate of the MTS.

144. Bill 107, An Act to Amend the Public Utilities Board Act and the Manitoba Telephone Act, was assented to July 29 1980. Since the Bill was assented to there was a change in government. According to Minister of Consumer, Corporate and Internal Services, Les Evans, the NDP government had problems with some sections of the bill and there are no plans to proclaim Bill 107 in the near future. See: Legislative Assembly of Manitoba Debates and Proceedings Vol. XXX, no 7, Thirty-first Legislative, 5 March 1982. p. 155.

145. Public Utilities Board of Manitoba, Order No. 157/80, p. 29.

146. Bill 78, An Act to amend the Manitoba Telephone Act, proclaimed on 15 August 1983. See also: "Tories say cable TV bill will create court battles," Winnipeg Free Press, 6 July 1983, p. 10.

147. Douglas Hartle, "The Regulation of Communications in Canada," in Issues and Alternatives 1978: Government Regulation, (Toronto: Ontario Economic Council, 1978), p. 172.

III. CABLE REGULATION IN SASKATCHEWAN: THE EVOLUTION OF CO-OPERATIVE OWNERSHIP AND SASK TEL HARDWARE OWNERSHIP POLICIES.

INTRODUCTION

In October 1972, Saskatchewan's NDP government announced a policy for the development of cable television in the province. First, cable television would be owned by non-profit co-operatives. Second, Sask Tel, the provincial telephone company, would own all the cable distribution hardware. The Saskatchewan policy was matched by initiatives from the Canadian Radio-television and Telecommunication Commission (CRTC) and the federal Department of Communication (DOC). On one hand, the CRTC was developing a policy framework within which its mandate to regulate the Canadian broadcasting system, including cable television, could be carried out. On the other hand, the DOC was interested in coordinating a national telecommunication system and introduced policies to encourage federal-provincial co-operation.[1] Thus, federal and Saskatchewan initiatives led to jurisdictional negotiation and compromise among the province, the CRTC and the DOC. In turn, the compromises were, and are, reflected in the regulatory environment for cable in Saskatchewan.

This case study will show how the diverse, although sometimes overlapping, interests and objectives of the Saskatchewan government, the CRTC and the DOC established the boundaries and mechanisms for jurisdictional negotiation over regulation in Saskatchewan. Second, the study will show how these interests were negotiated and how compromises were made. Examples will be given to show how the compromises affected Saskatchewan's initial policies on co-operative ownership of cable in Saskatchewan and Sask Tel hardware ownership in the province. Finally, evidence will be presented indicating that the jurisdictional questions related to cable regulation in Saskatchewan are far from being answered.

FRAMEWORKS ESTABLISHED

i. CRTC: A National Broadcasting System

Prior to 1968, broadcasting receiving undertakings were regulated by two different bodies. Off-air broadcasters were regulated under the authority of the Board of Broadcast Governors and cable undertakings were awarded technical licences from the Department of Transport. The 1968 Broadcasting Act created a new body, the Canadian Radio and Television Commission (CRTC).[2] The definition of "broadcasting" was expanded in the 1968 Act to include "...any radiocommunication in which the

transmissions are intended for direct reception by the general public...," and therefore encompassed cable television.

The CRTC's mandate, found in section 15 of the Broadcasting Act, is to "...regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act." Thus, operating under predetermined objectives, the CRTC began to license cable companies, set regulations and establish policy based upon its interpretation of the objectives.

The Commission's task over the next few years was to rationalize the regulation of the two forms of broadcasting so they would "constitute a single system," as prescribed by the Act. Moreover, a policy framework for cable television, which was generally absent during the Department of Transport regulation, had to be developed. A number of aspects of the CRTC's evolving policy came into play in its licensing of Saskatchewan cable companies.

The CRTC issued a series of public announcements of an interim nature between 1969 and 1971.[3] In July 1971, the first "policy statement" regarding cable television entitled "Canadian Broadcasting 'A Single System'," was released.[4] Further, several Orders-in-Council were issued by the federal government with regard to eligibility requirements for cable licences. Finally, between 1970 and 1974, through its decisions, the CRTC established a policy on hardware ownership.

The development of a policy framework for cable television was intimately connected to the CRTC's responsibility to maintain a single national broadcasting system. Fear of audience fragmentation and a loss of advertising revenue by off-air broadcasters were central issues the CRTC confronted. Part of the debate on the protection of off-air broadcasters focussed upon the importation of U.S. television signals via microwave. Under Department of Transport licensing, cable operators were limited to the use of community antennae which were required to be located within ten miles of the area to be served. In effect, this meant that cable operators in urban areas located close to the American border (for example Toronto and Vancouver) could pick up American signals but urban operators in other areas, such as in Saskatchewan's major cities, could not. Since the reception of American signals was considered essential for the profitability of a cable operation, the ban on microwave reception was prohibitive, in an economic sense, in the establishment of cable television in Saskatchewan.

When the CRTC assumed responsibility over cable television, the ban on microwave signal importation was continued. A public announcement to this effect, dated December 3 1969, stated:

> ...the Commission will not license broadcasting receiving undertakings (CATV) based on the use of microwave or other technical systems,for the wholesale importation of programs from distant U.S. signals....[5]

By 1971, however, the Commission began to reassess the ban. In a February 26 1971 statement, the Commission recognized that "...a compelling feature of cable television subscribers is the

programming from distant stations that broadens the choice of programming available..." and that "...[t]he provision of distant signals with high technical quality that long haul microwave or cable systems can provide would undoubtedly increase cable television revenues."[6] Later that year, in its first comprehensive policy statement, the Commission announced that it would "...authorize cable television systems to carry distant stations using microwave or other electronic communications systems which technically extends the system."[7] The lifting of the ban opened up the possibility of lucrative cable operations in Saskatchewan.

A second development in CRTC cable policy was the Commission's encouragement of community programming. In the July 1971 statement, the Commission announced that it would encourage cable licensees to provide access to a channel which might consist of community, local origination and informational programming. Further, the statement suggested that "community programming" defined as a "...process which involves direct citizen participation in programme planning and production...," should be given priority.[8] In November 1975, the Commission issued regulations which required all cable licensees to provide a community channel on their basic service on a priority basis and set minimum standards for the channel.[9] The concept of the community participation in the process of community programming was reiterated in the CRTC's 1975 policy statement issued the following month.[10]

The development of the CRTC's policy on community programming is important to note because it illustrates that the objectives of citizen access and participation in cable programming were shared by the Commission and the Saskatchewan government. Thus, although the two bodies implemented different policies to effect those objectives, the principle of "community interest" overlapped.[11]

The third important development in cable regulation with respect to the Saskatchewan case was the establishment of eligibility requirements for cable licensees. This had important implications in Saskatchewan because the requirement banned both the Saskatchewan government and the provincial telephone company, Sask Tel, from obtaining cable licences.

In a public announcement dated December 3, 1969, the Commission stated that common carriers would not normally be allowed to hold CATV licences.[12] This suggested that Sask Tel, as a common carrier, would not be eligible for a licence under normal circumstances. A 1970 Order-in-Council prohibited the CRTC from granting a broadcasting or cable television licence to a provincial government, their agencies or crown corporations.[13] This Order both ensured, since it is a provincial crown corporation, that Sask Tel could not receive a licence, and that the government could not set up an agency to operate cable in the province.

A fourth development, the establishment of a cable hardware ownership policy, was crucial in the Saskatchewan case. Before

the policy was developed, the ownership requirement was apparently that headends be located within Canada, that they be controlled by a licensee of a broadcasting receiving undertaking and that any agreements relating to the provision of microwave service by a common carrier be subject to CRTC approval.[14] While the CRTC's current hardware ownership policy was apparently not firmly established until 1974, minimum cable hardware ownership requirements were made a condition of licence as early as 1970.

In 1970, Metrovision Limited applied for a licence to operate cable systems in the Dartmouth and Halifax areas. The cable company had a leasing agreement with Maritime Telegraph and Telephone whereby the telephone company retained full ownership of the headend, studio, mobile equipment, microwave plant, and coaxial distribution system including service drops. The CRTC refused Metrovision's application. In approving the applications for two other companies to serve Halifax and Dartmouth, the Commission stated that:

> ...[a]pproval of these two applications is conditional upon the CATV licensees having effective ownership and control of the local head-end, amplifiers and associated equipment....The Commission proposes to discuss ownership and control of the distant head-end with each party.[15]

Again, in 1973 with the development of cost-sharing schemes to enable cable distribution to areas where subscriber population would make distribution by individual companies unfeasible, minimum hardware ownership requirements were imposed.[16]

Finally, in 1974, in a case similar to Saskatchewan's because the Alberta Government Telephones (AGT) was involved, the CRTC imposed the hardware ownership condition. In this case, Northern Cablevision Limited had acquired an existing cable system in Grande Cache, Alberta and proposed to sell the cable equipment purchased with the system to AGT. The Commission required Northern to own, as a minimum, the headend, drops and amplifiers and to acquire full access to the system for repairs and replacements.[17]

Thus, when the CRTC requested applications for cable licences to serve the Regina, Moose Jaw, North Battleford and Saskatoon areas on August 1, 1975, a cable policy framework had been established.[18] In its request, the Commission reminded potential applicants of the eligibility requirements and of the hardware ownership policy. The Commission also requested that agreements in principle between the telephone company for the provision of microwave be submitted.

ii. Saskatchewan: An Integrated Provincial Telecommunications System

On October 3, 1972, Saskatchewan Minister of Telephones John Brockelbank announced a two-pronged policy for the development of cable television in the province. First, the cable television system would become part of a provincial network which would be operated as a public utility with Sask

Tel owning and installing the distribution equipment. Second, only community-operated, non-profit groups would be allowed to use the system.[19] The rationale for the policy, according to Brockelbank, was that such a system would ensure the extension of services to smaller centres through rate averaging. Moreover, community control of cable would keep economic and organizational barriers to citizen access at a minimum. Finally, government control over the rate and structure of the cable system would ensure that profits went back into programming.

The NDP government's policy on cable television reflected the historic role of both the telephone company and co-operative enterprises in the province. Moreover, a statutory framework was already in place to facilitate the development of co-operative cable ownership and for Sask Tel to own the cable hardware. The provincial objective, in its initial stages at least, was to integrate cable television into the provincial communications system while continuing the tradition of co-operative development with the new technology.

Sask Tel's Statutory Framework

Saskatchewan has had a provincial telephone system since 1908 when the Department of Railways, Telegraphs and Telephones was established with the department minister authorized to construct, operate and acquire telephone and telegraph systems. The Rural Telephone Act, passed at the same time, allowed rural

co-operatives to construct rural telephone lines under the supervision of, and with funding from, the department. The telephone system remained a function of the department until 1947 when a crown corporation, Saskatchewan Government Telephones, was established. In April 1969, to reflect that the corporation had changed from a telephone company to a company dealing with a wide range of services, its name was changed to Saskatchewan Telecommunications or "Sask Tel."[20]

Through its enabling legislation, the Saskatchewan Telecommunications Act, the telephone company is given the power to: construct, maintain and operate a provincial telecommunications system; to provide telecommunication services; to lease or to set rates, charges, terms and conditions of services offered; and to participate in establishing a coordinated telecommunication system in Canada.[21] Section 39 of the Saskatchewan Telecommunications Act gives the telephone company exclusive rights to place its facilities for signal delivery on roads, streets, lanes and easements without restriction. Finally, "telecommunication" is defined in the Act as:

> ...the emission, reception, transmission, switching, storage and presentation of messages, communications, sounds, signs, signals, images, impressions and information by electronic, electromagnetic, electro-optical, sonic, supersonic, mechanical or chemical means or by a combination of such means and the processing and transmission of such messages, communications, sounds, signs, signals, images, impressions and information into useful forms, media or functions and, without restricting the generality of the foregoing, includes all means by which telephone, telegraph, wireless data, facsimile, radio, television

and other services are provided....

Therefore, under this definition and with the powers to own and operate telecommunication hardware, Sask Tel could, if it were allowed by the CRTC, operate a broadcasting receiving undertaking.

Until recently, there was no external regulatory body responsible for Sask Tel activities. In July 1982, a Public Utilities Review Commisssion was established to review rates charged by Sask Tel in Saskatchewan with respect to non-competitive telephone services.[22] Sask Tel is, and was, self-regulated through a cabinet appointed board of directors referred to as "the corporation."[23] There is no indication in the legislation of how board members are chosen. The Lieutenant Governor in Council appoints a member of the Executive to whom the corporation is responsible. Direction from the government is therefore provided through the Minister of Telephones who is normally appointed by the Lieutenant Governor in Council as chairman of the corporation. Usually, one or two other cabinet ministers sit on the board. The Lieutenant Governor in Council may make regulations for carrying out provisions of the Act. Finally, the Treasury Board makes regulations with regard to the financial operations and audit procedures of the corporation.

Sask Tel Hardware Development

The Saskatchewan government's announcement of a policy for the integration of cable television with the provincial telecommunications system may have been prompted by the CRTC's 1971 lifting of the ban on microwave importation of signals. However, earlier activities indicate that the policy of integration of all telecommunication services in the province predates the Commission's policy. Moreover, integration policies were initiated under Ross Thatcher's Liberal Government which was in power from 1964 to June 1971.

First, although rural companies established under the Rural Telephone Act are responsible to the Department of Telephones, their administration is delegated to Sask Tel. In the mid-1960s, the telephone company began plans to amalgamate the rural companies. This was replaced by an assimilation plan in 1976. In 1970, there were 863 rural companies operating in the province.[24] By 1982, there were only 72 rural companies left.[25] The amalgamation and assimilation projects are indicative of Sask Tel's construction plans in general and of a particular desire to establish a telecommunication system in the province under one body.

Second, as early as 1965, Sask Tel began a program of installing cable underground in new housing developments.[26] Part of the rationale for this move was to avoid problems with exposed wires created by Saskatchewan's climate. By 1970, however, coaxial cable was buried with underground telephone lines.[27]

Third, the province began to insist that Sask Tel own all cable hardware. In August 1969, prompted by a growing concern that cable operators were "infringing on the role of Sask Tel," the telephone company issued a one-page policy statement on cable television.[28] The statement announced Sask Tel's intent to play a "basic role" in the provision of hardware for cable systems in major Saskatchewan communities.[29] The type of contract that Sask Tel would offer to operators for the provision of cable facilities and microwave transmission was outlined.

The telephone company would own the cable facilities used to carry signals from the operator's master antenna or studio to the subscribers' homes for which the cable operator would pay an unspecified monthly rental fee. Sask Tel would have the right to purchase operator-supplied amplifiers and drop wires when the contract expired. The operators would be required to pay an unspecified provisioning charge for the system's construction. The statement noted that Sask Tel possessed both statutory rights of way in streets, lanes and easements and the rights required for the installation of poles and conduits. A suggestion was made, however, that subject to Sask Tel approval and supervision cable operators might be allowed to install cable. The telephone company would reserve four standard TV channels and other portions of the spectrum to provide educational television and other telecommunication services. Finally, if provision of these services so required, Sask Tel

reserved the right to replace the operator's amplifiers.

The terms outlined in the 1969 statement were a departure from Sask Tel's past policy where pole contact space was rented to cable operators. Pole attachment agreements had been made with operators in Prince Albert (1955), Estevan (1962) and Weyburn (1963). The operator at Ponteix had buried cable which was privately designed and administered.

Cable operator reaction to the Sask Tel proposal was unfavourable. The telephone company reformulated the policy in October 1971 under the new NDP government.[30] Three alternative roles for Sask Tel in cable development were considered. First, a continuation of pole rental to operators was rejected on the grounds that it left the operator in the position of owning and controlling the use of cable. Sask Tel predicted that this would lead to an independent system of buried cable which would duplicate the telephone company's function and threaten its economic viability. In addition, the provincial government would lose the opportunity to influence the extension of cable services to marginal areas and to control the use of streets and lanes.

The second alternative considered was for Sask Tel to own and operate the complete cable system. This proposal was rejected because it was contrary to the CRTC's policy prohibiting common carriers from obtaining cable licences. Moreover, the proposal was inconsistent with the common carrier argument that the message and medium functions of broadcasters

and common carriers should remain distinct.[31]

Sask Tel accepted a third alternative, Sask Tel ownership of cable and microwave facilities for lease to cable operators, as its policy for cable development in Saskatchewan. Like the 1969 policy, Sask Tel indicated its intent to play a substantial role in cable television development in the province through hardware ownership. The terms of the 1971 contract policy, however, were based on a full lease agreement (ie. telephone company ownership of all distribution equipment including amplifiers and drops) rather than the partial lease agreement offered in 1969. Sask Tel suggested that the full lease agreements would assist in the planning of facilities for both conventional cable television and new services such as computer communication and picture phones.

When the NDP government announced its cable policy in 1972, there were six cable television systems operating in the province. Licensed systems were located in Alsask, Weyburn, Prince Albert, Estevan and Ponteix. An unlicensed system operated in Mankota. The combined subscriptions of the system were 8,000.

Despite the two Sask Tel initiatives, existing systems continued to operate with pole attachment agreements. The largest undertakings were Estevan Co-Ax Cable TV Ltd. and Weyburn Co-Ax Cable TV Ltd. The two companies had contracts with Sask Tel where they paid the telephone company $3.75 per pole attachment per year and the companies owned all their coaxial

cable. Under its hardware policy, Sask Tel began to bury cable in the two cities and by 1976 about 6,000 feet of cable was buried in a new subdivision in Weyburn and 1,500 feet in Estevan. Under the government's cable policy, existing systems were to be phased into the system. Therefore, when Weyburn's contract expired in 1974 and Estevan's in 1976, Sask Tel did not renew them. The telephone company continued to lease poles to the companies on a day-to-day basis at the original rate. Apparently Sask Tel did not charge a rental fee for distribution on the underground cable.[32]

By February 1975, it was estimated that the cost of Sask Tel's 10-city, 118 mile proposal for cable distribution would be $18.5 million.[33] By August 1976, Sask Tel had installed 100 miles of coaxial cable in Regina, 40 miles in Saskatoon and 25 miles in Moose Jaw. The underground cables included amplifiers and service drops which indicated that Sask Tel would refuse to allow cable companies to own these portions of the distribution system.[34]

Thus, Sask Tel had begun to install the cable distribution system and had established its hardware ownership policy before the Saskatchewan government announced its cable television policy. More importantly, the system was, for the most part, in place before the hearing for cable television licences began in February 1976.

Development of Co-operative Cable Companies

Details of the co-operative scheme were outlined on October 12 1972 by Hurbert Prefontaine, chief cabinet planning officer. Community groups were required to raise ten per cent of the initial capital cost of the cable delivery system. The government was willing to provide initial funding for community groups seeking a CRTC licence. Once community groups were formed, they were to apply either to Sask Tel or the Department of Government Services (Brockelbank's portfolio). Then the applicants would be instructed to arrange details with Sask Tel in order to determine a rate structure as a basis for their CRTC application.[35]

The government did not set guidelines for the establishment of cable co-operatives until the following spring. Brockelbank attributed the delay to discussions with federal authorities.[36] On May 30, 1973, the "Provincial Government Guidelines for Cable Television in Saskatchewan" was issued.[37] Two points guaranteed the co-operatives would conform to the government's stated policy. First cable operators would "...be incorporated as a legal entity (company, society or co-operative) with by-laws which indicate the non-profit status of the incorporation." Following this guideline, the co-operative cable companies were constituted under the Saskatchewan Co-operative Associations Act.[38] Second, the earlier requirement that the co-operatives must be prepared to supply ten per cent of the capital cost of

Sask Tel's local distribution system was reiterated. Six other points dealt with subscriber and membership participation in administrative activities, community access for programming, the sharing of program resources and facilities and the importation of remote signals, and the establishment of a programming advisory council. Once these guidelines were met, the co-operatives would be eligible for a $5,000 grant to assist in their development.

Cable co-operatives to serve each of the four cities were established by the licence application deadline in October 1975. In light of the Saskatchewan government's policy and guidelines, it is interesting to contrast the development of the Regina and Saskatoon groups.[39]

In 1972, three groups interested in establishing cable co-operatives had formed. Two of these groups, Regina Community Cable Association (RCAA) and Community Cable Saskatoon (CCS), were developed locally. The third group was a consortium of five existing province-wide co-operatives which was established in 1971 when the controlling shares of a formerly private company, Sascable Television Ltd., were purchased.[40]

In April 1973, Sascable presented a brief to cabinet which embodied a proposal for a provincial cable network.[41] The scheme called for local control of local programming with provincial programming controlled by all districts and the consortium. Profits from the urban markets would be used to subsidize local programming in rural markets. Moreover, the brief suggested that

since the co-operatives would have guaranteed subscribers through their existing membership they were in the best position to implement the Saskatchewan cable policy. Brockelbank, suggesting that Sascable's centralized structure would inhibit autonomous community control, recommended the application be refused. The next month the government's guidelines were issued and Sascable withdrew its application.

Despite its rejection of Sascable's proposal, the government asked the consortium to aid in the development of the cable co-operative. Sascable agreed and recommended that local co-ops and credit unions become involved. As a result, steering committees were established in Saskatoon and Regina.[42]

In Saskatoon, after initial conflict regarding the cost of membership shares, the steering committee (established by the Saskatoon Co-operative Association and the Saskatoon Credit Union) and CCS joined forces. On February 18, 1974, a joint organization called the Saskatoon Cable Television Sponsoring Co-operative (SCTSC) was incorporated under the Saskatchewan Co-operative Associations Act. By February 1976, the SCTSC had changed its name to Saskatoon Cablevision Co-operative and had established a membership of 135 organizations.

The Saskatoon Cablevision Co-operative (SCC) established close ties with the government during its development. First, the government supplied and assisted with personnel. For instance, the executive director of the SCC from May 1974 to March 1975 was an employee of the Department of Co-operation and

Co-operative Development. Second, the Communication Secretariat supplied the SCC with information regarding developments within the government and between the province and federal authorities. Finally, significant financial assistance was offered by and received from the government.

On May 26, 1977, the SCC received the first $5,000 development grant from the government. Subsequent grants, including "managerial assistance grants," amounted to $10,000 per year. The SCC estimated prior to the February 1976 licence hearings that the government had made $35,000 available to the co-operative. This amounted to 90 per cent of the SCC's income in the period February 1974 to February 1976. The SCC planned to pay back $5,900 of the sum plus $12,000 raised from membership pledges if it received a licence. Finally, a loan of $1.5 million from the Credit Union Central, guaranteed by the government through the Co-operative Guarantee Board, had been arranged.[43]

The Regina co-operative developed quite differently from its Saskatoon counterpart. The conflicts between the Regina steering committee (led by the Sherwood Co-operative Association and the Sherwood Credit Union) and RCCA were never resolved. Finally, in July 1974, the steering committee, along with various service clubs and labour unions, voted to form the Regina Cablevision Co-operative (RCC).[44] The co-operative received a government grant within three months and the original community group faded away.[45]

It soon became apparent that the Regina co-operative was developing a character different from the Saskatoon group. Although it received the initial $5,000 development grant in October 1974 and asked the government to guarantee a $500,000 loan through the Co-operative Guarantee Board, it refused further funding from the province. In November 1975, the co-operative (which had changed its name to Regina Community Cable Services) announced it would raise $40,000 through its membership rather than risk its "arm's length relationship" with the government which it felt it must retain to be considered by the CRTC.[46]

In July 1975, the province announced it would provide $5,000 for the creation of an umbrella organization to assist the co-operatives in their applications and to share in the cost of remote signal delivery.[47] In response, the Saskatoon, Moose Jaw and North Battleford co-operatives formed the Saskatchewan Community Cable Federation. While the Federation was open to all co-operatives, Regina did not join.

Finally, in its application to the CRTC, Regina Cable offered two proposals for hardware ownership. One fell under the provincial government's guidelines (ten per cent of the capital cost of construction and Sask Tel owning the hardware). The "alternate" proposal would have the co-operative owning 50 to 60 per cent of the hardware in case the CRTC rejected the first proposal. Regina Cable President Torance Tornquist said the two proposals were offered because "...as a co-operative we do not

see it as our role, nor is it in our objectives, that we should undertake jurisdictional battles on behalf of any governments."[48]

Provincial Policy - The Pre-Hearing Status

For some time after the cable policy announcement in 1972, the Saskatchewan government appeared confident that their initiative would be accepted at the federal level. Indeed, Brockelbank pointed out that the federal government's authority to license cable television undertakings was recognized and not in question.[49] Following the announcement, Attorney-General Roy Romanow whose department was involved in the legal and jurisdictional aspects of the policy said he was satisfied that there would be no conflict with jurisdiction carried through the CRTC.[50] Early meetings with the CRTC and DOC to discuss Saskatchewan objectives were apparently positive. For instance, at a meeting with local co-operative groups in July 1973, Brockelbank announced that Sask Tel would proceed with plans to build a broadband network for cable TV and future telecommunication services because recent meetings with the federal Minister of Communications and the CRTC left him confident the provincial cable policy would be accepted.[51]

By April 1974, however, it became apparent that both the DOC and the CRTC were concerned with aspects of Saskatchewan's policy. In a meeting between Communications Minister Gerard

Pelletier and Brockelbank's special advisor, Leo Courville, the federal minister expressed two points of contention.[52] First, Sask Tel's role as a common carrier was questioned because access to the distribution system was being denied to private operators. Second, the DOC was concerned with Sask Tel's role in distribution agreements with cable operators. Pelletier indicated that the CRTC shared the DOC's concern about the provincial policy to limit access to Sask Tel's system. The Commission had suggested that the provincial government had set up a pre-licensing arrangement which ruled out private enterprise. At a gathering with the Saskatoon co-operative where details of the meeting were released, Courville said he had indicated to the minister that the CRTC would incur "political results" if applications from non-profit organizations were denied.[53]

When Courville met with the DOC and the CRTC in August, the major issue of the Saskatchewan policy became apparent. Disagreements among the DOC, the CRTC and Saskatchewan related primarily to who should own what part of the local cable distribution system.[54]

By this time Sask Tel had worked out a draft of a contract to be offered to approved cable co-operatives. Sask Tel's plans for signal delivery agreements with cable co-operatives, eventually formulated as the "Penetration Dependent Agreement" (PDA), stipulated that the telephone company would own all the distribution cable, amplifiers and drops. Sask Tel would pay 90

per cent of the cost of the delivery system while the cable co-ops would pay the remaining ten per cent. The cable co-operatives would then pay Sask Tel a monthly leasing charge based on the number of subscribers connected to the system.[55] The PDA was directed at the development of co-operative cable companies because it reduced the amount of capital required to get into business. Past CRTC policy, however, was that the cable licensee own a minimum of the local headend, amplifiers and drops in the cable distribution system to ensure compliance with Commission policy and regulations.

Courville met again with DOC and CRTC staff in early December 1974. At this point he was told that the PDA would receive positive response from Pelletier and the DOC.[56] The CRTC's reaction was uncertain. Courville said the Commission was worried about the effects of cable television on Saskatchewan broadcasters' revenue. He felt, however, that the CRTC's major concern was that Sask Tel was beyond their jurisdiction.

In January 1975, Brockelbank met with Pelletier but the details were not released.[57] In February, further talks were held between the Saskatchewan and federal authorities. After this discussion Brockelbank stated that most of the outstanding obstacles to the provision of cable services in the province had been cleared up. "We have received positive reaction to our view that the ownership of the means of delivery -- the microwave as well as the coaxial cable system -- should be the responsibility of our provincially-owned telecommunications company."[58] Thus,

with the co-operatives established and the DOC's apparent sympathy for Sask Tel hardware ownership, the provincial government again appeared confident that its cable policy would be recognized by the CRTC.

From the beginning a number of messages were coming from the provincial government and Sask Tel with regard to signal delivery agreements for private companies. Two days after the policy announcement, Premier Blakeney stated that private companies would not be allowed access to the Sask Tel system but could establish their own systems.[59] Later in the developments, Ned Shillington, who had taken over Brockelbank's responsibilities, said that if the CRTC licensed a profit-making company, no hardware would be provided to them.[60] During the hearings Sask Tel pointed out that they were the only one with legal authority to establish cable systems.[61]

The Commission's stand on the hardware issue was far from clear. Concern had been expressed about the Saskatchewan policy to limit access to the cable distribution system and past CRTC policy on hardware ownership had been noted in the August 1 1975 call for applications. On October 10, 1975, however, Brockelbank received a telex from CRTC Chairman Harry Boyle which suggested that the Commission might reconsider its ownership requirements.[62] Boyle said that the CRTC's past policy requiring licensees to have effective control over amplifiers and drops did not preclude applications that did not conform with the ownership requirements. All applications would be accepted and

given full consideration.

By December 3, the provincial government appears to have felt it needed to assert its policy in other ways. Sask Tel submitted last minute applications to the CRTC which would give the telephone company licences for the four Saskatchewan cities.[63] Although a federal Order-in-Council prohibits provincial governments or their crown corporations from holding licences, Brockelbank wrote to Pelletier asking for an amendment.[64]

Courville said the province had allowed the Sask Tel applications because of concern that the CRTC might give a licence to private groups with a requirement that non-profit groups have an involvement in programming rather than giving the licence to community groups alone. Moreover, the government felt Sask Tel would have no problem conforming to the provincial cable policy since it was a crown corporation and already owned the hardware.[65]

In its CRTC applications, Sask Tel introduced two signal delivery agreements, the "Signal Delivery Tariff" (STD) and the "Direct Delivery Alternative" (DDA). The SDT was basically the same as the Penetration Dependent Agreement that had been developed earlier. Under the SDT, the licensee would pay ten per cent of the capital cost for the distribution system (which did not imply ownership). They would own local and distant headends and arrange for bill collecting. The other scheme was Sask Tel's application for cable licences. Under the DDA, Sask Tel would

own all the hardware and collect fees from subscribers. Other groups in the four cities, to be named by the CRTC, would do the programming. Cable programmers would not be required to pay the initial ten per cent capital cost for the distribution system. Thus, Sask Tel would share licences with CRTC-approved operators in the four cities.

In a meeting with the Saskatoon co-operative, Sask Tel legal counsel Tom Howe explained that the DDA was a way to "plug holes" in the co-operative's position.[66] Sask Tel could take over responsibility for billing, headends and the provisioning charge at a cost of about 99 cents per subscriber per month as opposed to a cost estimated at $1.50 for the co-operatives. The saving in costs would allow Sask Tel to contribute $1.00-$2.00 per subscriber each month to programming for the co-operatives. Therefore, even if the private operators accepted Sask Tel's PDA and offered the local co-operatives 75 cents of the monthly rental fee for programming, the Sask Tel alternative would provide more funding for programming.

Less than two weeks after the Sask Tel applications were submitted there was an apparent turn-around in Saskatchewan's policy regarding system access. On December 15, the provincial government announced that in the interest of a "fair and equitable hearing" a decision had been made to allow signal delivery agreements to the private operators if they were licensed.[67] However, the policy that private groups would not be able to use Sask Tel's hardware would not be changed until the

CRTC's decisions were made.

At a January meeting with the Saskatoon co-operative, Tom Howe described the move to open Sask Tel's facilities to all applicants as a trade-off with the CRTC. Had the government continued to limit signal delivery agreements to co-operatives, the Commission would lose its power to grant licences. Howe suggested that Sask Tel would be allowed total ownership of the delivery system, including service drops, in return for allowing the signal delivery agreements to private operators.[68]

The Hearings

The hearings for cable television service for the four Saskatchewan cities took place on February 9 to 12, 1976. Despite the Saskatchewan government's cable initiative, the co-operatives had significant competition. Aside from the four cable co-operatives and Sask Tel, sixteen other applications were heard.

First, Provincial Cablevision Ltd., a company formed by six television stations, applied for licences in all four cities.[69] The largest shareholder in the groups was Armadale Communications which is involved in television, radio and newspaper interests in the province. The broadcasters argued that their ownership of cable was the best way to protect the Saskatchewan broadcasting market industry against the effects of cable. Provincial Cablevision suggested the company would allow

the public to buy shares sometime in the future.[70]

Second, Prairie Cable Television, formed in 1972, applied for all four licences. Jack Turvey, President of Interprovincial Steel and Pipe Corporation Ltd. (IPSCO) held controlling interest. Other shares were divided among another IPSCO official and a doctor and lawyer from Regina.[71]

A third applicant for the four cities was J. Ronald Mitchell representing a company to be incorporated. The company would be controlled by Moffat Communication Ltd., owner of CHAB Moose Jaw and other communication interests in Canada.[72]

Four other private companies applied for licences. Agra Industries Ltd., which already owned systems in Estevan and Weyburn, applied for the Saskatoon licence. The company was also connected with Cablesystems Ltd. and owned other cable companies in Alberta and British Columbia. A company to be incorporated, which was 50 per cent owned by Capital Cable TV of Edmonton, also applied for a Saskatoon licence. Finally, Saskatoon Telecable, whose owners had established radio station CJWW in Saskatoon under the ownership of Western World Communications Ltd., applied for the Saskatoon licence.[73] Prairie Co-Ax TV Ltd., which was controlled by Cablecasting Ltd. and connected to Agra Industries applied for the Moose Jaw licence.[74]

During the hearing, the provincial government and the telephone company asked for an end to the strict rules against telephone ownership of the cable system.[75] The Saskatchewan government's brief focussed on the historic role of the

telephone company in the province, the existing concentration of media ownership and the necessity of separating the "medium" (delivery) role from the "message" (programming) role in cable operations.[76] The telephone company stressed its statutory right as exclusive supplier of telecommunication services in the province and the economic rationality of a single supplier of cable equipment.

CRTC Chairman Harry Boyle suggested the medium-message separation was a "neat arrangement" but neglected important factors such as the effect of cable on broadcaster revenues.[77] On the issues of Sask Tel's applications and hardware ownership, Boyle said in a post-hearing interview that the CRTC had agreed to hear the applications but hadn't abandoned its policies. He said that unless the federal cabinet changed the Order-in-Council prohibiting provincial crown corporations from holding CRTC licences, Sask Tel could not be granted a licence.[78]

Concern was raised by both the CRTC and the Canadian Cable Television Association regarding the non-profit status of the co-operative cable applicants. They suggested a lack of profit incentive might lead to a dwindling of interest in the cable undertakings. CRTC legal council Chris Johnston expressed concern about the government's encouragement of the co-operative applicants. Shillington replied that, with the organizational grants, the cable groups were being treated no differently from other co-operatives developed in the province.[79]

When the hearings closed on February 12, a number of new actors and issues had been introduced. The CRTC was left to decide on the licences based on the Saskatchewan government's policies, its own policies on hardware ownership, the diverse ownership schemes represented by the applicants and the potential loss of revenue to broadcasters from cable television.

iii. The DOC: A National Telecommunications System

While the DOC did not publicly address the Saskatchewan government's 1972 initiative, its activities and interactions with provincial governments on a multilateral level set the context within which the future negotiations would take place. The DOC was interested in initiating a consultation process with the provinces to facilitate the development of an integrated national telecommunications system. The DOC's 1970s agenda for federal-provincial consultation eventually provided the Saskatchewan government with a forum for bilateral negotiations over cable jurisdiction. Moreover, because the other provinces were interested in asserting their respective roles in communication policy development, the Saskatchewan government found allies for its demands.

During the period before the CRTC awarded the four Saskatchewan licences, two developments promoted intergovernmental interaction. First, the DOC published two position papers as a means to prompt federal-provincial

discussion. The proposals set forth in the 1973 and 1975 documents suggested approaches to "harmonize federal and provincial objectives and activities in the field of telecommunications" and to provide "a basis for further consultation and ...revision of federal communication legislation."[80] Second, during this period, the mechanisms were set up for political interaction on both an interprovincial and a federal-provincial level with the introduction of conferences for communications ministers.

By 1976, however, it was apparent the federal government and the provinces had different perspectives on cable jurisdiction and, as a result, different agendas. On one hand, the federal government maintained the position that cable television was an integral part of the broadcasting system and was properly under federal jurisdiction. They were, however, willing to give the provinces a consultative role in the development of cable systems or to make arrangements so the provinces could play a larger role in the regulatory function. But these arrangements would necessarily presuppose federal control and account for federal objectives. On the other hand, the provinces claimed a constitutional right to jurisdiction over cable television. Effective control, not just consultation, regarding cable systems was the least they wanted.

The Green Paper

In 1973, the federal Minister of Communications Gerard Pelletier released a federal position paper entitled Proposals for a Communications Policy for Canada. The purpose of the "Green Paper" was to provide the basis for provincial participation in the development of a "national communication policy."[81] The paper stated that studies had demonstrated a "need for consultation and collaboration on matters of policy and planning between the federal and provincial governments." Therefore, a process of consultation was proposed to "assure this harmonization is achieved."

The "consultative arrangements" suggested were periodic meetings of ministers of communications and continuing dialogue between the two levels of government. These mechanisms would be sensitive to provincial views and interests in the development of national policy-making.

Specific comments on the rationale for provincial consultation in the development of cable policy are interesting, especially compared to judicial interpretation of cable jurisdiction up to this point.

In 1965, the British Columbia Court of Appeal had established that the federal government had constitutional jurisdiction over cable signals which used broadcast signals.[82] The federal government, in turn began to regulate cable under the auspices of the CRTC by recognizing cable as a "broadcasting

receiving undertaking" in the 1968 Broadcasting Act. The legal foundations for federal control were far from solid, however, especially in terms of the regulation of closed circuit community channels and other non-broadcast-related services.

Based upon the Victoria Cablevision case, the Green Paper maintained that cable television was a broadcasting receiving undertaking and therefore under federal jurisdiction. With federal dominance established, the Paper suggested, however that:

> ...[i]t seems desirable to reconsider and perhaps clarify the statutory provisions governing the relationship between the broadcasting and carrier functions of cable television systems.[83]

To this end, the DOC asked for provincial views on the problems arising from the dual nature of cable operations.

The DOC's interest in the "dual nature" of cable operations and the need for consultation is suggested in other commentaries. The approach taken toward the non-broadcast elements of cable operations, for instance, was somewhat different from that taken toward programming elements. The Green Paper recognized, without making reference to any specific examples, that judicial interpretation was "neither comprehensive nor in all respects conclusive." Indeed, the constitutionality of federal or provincial jurisdiction over closed circuit cable services had not then (and has not since) been tested by the courts. This is important in view of the Green Paper's emphasis on the need for provincial consultation and co-operation regarding non-broadcast services. The Paper

recognized that:

> ...the coaxial-cable systems that distribute the broadcast signals are technically capable of being developed so as to carry other services of a closed-circuit nature, involving computers, databanks, and sophisticated display devices, which might otherwise be handled by telecommunication carriers....
>
> ...it may be difficult to distinguish clearly between broadcasting and carrier function on the basis of hardware alone, since many of the closed-circuit services using the facilities of CATV systems will contain an element of "programming"....[84]

Therefore, the Green Paper proposed measures to "harmonize" broadcasting and telecommunication regulation.

The Green Paper suggested that the functions of the Canadian Transport Commission which had authority over federally regulated telecommunication carriers (Bell Canada and BC Tel) and the CRTC should be combined into a single regulatory agency which would have jurisdiction over both broadcasting and telecommunications. The Paper noted that:

> Several provincial governments have expressed increasing interest in the development of CATV and other cable systems in relation to regional and local planning for telecommunications services of all kinds. The increasing complexities of the Canadian broadcasting system demand the most careful attention to the impact of CATV undertakings upon its stability and capacity to serve national and local needs. The increasingly complex relationship between broadcasting and carrier functions suggests that a single federal telecommunications agency responsible for both the supervision of the broadcasting system and for the regulation of telecommunications carriers subject to federal jurisdiction, would be in a position to give weight to the expressed provincial interest in the development of communications facilities....[85]

In those provinces where the principal telecommunications carriers were subject to provincial jurisdiction, the government

was willing to discuss the "formulation of arrangements for consultation between federal and provincial bodies in advance of policy decisions falling within the competence of those bodies."

The First Federal-Provincial Communication Ministers' Conference

The DOC's Green Paper proposals were to be the main topic of discussion at the First Federal-Provincial Conference on Communications. However, the conference agenda was somewhat altered due to earlier interaction among provincial governments. Beginning in 1972, the provinces agreed to provide for continued co-operation and to "establish common policy positions to ensure realization of national and regional objectives."[86] The provinces had met three times on an interprovincial level before the first federal-provincial conference for communications commenced in November 1973. By 1972, the premiers of all ten provinces agreed that:

> ...federal initiatives in the fields of voice and data communications, including cable television,...do not take into account provincial policies, priorities and jurisdiction.[87]

Therefore, while Pelletier had planned to discuss the specific points for consultation set out in the Green Paper, the provinces refused to co-operate. Instead, they insisted that the whole issue of communications, including jurisdiction, be discussed. The result was that the first Federal-Provincial Conference on Communications ended in a deadlock between the two

levels of government. The provinces agreed they would plan the agenda for the next meeting and issued a joint statement to the effect that:

> The provinces' historic responsibilities in communications have in recent years taken on new dimensions and importance by reason of social, economic and cultural impact of rapidly changing technology.[88]

The Grey Paper

Following the conference, a series of bilateral meetings were held between Pelletier and the provincial ministers responsible for communications. In response to these meetings and to the provincial positions presented at the November 1973 conference, the DOC released a second position paper in April 1975.

Communications: Some Federal Proposals, which was a so called "Grey Paper," reiterated the federal government's position on the need for a centralized nationwide control of communications. Like the Green Paper, the Grey Paper stressed the need for "harmonization" between the federal and provincial governments. However, the focus on the Grey Paper was on the integrated nature of telecommunications technology. This time the need for consultation and co-operation was based on studies which showed that "all forms of telecommunications have both national and local aspects and that these aspects cannot be separated on the basis of the technical characteristics of the

facilities involved."

The Grey Paper said neither level of government could give proper attention to the development of the Canadian telecommunications system as a whole because the regulation of telecommunications carriers and broadcasting came under different jurisdictions.

> Legalistic questions as to which aspect predominates in a particular stuation are much less important than a mutual determination to ensure that the people of Canada have access to the best communication services that the country can afford. This objective can be best achieved if the federal and provincial governments can agree upon effective means to harmonize their policies and priorities so as to arrive at the best results for the Canadian public.[89]

While a formal transfer of legislative powers either to or from the provinces was rejected, the Grey Paper suggested that a consultation process could be institutionalized with the establishment of a Committee for Communications Policy and an Association of Communications Regulatory Bodies.

The Grey Paper also announced that the federal government was going to introduce two-stage legislation. The first stage would consist of the establishment of a single body which would combine the regulatory functions of the Canadian Transport Commission and the CRTC. The second stage would consist of a revision of existing broadcasting and telecommunications legislation.

Continuing the policy of co-operation and consultation, the Grey Paper stated that mechanisms were needed to incorporate provincial concerns with the development of carrier and cable

facilities. Therefore, the second phase legislation would:

> ...provide that a representative of the appropriate provincial regulatory body [for telecommunications carriers] will be entitled to take part in the public hearings and the private discussions of the federal regulatory body in advance of decisions taken with regard to the issue, amendment, renewal suspension or cancellation of a licence for a broadcast receiving undertaking.[90]

The most significant statement in the Grey Paper with regard to cable was that the federal government would consider delegating a share of cable responsibility to the provinces if federal objectives were recognized. The Grey Paper stated that the federal government would:

> ...be willing to discuss any practicable arrangements that the provinces might suggest to give them a greater share in the process of licensing and regulating broadcasting receiving undertakings.[91]

Any such arrangements would be subject to an agreement allowing the federal authority to impose conditions or criteria on undertakings offering "programming" and would be subject to the technical certification of any radio-receiving equipment.

The Second Federal-Provincial Communication Ministers' Conference

Between 1973 and 1975, the provinces held a series of conferences at an interprovincial level where individiual objectives and stands eventually jelled into a unified position on the question of cable jurisdiction. Therefore, by the time of the second Federal-Provincial Conference on Communications in

1975, the provinces reacted in unison to the federal initiatives set out in the Green and Grey Papers.

Under a provincially-set agenda heading entitled "Roles and Responsibilities" the provinces spelled out their opposition to the federal position and tabled a provincial alternative to the federal proposals.

They rejected the federal mechanisms for consultation as "setting up a complex structure which will perpetuate the already confused roles and responsibilities of both levels of government." They stressed, however, that they would rather have a political solution to the jurisdictional question than a judicial one.[92]

The provincial alternative for the resolution to the question of cable jurisdiction was embodied in one of the three counter-proposals dealing with "a realignment of roles and responsibilities." In contrast to the federal position, the provinces drew a distinct line between broadcast and non-broadcast services. The joint statement suggested that:

> [w]hereas the provinces agree that the cable distribution systems are in fact local broadband carrier systems with a capacity far in excess of their immediate television uses....Be it resolved that provincial jurisdication would extend over all aspects of the cable distribution systems and services with the exception of federal broadcasting services.[93]

Thus, there was a fundamental difference of opinion between the two concepts of cable jurisdiction held by the two levels of government.

Pelletier responded by restating that the cable distribution systems must be regarded as broadcasting receiving undertakings, integral to the national broadcasting system.[94] He then suggested that the federal government's confidence in their constitutional right to regulate was strong enough that it was being currently tested in court with Quebec's moves to regulate and license cable undertakings in the province.[95] Pelletier also suggested that the provincial proposals were beyond the terms of reference at a Communications Ministers' Conference. The provincial proposals, he suggested, would involved a transfer of jurisdictional responsibility which would require constitutional amendment. Therefore, they could not be discussed at a conference of First Ministers.[96]

With one level of government committed to centralized control over cable within the existing framework and the other level committed to a significant transfer of powers, the political negotiations on a multilateral level came to a standstill. Political interaction continued but it occurred on a bilateral level.

THE CRTC'C DECISION: A CATALYST FOR NEGOTIATION.

The CRTC announced its decisions for cable television licences for the four Saskatchewan cities on July 15, 1976.[97] The Commission did not explicitly recognize the Saskatchewan government's policy on non-profit co-operatively run cable

undertakings in the province. Instead, the problems of high levels of absentee- and cross-ownership in the province's existing media were identified as the basis for its decision. The Commission suggested the licensing of cable undertakings in the province could be used to correct this problem through licence awards to applicants whose owners resided in Saskatchewan. The four licences, "based on the merits of their individual applications," were awarded to Regina Community Cable Services, Battleford Cablevision Co-operative, Saskatoon Telecable and Prairie Co-Ax.[98]

Implicitly, the provincial government's initiatives on non-profit co-operatively owned cable undertakings were met halfway in two respects. Two out of the four co-operatives established were licensed. Second, although the Commission recognized the "historic role of co-operatives in the social and economic development in the province," it reiterated concerns raised at the hearings about long-term interest being curtailed by the non-profit status of the co-operatives. The Commission suggested that:

> [t]he success of the co-operative movement in the province lies in genuine co-operative enterprises in which the members have a strong economic, as well as social, interest.[99]

In its opinion, the co-operative applicants as constituted did not meet the criterion of "economic interest." As a condition of licence, therefore, the Regina and North Battleford co-operatives were asked to submit amendments to their Memoranda of Association under section 16 of the Co-operative Associations

Act. A consumer co-operative structure was suggested.[100]

On the issue of hardware ownership, the CRTC did recognize the government's policy but its own policy on minimum hardware ownership of distribution equipment by cable licensees was maintained. While Sask Tel's historic role in providing telecommmunication services to rural and remote areas through cross-subsidization was noted, the cable licensee's ability to comply with CRTC regulation was emphasized.

> The Commission considers that the ownership of the headend, amplifiers and drops is essential to ensure that the licensee is always in a position to comply fully with national legislative broadcasting requirements for the provision of those broadcasting and entertainment services for which it has been licensed. The licensee must exercise control over the means of delivery of the service and should be in a position to contribute to the design of the system in order to ensure compliance with national technical standards.

Moreover, hardware ownership was considered essential for cable operators' accountability to their subscribers because licensees could plead lack of control over the delivery system as a means of avoiding responsibility for their services. Finally, the Commission suggested that the cable operators' ownership of distribution equipment could satisfy both provincial and CRTC objectives.

> The Commission considers...that the ability of the licensees to carry out their responsibilities under the Broadcasting Act and the ability of Sask Tel to carry out its responsibilities as the instrument of Saskatchewan Government policy to provide telecommunication services in the province can both be safeguarded by appropriate ownership of facilities and contractual arrangements with respect to their use.

Thus, the Commission imposed its policy of minimum cable

operator ownership of the local headend, amplifiers and service drops as a condition of licences. All contracts between the cable companies and Sask Tel would be subject to CRTC approval.

NEGOTIATION AND COMPROMISE

The CRTC's decisions served as a catalyst for the jurisdictional negotiations between the Saskatchewan government and the two federal bodies. The provincial reaction to the decision was three-fold. First, appeals were made to the federal cabinet and the federal court by the Saskatchewan government, Sask Tel and the two unsuccessful co-operative applicants. Second, the government put a freeze on all cable operations by refusing to allow any of the licensees access to Sask Tel's system until the CRTC approved the ownership of all cable distribution hardware by the telephone company. Finally, within two weeks of the decision, the government announced plans to introduce a non-profit co-operatively owned closed circuit pay television system in Saskatchewan.

While the appeals to cabinet and the federal court were not successful, the Saskatchewan government's other two tactics opened up routes for negotiation.[101] By prohibiting cable services to commence for a period of about eighteen months, the government was able to establish a negotiating dialogue with the CRTC. Before that, however, the negotiations with the DOC which had begun earlier on a multilateral level at the

federal-provincial conferences continued at a bilateral level. The announcement of a provincially-established pay television network became an important tool in these negotiations.

i. DOC NEGOTIATIONS: Shared Jurisdiction

The agenda and boundaries for the negotiations between the DOC and the Saskatchewan government were set by the DOC's Grey Paper where a suggestion was made that the federal government would negotiate an administrative agreement to share cable authority with the provinces. On March 17, 1976, Jeanne Sauve, who had taken over Pelletier's position as federal Communications Minister, embarked on a course of bilateral discussions by making a speech. Sauve repeated the policy paper's proposals for a "practicable arrangement" to share in cable licensing authority so long as the federal authority in programming and the broadcasting system aspects were recognized.[102]

Two weeks later, Sauve met with Saskatchewan's minister responsible for cable, Ned Shillington. The question of cable jurisdiction was apparently not a major part of the meeting. Instead, the discussion focussed upon the possibility of a "mixed system" of private and co-operative cable interests in the province and upon the establishment of a council to discuss communications problems as suggested in the Grey Paper.[103]

It is important to note that the discussion took place before CRTC had issued its licensing decisions for Saskatchewan. Indeed, the conflict between the CRTC and the DOC's agendas became apparent when the CRTC issued statements regarding cable policy in December 1975 and March 1976.[104] The first policy statement came at a time when the then federal Communications Minister Gerard Pelletier was conducting bilateral discussions with the provinces regarding the proposals set out in the Green Paper and three months prior to the second Federal-Provincial Conference on Communications. The CRTC's second policy statement was issued on March 27, 1976, just before Sauve began her tour for bilateral discussions on shared jurisdiction with the provinces.

While the first bilateral meeting between Sauve and Shillington was relatively uneventful, the Saskatchewan government's announcement of pay television for the province changed the dynamics of further meetings. Indeed, the pay TV issue allowed the province to establish a new agenda item for bilateral negotiations and to gain a bargaining tool which had not existed in prior discussions.

The Saskatchewan government's announcement that it would support co-operative pay television on closed circuit was made on July 30, 1976.[105] As in its early policy for conventional cable television, only non-profit groups would be allowed to use Sask Tel facilities. Rather than beaming cable programming via microwave, videotapes and films for community and educational

programming would be "bicycled" to different centres. Shillington stressed the importance of the initiative as an opportunity for community programming and rural expansion of cable television. Finally, since the closed circuit system would not make use of the radio frequency spectrum, CRTC licences would not be required.

When the policy was announced, Shillington suggested that provincial pay TV had been in the works for some time but was being brought out earlier than expected because Saskatoon Cablevision Co-operative had indicated it was going to seek government approval to implement a closed circuit system. Later in the negotiations, however, the Minister admitted the government's decision to support the co-operative pay TV network was brought out of the closet as a means of putting pressure on the federal government.[106]

Although Shillington's statements suggest that the closed circuit policy was prompted by the Saskatoon co-operative, the scheme was apparently introduced for two reasons. First, a co-operative pay TV network was a means for the government to implement its 1972 cable television objectives. Second, the pay television scheme could be used as a tool in negotiations with the federal authorities if the CRTC's decisions failed to recognize the Saskatchewan policy.

The idea of closed circuit pay TV was presented to the Saskatoon co-operative before the CRTC's July 15, 1976 decision on cable television. On June 9, Shillington and Courville met

with the Saskatoon Cablevision Co-operative and discussed various options for closed circuit and pay television in the province.[107] The co-operative investigated details of the closed circuit plan such as programming packages, Sask Tel contracts and marketability. However, the decision to proceed with the establishment of a closed circuit television system was not made until December 2, 1976 at the Saskatoon Cablevision Co-operative's Annual General Meeting.[108] The membership was also presented with the options of withdrawing completely or doing community programming for Saskatoon Telecable, an offer made by the Saskatoon licensee.

A report dated July 14, 1976, the day before the CRTC's decision was released detailed the provincial government's objectives for closed circuit television. The report, written by Leo Courville, suggested five rationales for a closed circuit television offering. Closed circuit television could ensure Sask Tel control of hardware; establish provincial presence in pay television in a "meaningful and politically acceptable" way; provide a sufficient revenue source for local cable co-operative programming; establish a basis for provincial jurisdiction over closed circuit community and educational channels; and allow a conventional cable television system or a full closed circuit television system of up to nine channels to develop alongside the closed circuit offering.[109] It is important to recognize the multiple objectives set out for the closed circuit policy, outlined in the Courville Report. While the stated objectives of

the provincial government's 1972 cable policy were incorporated into the scheme, the jurisdictional stakes in the 1976 closed circuit policy were clearly recognized.

Federal Communication Minister Sauve reacted strongly to the Saskatchewan government's pay TV plans. The reaction was understandable as a national pay TV system had been on the DOC's agenda for the past few years. In June, Sauve had set out a series of conditions for the introduction of national pay TV and the first hearings on pay TV were scheduled for the fall.[110]

Sauve said she would "fight to the finish" Saskatchewan's pay TV plans because they could have disastrous consequences for the future of the Canadian television industry.[111] Saskatchewan's plans, she suggested, could effectively kill the orderly introduction of pay TV across Canada, especially if other provinces followed their lead. As a result the Canadian pay TV market could be swamped with second rate programming. Finally, Sauve expressed confidence in Ottawa's legislative authority over pay TV on closed circuit but said, if necessary, legislation would be passed to guarantee an end to Saskatchewan's plans. The CRTC, on the other hand, expressed some doubts about jurisdiction over closed circuit undertakings. A CRTC lawyer said it was a "shadowy area" and there was a possibility it would not come under the CRTC's jurisdiction in the Broadcasting Act.[112]

While the DOC could have referred Saskatchewan's claim to jurisdiction to the Supreme Court or introduced amendments to

the Broadcasting Act, it did not. Instead, negotiation over pay TV became part of the wider negotiation over shared jurisdiction of cable with the province. It is possible that the DOC wanted to avoid legal routes because the issue of constitutional jurisdiction over conventional cable television was already being considered in the Quebec Court of Appeals. In addition, the DOC may have wanted to avoid legislative routes to the resolution of the matter because of negotiations with other provinces. Court challenges and legislative amendments could hamper the discussions by establishing jurisdictional uncertainty and be perceived by the provinces as "bad faith" bargaining.

By the first week in September, Shillington indicated that Saskatchewan was willing to co-operate with Ottawa on some aspects of its plans to introduce pay TV. In reaction to Sauve's concerns regarding programming, Shillington said he would be willing to discuss a pooling arrangement of profits for feature length films and community programming.[113] Any co-operation would have to be based on a recognition of regional needs and involve community programming for small centres in the overall plan for pay television. Before anything could be discussed, however, Shillington wanted clarification of Ottawa's policy. If by orderly introduction Sauve meant Ontario and Saskatchewan had to initiate pay TV at the same time, "then that's carrying centralism to an extreme."

Further talks with the federal minister did not take place until late November. By this time the DOC had been successful in its negotiations with Manitoba. The Canada-Manitoba Agreement of November 10, 1976 provided a form of regulatory delegation which recognized federal jurisdiction over programming services and provincial responsibility for non-programming services.[114] Moreover, the provincially-owned telephone company, Manitoba Telephone Systems (MTS), was ensured exclusive rights in the agreement to provide all of the distribution equipment for the delivery of cable services. The trade-off in the Canada-Manitoba Agreement was that the provincial government agreed to federal jurisdiction over pay television.

The Canada-Manitoba Agreement was offered as a model to the Saskatchewan government in its negotiations with the DOC. The key was that Saskatchewan would have to agree that pay TV should be established by the CRTC. Shillington rejected the Canada-Manitoba Agreement as a "quick solution" and said the province was not prepared to abandon closed circuit pay television because it lay in provincial jurisdiction.[115] However, Shillington said that in his November 29th discussions with Sauve there was an increasing recognition of Saskatchewan's approach to cable and there had been no real disagreements. However, whereas the federal government seemed to be softening on the issue of Sask Tel hardware ownership and closed circuit television, Shillington expressed doubts about the DOC's mandate to negotiate cable and pay TV issues.[116]

Negotiations along the lines of the Canada-Manitoba Agreement continued. In December, Sauve said the federal government could accept the Saskatchewan government's monopoly over hardware in return for a guarantee of federal jurisdiction over broadcasting which allowed broadcasting services to develop along national lines. The province's right to regulate other uses of cable were not in question. However, excessive competition in the pay television field could lead to audience fragmentation which would limit profits necessary to produce programs. Therefore, a single agency, the CRTC, was needed to regulate pay TV on a national basis.[117]

Shillington responded the next month with a recognition of federal authority over cable programming. While the province was unwilling to give the federal government a "blank cheque" as Manitoba had done, Saskatchewan was prepared to admit federal responsibility for using closed circuit pay TV to foster a Canadian identity. The province, however, also had a responsibility to foster the programming needs specific to its region.[118]

The DOC's next step in the negotiation process was directed toward all the provinces. On March 22, 1977, the new telecommunications legislation promised in the Grey paper was introduced. Bill C-43, An Act respecting telecommunications in Canada, would allow the provinces greater power in regulating communications but ultimate control would be retained by the federal government.[119] The legislation contained two measures

which would appease provincial interests in cable policy. First, the Act would allow the federal government to delegate certain regulatory responsibilities to provincial agencies by agreement. Second, the bill provided for a binding power of direction by the DOC over the CRTC. While the first measure was not new to the federal-provincial dialogue, it would establish a statutory guarantee of earlier promises set out in the DOC's policy papers. It would also give the DOC the statutory right to make delegation agreements, a right which was questioned when the Manitoba accord was signed. The proposed power of direction would bring the CRTC in line with DOC initiatives and with agreements arising from federal-provincial negotiation.

Shortly after the telecommunications bill was introduced, the federal and provincial communication ministers met in Edmonton. While Quebec's absence from the discussions hampered any serious negotiation, the conference provided Saskatchewan with a larger forum in which its jurisdictional claims to pay TV could be expressed. As a result of the conference, a federal-provincial committee was established to develop a jurisdictional formula for pay TV.[120] Shillington left the conference expressing confidence that the CRTC would reverse its position on Sask Tel's ownership of cable hardware in light of the DOC's support of the provincial policy and of the impending telecommunications legislation.[121]

Despite the work of the newly established federal-provincial committee on pay TV, the Saskatchewan

government decided to lay statutory claim to closed circuit jurisdiction. On April 18, 1977, the Community Cablecasters Act was introduced in the legislature.[122] The Act embodied Saskatchewan's claim to jurisdiction over educational, cultural and information programming offered on intraprovincial closed circuit pay television. It is also important to note that, although the Act was assented to on May 10, 1977 and remains on the books, it has never been proclaimed.

The Act covers only "cablecast services" which are defined as programming carried exclusively on closed circuit and located entirely in the province. The programming offered as cablecast services originates from tapes, films, cassettes or discs as opposed to broadcasting which utilizes the radio frequency spectrum to transmit signals.[123]

The Act provides that closed circuit programming is offered only by co-operatives and only on Sask Tel's distribution system. Under section 3 of the Act, exclusive rights to provide cablecast services are given to "cablecasters" who are co-operatives that have entered into agreements with Sask Tel to operate the "cablecast system." Thus regulation is provided through Sask Tel leasing cable hardware rather than through licensing because only cable operators within an intraprovincial scope who use hardware "owned in whole or part" by the telephone company are allowed to be cablecasters.[124]

By May it appeared a federal-provincial agreement was within reach. On May 7, a DOC official was quoted as saying an

agreement with the Saskatchewan government was expected in two months. Shillington predicted an agreement by mid-summer.[125] The provincial minister attributed the impending agreement to Ottawa's change in attitude regarding pay TV. In the past, the federal government had insisted pay TV matters be settled before an agreement on shared jurisdiction could be reached. Ottawa was not willing to accept that the pay TV issue could be worked out within an overall agreement on shared authority.

ii. CRTC Negotiations: An Alternative Route

After these statements were made, however, negotiations with the DOC appear to have broken down. A few speculations on why that may have happened can be offered. First, a provincial election was drawing near and the NDP government may have felt that further wrangling with the DOC would mean that resolution of the cable dispute would take too long. Moreover, any resolution would have to be passed through the CRTC because the federal Minister only had authority to ask the Commission to review licensing decisions. There was no guarantee, as the Canada-Manitoba Agreement illustrated, that the Commission would feel bound by a federal-provincial accord. Thus, the government may have felt that a negative reaction at the polls to the delay in services was too great a risk. Second, the Community Cablecasters Act stood unchallenged. The Saskatchewan government may have felt that it was unwise to trade off the exclusive

authority over closed circuit television once statutory jurisdiction was claimed.

Another possibility is that it became unnecessary to continue negotiations based on pay TV. If, as the evidence below suggests, the Saskatchewan government was able to negotiate a hardware agreement with the CRTC, trade-offs for shared jurisdiction with the federal government would be unnecessary.

In January 1977, Richard Simpson of the provincial Communications Secretariat informed the Saskatoon Cablevision Co-operative about a meeting with CRTC staff in Ottawa.[126] According to Simpson, the Commission said it could accept the idea of Sask Tel hardware ownership with the exception of the local headend and inside wiring. He reported four CRTC conditions of such a compromise: the cable licensees would have to serve all potential subscribers in their franchise area; cable licensees would be responsible for servicing; no cable licence would be allowed to sign a contract with Sask Tel without prior CRTC approval; and Sask Tel would be allowed to serve only cable operators licensed by the CRTC.

Shillington had a private meeting with CRTC Chairman Harry Boyle prior to the March federal-provincial conference.[127] While the details of the meeting were not released, it is possible that the CRTC and the Saskatchewan government had come to terms on the issue of hardware ownership. By mid-March it was rumoured that the CRTC had agreed to concede Sask Tel ownership of the headends, drops and amplifiers if the inside wiring continued to

be supplied by the cable licensees. In response to questions raised in the Legislature, Shillington admitted that the CRTC was prepared to make some concessions but they fell short of provincial and Sask Tel needs.[128]

Finally, by April 21, 1977, the "essence of an agreement" with the federal government had been reached. Again in response to questioning in the Legislature, Shillington implied that an agreement had been made with the DOC. However, he was confident the CRTC would approve the agreement after hearings on the issue of common carrier hardware ownership were held in Manitoba in June. With respect to the CRTC's position on Sask Tel hardware ownership, Shillington said, "I anticipate the CRTC would not approve any Saskatchewan agreement before that but I anticipate that after the hearing such an agreement will be approved."[129]

The next day, April 22, Shillington asked the conventional cable operators to apply to the Commission for licence amendments to allow Sask Tel to own the amplifiers and drops of the cable distribution system.[130] On May 6, Battleford Cablevision Co-operative applied for the amendment.[131] Two weeks later, the co-operative umbrella organization, the Saskatchewan Community Cable Federation, reported a letter from the Battleford Cablevision Co-operative in which the operator withdrew its membership from the Federation.[132]

The North Battleford application was heard in conjunction with applications for services to rural areas in Manitoba, including those areas where licences had been set aside by the

Minister of Communications as a result of the Canada-Manitoba Agreement. Hardware ownership was therefore a major issue in the hearings. Battleford Cablevision Co-operative proposed that Sask Tel own all the cable distribution equipment aside from the local headend. Sask Tel would be responsible for service calls and the cable co-operative would relay customer complaints to the telephone company, bill customers and be responsible for programming.[133]

The Commission's decisions for rural Manitoba cable licences were issued in August and for the North Battleford amendment one month later. It is interesting to contrast the CRTC's reaction to the hardware owership issue in the two provinces.

Despite the Canada-Manitoba Agreement, or perhaps because of it, the CRTC's decisions in Manitoba were hardline.[134] The preamble stated that the Commission could not subject its authority to limitations imposed by other municipal, provincial or federal authorities unless in conformity with the Broadcasting Act. The Commission stated that it considered that licensees should be afforded a range of options from minimum (i.e. under CRTC policy) to total plant ownership in order to meet CRTC regulatory obligations.

While the Commission modified its hardware ownership requirements to avoid further delays in service to Manitoba, the condition that cable licensees provide their own service drops and inside wiring was maintained. Thus, although the decisions

allowed the provincial telephone company to own amplifiers, a deviation from past policy, the CRTC repudiated the terms of the Canada-Manitoba Agreement.

Just one month later, and without a formal agreement, Saskatchewan was able to achieve what Manitoba had attempted - virtual control of the cable distribution system. In its September 15, 1977 decision, the Commission noted that with the exception of Manitoba, past policy was to require a cable company to own its headends, amplifiers and drops to ensure compliance with federal broadcasting regulations and to guarantee response to subscribers.[135] However, the Commission was "prepared to adopt alternative means of achieving these policy objectives" because of the special circumstances of Saskatchewan and to avoid further delays in service.

As in the Manitoba decision, the cable operators were required to provide the inside wiring. Unlike the Manitoba case, however, Sask Tel was allowed to own the service drops. The Commission stated the proposed amendment was approved for the Battleford Cablevision Co-operative on the condition that the licensee:

> ...own and operate its local head-end, signal modification, studio equipment, channel modulators, antennas and inside wiring.

The "alternative means" of ensuring CRTC objectives and licensee accountability consisted of conditions related to the cable operator's signal delivery agreement with Sask Tel.

The contract would have to provide terms guaranteeing CRTC responsibility for determining and approving programming material and priority. Second, the distribution of that programming over other services distributed on the same cable facility would have to be guaranteed. Third, to ensure the cable company remained accountable for service quality, the contract would have to specify that the licensee was responsible for the provision of customer services such as initial sales contact, billing, subscriber requests, repairs, and complaints. Fourth, while the contract would have to provide a term which allowed the cable licensee to own, install and maintain inside wiring, another term "could be added" to authorize Sask Tel's use of the capacity in the inside wiring upon CRTC approval. Finally, the contract would have to include a term ensuring that the licensee would be provided capacity within the distribution system to all delivery points in the area licensed.

The Commission concluded its decision by offering assistance to Sask Tel and the North Battleford company in working out the contractual arrangements. The signal delivery agreement between Battleford Cablevision Co-operative and Sask Tel became the subject of negotiation over cable jurisdiction between the province and the Commission over the next two months.

While the CRTC and Sask Tel were initially at odds over sixteen points in the signal delivery agreement, three points were still being negotiated on November 1, 1977.[136] First, there

were disagreements on who should service the drop wire. Second, the number of channels the cable operator would be allowed to occupy was in question. Finally, the Commission and Sask Tel disagreed on who would have the power to allocate mid-band channels. The latter point was most crucial because mid-band channel allocation was the key to the control of the only part of the distribution system left to the cable licensee, the inside wiring.

The inside wiring can carry signals on "low" VHF channels (2-6) and "high" VHF channels (7-13). Thus, on the VHF (Very High Frequency) spectrum, 12 channels are available and can be received on a conventional television set. In between the "low" and "high" VHF channels (i.e. between channels 6 and 7) is the mid-band range where additional channels are accessible. Signals transmitted on the mid-band range must be converted to the UHF (Ultra High Frequency) band for viewing on conventional television sets.

With closed circuit pay TV, conventional cable TV and off-air TV all needing channel space, the capacity on the usual VHF spectrum was not sufficient. Thus, to offer closed circuit pay TV, the provincial government decided o use converters to take advantage of the extra capacity on the mid-band. Moreover, the additional mid-band capacity is needed to provide non-programming services such as burglar, fire and medical alarms.

If the CRTC was given authority over the mid-band, the Commission would have indirect regulatory authority over closed circuit pay TV and non-programming services. The Saskatchewan government was worried that cable operators might be allowed to get into non-programming.[137] If Sask Tel was given authority to allocate the mid-band channels, future cable programming services, such as pay TV, would be subject to indirect provincial regulation.

An agreement was reached in late November when the CRTC approved the contract between Sask Tel and the cable company.[138] The issue of drop wire servicing was rectified by allowing the cable company to make temporary repairs, but only after notifying Sask Tel. Second, the cable licensee would be given priority on the ten available VHF channels.[139] Finally, the CRTC agreed to provide the exclusive rights on the mid-band to Sask Tel for the provision of telecommunications services.

With allocation rights for the mid-band channels and ownership of service drops and amplifiers, it appeared the Saskatchewan government had won in its negotiations for hardware ownership. Soon after the North Battleford/Sask Tel contract was approved, the three other Saskatchewan licensees applied to the CRTC for similar amendments. By January 1978, the amendments and signal delivery contracts for the other licensees were approved and cable television began in the four Saskatchewan cities.[140]

THE OUTCOMES: CONSEQUENCES FOR CABLE REGULATION IN SASKATCHEWAN

The Saskatchewan government appeared to have gained significant ground in achieving its objectives as a result of negotiations with federal authorities. However, to understand the consequences of these negotiations, one must examine the regulatory environment in the province which ensued. The following sections will provide two examples of the regulatory results of the negotiations. The post-negotiation developments in closed circuit pay TV and Sask Tel hardware ownership will be examined.

i. Pay TV In Saskatchewan: The Retrogression of Provincial Jurisdiction

The CRTC's September 1977 announcement of the hardware ownership amendments to the North Battleford licence was paralleled by a statement from the Saskatchewan Minister responsible for cable, Roy Romanow. He suggested the Commission's decision might force the closed circuit pay TV network to "reassess its viability." On October 8, Premier Blakeney expanded on the Minister's statement. The network would have to "prove" its viability before the government would guarantee the $2.6 million loan sought by the Saskatchewan Community Cable Federation (SCCF) on behalf of the closed circuit co-operatives.[141] In effect, this meant the pay TV

co-operatives would have to prove their worth in subscriber competition with the conventional cable operators. The statements signalled the demise of closed circuit co-operative pay television in the province.

In order to understand how the closed circuit co-operatives came to be viewed as competitors rather than instruments for implementing Saskatchewan government's cable policy, it is necessary to trace the developments during the period of federal-provincial negotiations. The Saskatchewan government appears to have initially adopted the closed circuit concept as an alternative means to implement the 1972 objective of establishing co-operative ownership of cable in the province. Co-operative ownership, however, was not the sole objective. Government and Sask Tel actions indicate that telephone company ownership of hardware and jurisdictional questions had become priorities.

The two co-operatives developed to compete for conventional cable licences in 1976, Saskatoon Cablevision Co-operative and Moose Jaw Cablevision Co-operative, formed the basis for the closed circuit network. In May 1977, another organization, the Cablecaster's Co-operative of Regina, was established. The same month, under the umbrella of the SCCF, the three adopted Co-operative Cable Network (CPN) as their trade name. In July 1977, a signal delivery agreement between Sask Tel and CPN was signed. "Sample" programming, consisting of music and news, began on September 15, 1977 on VHF channels in the three cities.

CPN planned to offer first run movies, general entertainment, children's television and community programming on four channels once programming was available.

Closed circuit operations within the first year and a half, however, were restrained by government and intergovernmental actions. Whereas the co-operatives were given unsolicited financial support in their bids to gain conventional cable licences from the CRTC, government funding for closed circuit pay television was, at best, reserved. Although the co-operatives, prompted by the Communications Secretariat, began to develop the mechanisms to implement the closed circuit network, cabinet did not immediately guarantee the plan would proceed.[142] Fears that the government might abandon the co-operative pay TV objective in their negotiations with federal authorities were expressed at a November 5, 1976 Board meeting of the Saskatoon Cablevision Co-operative.

> The major concern which arose...was the possibility that the cable co-op might be sold out in federal-provincial negotiations....In light of these facts, the need for a government guarantee continues to be an imperative.[143]

In November 1976, cabinet apparently approved the closed circuit project in principle.[144] A loan guarantee, however, was not immediately forthcoming. Instead, in December 1976, an interim loan of $67,000 (SCCF - $21,000, Moose Jaw - $16,000 and Saskatoon - $30,000) was granted.[145]

In late 1976 or early 1977, Saskatoon Cablevision Co-op members met with Romanow. The report of the meeting indicates continued anxiety on the part of the co-operative due to

developments in the federal-provincial arena. The report states:

> [t]he discussion was frank. George Dyck [President of the SCC] outlined the basis of our concern -- that we were out on a limb and afraid the provincial government might saw it off.[146]

Romanow responded that he was skeptical about the marketability of the closed circuit system and said that the cabinet did not have a cohesive view on closed circuit.[147] However, he said the DOC and the provincial government were conducting meetings and if negotiations developed, closed circuit would probably be "the branch sawed off" in exchange for total hardware ownership by Sask Tel.

Despite the rather negative outlook, the SCCF continued to develop the closed circuit plan. But without a loan guarantee, the plan could not be implemented. The Credit Union Central had cancelled the loan guarantees of the unsuccessful co-operative CRTC applicants. Moreover, it was reluctant to supply a line of credit because the bank was already successful in financing the two co-operatives that did get CRTC licences. Therefore, a loan would be negotiated only if the CRTC approved the closed circuit network.[148] The SCCF was forced to look elsewhere to find a bank to provide long-term financing through a $2.6 million guaranteed loan. Finally, in May 1977, an agreement in principle was made with the Northland Bank to provide the loan. The Northland agreement was achieved with substantial assistance from the provincial government. Indeed, the Co-operative Guarantee Act had to be amended to approve Northland as a lender so that the provincial treasurer would have the power to guarantee the

loan.[149] In September, with the CRTC's approval of the North Battleford amendment, CPN was asked to prove its viability. The loan guarantee did not come until December 22, 1977, one month after the announcement that the CRTC had approved the signal delivery agreement giving Sask Tel the hardware ownership desired by the provincial government. In the meantime, an advance of $100,000 was provided to the SCCF.[150]

Although the provincial government did eventually guarantee the loan requested by the SCCF, financial uncertainty hampered the organization's attempts to obtain movie packages and other programming. By October 1977, CPN had 4,000 subscribers, with 2,000 in Regina and 2,000 split between Saskatoon and Moose Jaw.[151] Only 40 subscribers were hooked up.

CPN's Demise

Sask Tel's signal delivery contract with the conventional cable operators spelled CPN's demise. The contract specified that the CRTC-licensed cable operators had priority on the VHF spectrum. This dictated that the closed circuit network operators would have to move off the standard VHF channels and onto the mid-band.

The closed circuit operators were aware as early as October 1976 that they would be asked by Sask Tel to accept the mid-band channels.[152] Although the terms of a contract with Sask Tel had been worked out by mid-November 1976, uncertainty about the

future of closed circuit and the technical problems created by serving two cable operators in the same cities, delayed the signing of the contract.[153] According to Gerry Parfeniuk, Executive Director of the SCCF, the technical problems slowed down Sask Tel's response to the contract needs of the closed circuit operators. In a January 11, 1977 report Parfeniuk states:

> ...[O]ne has the feeling that the company is in disarray in terms of their co-ax cable services. The government is pushing the concept of multi-operators together with closed circuit services as priorities. Sask Tel knows that conventional cable T.V. is the service that will ultimately pay for the investment that they are making into the system. However, if they let closed circuit get established at a rate below costs and since engineers state that two operators are not possible, then Sask Tel does have some justification in being cautious.[154]

After a January meeting between representatives from the provincial Communications Secretariat and CRTC staff where the Commission appeared to be weakening on their stand on Sask Tel ownership of distribution hardware, three options were presented to the SCCF.[155] First, Sask Tel could provide CRTC licensees with the first ten VHF channels. The closed circuit operators would be given the educational channel, the premium movie channel and the CRTC licensees' community channel. This option would have put the closed circuit operators under CRTC authority. Second, Sask Tel could provide the prime VHF channels to the closed circuit operators. Then, if and when the CRTC licensees approached Sask Tel for service, the telephone company could refuse, saying they had only one economic service to sell. It was predicted this option would lead to court action. The

final option, which was eventually adopted, was to give the CRTC licensees the VHF channels and the closed circuit operators the mid-band channels.

Sask Tel pointed out at the meeting that the telephone company would be economically unable to protect the separate reception of the VHF signals from the mid-band signals. Sask Tel had not planned to serve two operators in the same city. A special converter/filter to secure one service from the other would be needed because the telephone company would be sending signals from both the conventional cable operators and CPN to homes on the same cable. The converter/filter would have to filter out conventional cable signals transmitted on the VHF frequencies, pick up CPN's signals transmitted on mid-band frequencies and "convert" them to be picked up on the UHF channels.[156] The problem was that a converter/filter with this technical capacity had not been designed.

Closed circuit signal delivery agreements were finally signed on July 8, 1977.[157] It was understood that the closed circuit operators would be placed on the mid-band if any agreement was made between the CRTC and Sask Tel. Despite the technical problems, Sask Tel told CPN that the special equipment needed was the telephone company's responsibility and that no problems were envisioned.[158] The contracts provided for five channels for $2.75 per subscriber per month with a protected signal.[159] In September the CPN operators in Regina, Moose Jaw and Saskatoon began sample programming on a VHF channel.

When conventional cable operators began services and CPN's loan was guaranteed, Sask Tel was faced with serving competing services in the same cities. CPN had no way of moving onto the UHF channels because Sask Tel had not found the necessary converter/filters. This problem effectively meant CPN would be unable to present its full program package to its subscribers until June (Saskatoon) and July (Regina and Moose Jaw) 1978. In the meantime, conflict over channel allocation arose between the conventional cable operators, CPN and Sask Tel.

The CRTC cable licensees in Regina, Moose Jaw and Saskatoon, apparently with tacit approval from the CRTC, complied with a Sask Tel request to allow CPN to use a VHF channel in each city until the converters were available. The 45 day agreement stipulated that Sask Tel would remove CPN's signal from the VHF channels by noon April 7, 1978.[160]

At noon April 7, CPN was still occupying the VHF channels. Sask Tel had ordered 10,000 converters from a company called Microcom but they were not expected to arrive until May. When the conventional cable operators attempted to take over the channels their signals were filtered by Sask Tel. The telephone company said that although it had contract obligations with both CPN and the conventional operators, they had decided to allow CPN to continue operating on the VHF community channels since they were not yet being used. Romanow responded to the situation by identifying it as a contractual matter between the cable operators and Sask Tel.[161]

The day before the interim agreements had expired, the CRTC notified the cable licensees that if they had not succeeded in "forcing" CPN to vacate the VHF channels by April 7, the Commission would have to "take action." On April 11, another CRTC telegram warned the licensees that they were in contravention of federal broadcasting regulations by allowing CPN to occupy the VHF channels. If something wasn't done about it, their licences could be suspended.[162]

The licensed cable operators responded by taking CPN and Sask Tel to court. On April 13, 1978, Saskatoon Telecable and Regina Cable filed applications in the Court of Queen's Bench seeking injunctions and damages against the telephone company and CPN. The next day, Prairie Co-Ax Cable filed a similar application in District Court. CPN reacted by filing a countersuit against the Regina, Moose Jaw and Saskatoon operators seeking to have their signals removed from Sask Tel's cable. The Network claimed the conventional cable subscribers were illegally receiving the CPN signal and requested damages of an unspecified amount.[163]

The cases were to be heard in the Regina Court of Queen's Bench on April 18. However, Sask Tel asked for and was granted a two week adjournment to prepare its case. In the meantime, Justice Kenneth McLeod ordered Sask Tel to deliver both systems free of charge and the telephone company was prohibited from hooking up any more CPN subscribers. CPN was allowed to continue operations on the VHF channels.[164]

On May 1, 400 handmade converters, specifically designed for Sask Tel by Microcom at a cost of $60 each had arrived. Another 2,000 were to arrive on June 2 for installation by June 7.[165] Two more adjournments were granted when Sask Tel said it would attempt to accommodate both conventional and closed circuit cable by June 30. By the July 5 hearing date CPN had moved onto UHF channels in Saskatoon and Moose Jaw and was expected to vacate Regina VHF channels on July 9. Thus, almost three months after the applications had been filed, they were dismissed.[166]

The channel controversy had prohibited CPN from hooking up subscribers and offering its planned programming. When the closed circuit network did begin full scale operations it was plagued with another problem. While Sask Tel needed a special converter for its purposes, viewers did not. By November 1978, an estimated 12,000 unauthorized converters were being used to pick up CPN's programming. This deprived CPN of approximately $130,000 each month in revenues. The "pirating" almost equalled CPN's 15,000 subscribers.[167]

In November 1978, CPN reported that $2.3 of the $2.6 million loan had been spent and that an operating deficit of $675,000 for the year ending August 31 had been accumulated.[168] The Network asked the government for an additional $600,000 loan so it could continue operations. At this point, the provincial Finance Department moved in to examine CPN's operations. Their analysis showed that by year end CPN had recorded a loss of $1.5

million. This did not include approximately $600,000 worth of unpaid bills to Sask Tel for its subscriber hook-ups.[169]

On January 12, 1979, Romanow announced that Northland Bank had appointed Clarkson, Gordon and Co. as receiver manager of CPN to assess its operations and make recommendations. This resulted in the "Strang Report," named after its author Ian Strang. On April 17, the government announced that the report contained three recommended options for CPN's future: to revive it through an injection of funds and managerial expertise; to dissolve it; or to sell it.[170] The government opted for the third recommendation and, despite rumours that the province had already decided to sell the Network to a consortium of co-operatives, Blakeney said CPN would likely be sold by tender.[171]

By June at least three groups had shown an interest in the network. Two offers, one by Agra Industries and another by a private group rumoured to be Rogers Cablecasting, were rejected on the grounds that they would create further competition between pay TV and conventional cable.[172] The third offer came from a consortium called CableCom which had been established to bid for the CPN assets. CableCom was jointly owned by the conventional cable operators (40 per cent), the Crown Investments Corporation (30 per cent) and a group of major co-operatives (30 per cent).[173] Ironically, the three co-ops (the Saskatchewan Wheat Pool, the Saskatchewan Credit Society and the Federated Co-operatives Ltd.) had all been involved in

the initial Sascable bid for government approval in 1973.

The CPN assets were sold to CableCom for $1.1 million. The provincial government announced it had lost approximately $2.4 million on the network. According to Romanow, the province had invested the $2.6 million loan, and $500,000 in operating costs. CPN owed creditors $100,000 and owed Sask Tel $300,000 for normal line charges and installation. Sask Tel had also paid for and installed 15,000 converters at $60 each. Not including the cost of installation this would have added $900,000 to the $3.5 million invested in the CPN initiative. In addition, the Crown Investment Corporation's $300,000 share in CableCom, the newly formed consortium, was new money.

CPN closed down its operations on June 29, 1979 and in December a new single channel closed circuit network with programming which consisted primarily of movies began operations under the name Teletheatre.

National Pay Television for Saskatchewan

In order to join CableCom and eventually to offer the Teletheatre service, the conventional cable operators needed CRTC approval. According to one of the cable licensees, the CRTC agreed to ignore its rules by making a special case of Saskatchewan until such a time as the Commission's own pay television policy became clear. Once that happened, the cable operators would have to conform to the national policy.

Teletheatre operated until February 1, 1983 when the CRTC-approved pay television services were available. CableCom initially applied to exhibit the national pay television channels but withdrew its application two months later.[174] This may be due to the fact that one of CableCom's shareholders, the Crown Investment Corporation, is a provincial government agency and therefore not eligible for a CRTC licence. On January 7, 1983, the CRTC approved amendments to the Regina, Saskatoon and Moose Jaw cable licences to permit them to exhibit pay television services.[175] Four days later, a consortium made up of the three CRTC licensees called Sascable bought the provincial government's share in CableCom for $1 million.[176] Closed circuit pay television in Saskatchewan ceased to exist on February 1, 1983 when First Choice and C-Channel programming was delivered via satellite.

Provincial control over pay television in Saskatchewan currently consists of Sask Tel's allocation of mid-band channels for the service. The provincial government apparently receives 50 cents a month for each subscriber hooked up to the pay TV channels paid by the pay TV licensees through Sask Tel.[177] Signal delivery contracts for the pay television distribution are negotiated for the cable operators through Sascable. One condition of the agreement is that the operators will address the problem of signal security.[178]

ii. Satellites or Fibre Optics? Hardware Ownership in Saskatchewan

With the CRTC's 1977 compromise on cable hardware and the ensuing signal delivery agreements between Sask Tel and the cable licensees, it appeared the Saskatchewan government had won in its negotiations over hardware ownership. The 1972 provincial objective of an integrated telecommunications network in Saskatchewan with Sask Tel as the sole supplier of distribution services could be met. In the late 1970s, Sask Tel began plans to overhaul the existing terrestrial system with this role in mind.

In October 1980, the telephone company announced plans to establish a "Broadband Network" (BBN) incorporating fibre optics technology. The 3,200 km fibre optics network would link Saskatchewan's ten major cities and about 40 larger towns with coaxial cable distributing signal within the communities. At an estimated cost of $56 million, the BBN was expected to serve 500,000 people by 1984.[179]

Sask Tel's stated objectives for establishing the fibre optics system were threefold. First, fibre optics would allow the integration of telephone, television and data signals because of the large bandwidth of the technology. Technically, one fibre has the capability of simultaneous voice, data and video transmission whereas conventional wire systems require specific cables for each of these services. Second, the fibre

optic system would be used to accommodate regional and local programming. Finally, fibre optics afforded the capability of two-way programming.[180]

In March 1982, with a $22 million contract to supply fibre optics for Sask Tel's system, Northern Telecom Canada Ltd. established its first optical systems plant in Saskatoon. By August 1983, Sask Tel was delivering signals for Saskatchewan cable licensees on the fibre optics system. According to a provincial telecommunications official, Sask Tel's investment on its fibre optics/coaxial cable "electronic highway" was $150 million.

By 1980, however, it became apparent that the cable operators in Saskatchewan were not going to conform to Sask Tel's hardware development plans. In late 1979, Saskatoon Telecable and Regina Cable applied to the CRTC for an increase in subscriber fees.[181] Part of the proposed increase would cover the costs of adding ABC and PBS programming. The other 20 cents of the fee increase would be used to buy out the licensees' ten year contract with Sask Tel. At the CRTC hearing, Regina Cable representative Fred Wagman said the cable co-operative planned to build a fund of $311,000 over the next five years so that the Sask Tel contract could be terminated. The rationale for opting out of the contract at that time was that an inexpensive satellite system for television signal delivery would be ready. While the CRTC rejected the 20 cent increase, the applications were the first indication of the cable companies' agenda to

establish a satellite-fed delivery system in Saskatchewan.[182]

The second event in the fibre optics/satellite conflict occurred in April 1980 after the CRTC awarded a temporary licence to Cable Satellite Network (CSN) to distribute the House of Commons proceedings.[183] Saskatoon Telecable, a shareholder in CSN, set up a satellite dish in its parking lot for the reception of the CSN signals.

On April 12 Sask Tel had erected its own ground stations in Moose Jaw, Regina and Saskatoon in co-operation with Telesat Canada. The telephone company then offered to intercept the CBC version of the House of Commons proceedings and provide Telecable with the feed. When Telecable rejected the offers and began receiving the CSN signal, Sask Tel responded by jamming signals from Telecable. The telephone company said the earth stations were part of the delivery system and therefore it was Sask Tel's responsibility to own the dishes and to deliver the signals. By setting up the earth station, Telecable was in breach of its contract.

Telecable argued that the ground station was similar to a receiving antenna (local headend) which the cable company was required to own by the CRTC and allowed to own under the signal delivery agreement with Sask Tel. By jammming the signals, Sask Tel was in breach of the signal delivery contract which specified that the telephone company would carry the cable company's signals on its microwave or cable distribution system.[184]

Apparently, Telecable began to use the earth station before obtaining CRTC approval for the distribution of House of Commons proceedings. However, on May 14, 1980, the Commission approved applications from Telecable and the Regina licensee to distribute the programming.[185] Noting the allegations of breach of contract based on the interpretation of the signal delivery agreement the Commission said:

> [g]iven the serious nature of the contractual differences between Sask Tel and the licensees, the Commission considers that the parties should attempt to resolve this matter between themselves, failing which the proper forum for judging contractual disputes is the Court. The Commission considers that by granting approval for the House of Commons proceedings, it is not prejudicing the rights of either party.

The provincial government responded to the CRTC's decision with an appeal to the federal government to ask the Commission to reconsider its decision. The new Minister of Telephones Don Cody said the appeal was being made because the decision gave the cable companies authority for programming but not delivery of signals. Attorney General Roy Romanow criticized the CRTC for granting the applications without a hearing. In doing so the Commission was failing to recognize the serious consequences of allowing the federal licensees to deliver the signals via satellite. He predicted the companies would use the CRTC's approval to challenge Sask Tel's authority to provide earth station hardware. Thus, by helping the cable companies withdraw from Sask Tel's rate-averaging distribution scheme, the decision was a threat to Sask Tel's fibre optics network.[186] The provincial government's appeal was unsuccessful.

On the recommendation made in the CRTC's decision, Telecable launched legal action against Sask Tel in a Saskatoon court. The cable company asked the court for an injunction to prevent Sask Tel's distortion of the signals. Queen's Bench Justice F.W. Johnson stated in his June 1980 decision that the cable company's case was not strong enough for an injunction.[187] However, by December 1981, Sask Tel had stopped jamming the signals pending the court's decision.[188]

The Saskatoon court's decision was issued on March 30, 1982, almost two years after the conflict began.[189] The fundamental question raised was whether the signal delivery contract between Sask Tel and Saskatoon Telecable allowed Saskatoon Telecable to gather signals from a satellite by means of its own Television Receive Only (TVRO) earth station and direct those signals to its subscribers through Sask Tel's cable equipment.

During the hearings Sask Tel had based its case on three arguments. First, the telephone company stated tht it was a matter of policy that all satellite earth stations in the province be owned and operated by Sask Tel. Second, as a matter of law, Telecable's TVRO was not a "receiving antenna." Finally, Sask Tel said the TVRO was not part of Telecable's local headend but part of a remote delivery facility which the signal delivery agreement specified must be provided by the telephone company.[190]

The Court based its decision on a strict interpretation of the signal delivery agreement between Sask Tel and the cable company. The judgement pronounced by Justice C.R. Wimmer stated:

> ...that contracts made between parties and dated January 6, 1978 and June 11, 1979 permit the plaintiff to use its own TVRO earth station to receive program signals from satellites in space and arrange them for distribution to its subscribers through Sask Tel's cable facilities....[191]

Because the decision was based on a strict interpretation of Telecable's contracts with Sask Tel, the issue of earth station ownership was not resolved in a final sense. In other words, earth station ownership in Saskatchewan is dependent upon the terms provided in signal delivery contracts between cable operators and the telephone company.[192]

A third stage of the satellite/fibre optics conflict has yet to be played out. On April 14, 1981, the CRTC licensed Canadian Satellite Communication Inc. (CANCOM) to provide packages of Canadian programming services to "core markets" defined as those "remote and underserved communities that presently receive only two or less television signals."[193] On May 8, 1983, the Commission licensed CANCOM to distribute CBS, NBC, ABC and PBS signals via satellite from Detroit and Seattle.[194] CANCOM's American signal package is available to cable operators in "core markets" and "extra core markets" which are defined as those markets "served by cable but not currently distributing one or more of the U.S. network signals." In addition, the Commission considers applications for CANCOM's American signal package on a "case-by-case basis" where

exceptional (ie. other than qualifying as core or extra core markets) circumstances exist.

At the hearing for satellite distribution of U.S. network signals in July 1982, a possibility was raised that existing microwave arrangements might be undermined by the satellite proposal. Noting that microwave contracts for most major areas do not expire until 1988, a CANCOM representative rejected immediate concern for competition between satellite and microwave delivery of American signals.

On June 13, 1983, however, eight Saskatchewan cable licensees applied to the CRTC for an amendment to their licences to allow the importation of American network signals from Detroit and Seattle via satellite by CANCOM.[195] The proposed amendment would replace microwave distribution of American signals from North Dakota via Sask Tel's Broadband Network (BBN). Because the licensees do not qualify as either core or extra core markets, their case was based on exceptional circumstances. The cable companies' rationale for the amendment was that the proposed satellite delivery package would solve picture quality and reliability problems which they claimed originated at the distant headends located at Outlook and Outram. Under the proposal, a TVRO earth station would be located at Cable Regina for the reception of CANCOM signals. From there the signals would be transmitted through Sask Tel facilities and distributed through the telephone company's BBN. Thus, a portion of Sask Tel's distribution system would be

by-passed.

The cable companies have similar Signal Delivery Agreements with Sask Tel which expire in January 1993. While the agreement contains an opting out provision, the applicants suggested a heavy financial penalty would prohibit them from exercising the option.[196] Therefore, unless it became financially feasible to opt out of the agreement, subscribers would continue to be charged the microwave and BBN costs for delivery of the North Dakota signals until the agreement expires. An increase of .76 cents for the reception of CANCOM signals was also proposed.

The Commission's November 16, 1983 decision was based on the licensees' claim that the exceptional circumstances of poor signal quality stemmed from technical problems at the Outlook and Outram distant headends.[197] While the Commission recognised the licensees are encountering technical problems the engineering reports provided failed to substantiate that the problems originate at the distant headends. The Commission stated that:

> ...no clear evidence was provided to show that significant technical problems originate at the distant head-ends and, on that basis, that approval of the replacement of the current 3 + 1 North Dakota signals by those received by satellite by CANCOM is not justified in this case. Accordingly the Commission denies the applications....

The decision noted that studies had not been conducted on the BBN, microwave links or local delivery systems to ascertain whether the technical problems originate from these sources. Moreover, the applicants did not survey subscribers to assess

their views on the quality of services, the proposed replacement of the microwave signals or the proposed fee increase. Because the decision is based on lack of evidence and implicitly suggests where evidence might be found, the case for satellite delivery of American signals is not yet closed. According to Fred Wagman, General Manager of Cable Regina, the Sakatchewan cable operators intend to reapply.[198] In the meantime, negotiations are taking place between the operators and Sask Tel to determine how best to utilize Sask Tel facilities and satellite services.[199] It is possible that these negotiations stem from the CRTC's suggestion that the question of whether subscribers should pay for unused microwave capacity will be addressed in future proposals to replace existing microwave facilities.[200]

The most recent satellite/fibre optics conflict is dictated, in part, by the same considerations as those made over ten years ago on the matter of microwave importation of American signals. In approving the importation of American signals via CANCOM's satellite the Commission stated that it was "completing a process which began in 1971 when it first approved the microwave importation of U.S. television signals."[201] Importation of U.S. signals via microwave allowed the Commission to "equalize" broadcasting services among Canadians with the exception of remote areas where the establishment of microwave systems was not technically or financially feasible and the cost of local delivery was prohibitive. The CANCOM service was

licensed to offer the opportunity for these areas to receive the 3 + 1 U.S. signals permitted by CRTC policy.

On the other hand, satellite technology creates a different scenario for the Saskatchewan government and Sask Tel than the one created by microwave technology. The CRTC's lift on the microwave importation ban in 1971 opened up the cable TV market in Saskatchewan and, in turn, allowed the provincial government to initiate a policy for its development. Should the CRTC eventually approve applications for satellite importation, the provincial fibre optics network for cable distribution which was created as a result of those early initiatives may eventually be by-passed by the cable licensees. Provincial and CRTC objectives remain largely unchanged in terms of the new technology but the environment in which they are played out in Saskatchewan has changed significantly.

iii. The Cable Services Bill: Setting New Boundaries for Negotiation

For over a decade, the CRTC, the DOC and the Saskatchewan government have been involved in jurisdictional negotiation on the question of cable regulation. These negotiations have resulted in compromises which, in turn, have had consequences for the Saskatchewan regulatory environment. The negotiations have not, however, provided any answers to jurisdictional questions. Instead, the process of negotiation continues albeit

in a changed and changing environment. Perhaps the most distinct example of jurisdictional uncertainty is illustrated by a bill which was introduced in the Saskatchewan Legislature on June 3, 1983. Progressive Conservative Justice Minister Gary Lane tabled the bill, An Act Respecting Cable Services in Saskatchewan, with the statement that:

> ...[t]he federal government of Canada is increasing its jurisdictional stranglehold over the cable industry. Without some clear declaration of Saskatchewan's jurisdiction, there is an ever-increasing danger that Ottawa will intrude into provincial areas of telecommunication jurisdiction.[202]

The Cable Services Act would repeal the Community Cablecasters Act and establish a provincial Commission which would regulate access to and use of cable facilities in Saskatchewan.[203] The three-person Cable Services Commission would have the authority to prescribe classes of licences and to issue, renew, amend and revoke licences for any term and with any conditions it might determine for "cable services" in the province.

If passed, the Cable Services Act would introduce two-tier regulation for cable in Saskatchewan, a concept similar to that tested in Quebec in the early 1970s. In that case, the province empowered the Quebec Public Services Board to issue cable licences to Quebec residents with no interests in other communications businesses. Cable programming and licences were subject to provincial regulation and cable companies were allowed to sell advertising space.[204] A conflict between CRTC and provincial licensing arose in 1974 and the case eventually

went to the Supreme Court of Canada. The Supreme Court's November 1977 decision ruled that the federal government had constitutional jurisdiction over cable services which make use of the radio frequency spectrum. The licensing authority proposed for Saskatchewan, however, is somewhat different as it includes non-programming aspects of cable services which can be carried on closed circuit. This is a matter of jurisdiction upon which the Supreme Court has not made a decision.

The Cable Services Bill was deferred to the fall on 1983 sitting of the legislature and again to the spring session. One might suggest that with the Cable Services Act, the province of Saskatchewan is establishing new boundaries for intergovernmental negotiation over cable jurisdiction.

CONCLUSIONS

One might conclude that jurisdictional negotiation and compromise in the area of cable regulation in Saskatchewan is not complete but instead entering a new era. However, a number of conclusions may be drawn from the history of negotiation to date. These conclusions, though drawn from the Saskatchewan case, may be used to inform studies on federal-provincial relations and the Canadian regulatory arena as a whole.

The case study has identified the process of federal-provincial relations by considering the boundaries or frameworks established for negotiation, the mechanisms of

negotiation and the compromises achieved through negotiation. Further, the study has suggested that the compromises achieved through negotiation cannot be assessed without examining the post-negotiation regulatory consequences. Finally, a suggestion is made that the negotiation and compromise resulting from federal-provincial interaction have done little to answer jurisdictional questions.

Boundaries for Negotiation

The boundaries for negotiation of cable jurisdiction were drawn by three actors; the CRTC, the Saskatchewan government and the DOC. Each actor established diverse, although sometimes overlapping, objectives in relations to the role of cable services. In turn, policies through which these objectives might be realized were developed. The policy frameworks, therefore, were largely autonomous.

The CRTC's objective to integrate cable television into the Canadian broadcasting system was determined by the Commission's statutory mandate and the policy objectives set out in the Broadcasting Act. The policies developed by the Commission for cable regulation were based on an interpretation of the objectives set out in the Act. The CRTC's power to regulate "broadcasting receiving undertakings," including cable television, through licensing was the means of implementing the Commission's cable policy. In the sense that the Commission's policies were developed for and directed at all cable licensees

in Canada, they were intended to be universal in application.

The Saskatchewan government's objective to integrate cable television into the provincial telecommunications system was based on an interest in provincial development. The policies established by the government reflected the historic use of crown corporations and co-operatives as instruments of developmental policies. Existing legislation, for example the Co-operatives Association Act and the Co-operatives Guarantee Act, was used to implement the policy of non-profit cable co-operatives. The presence of the provincially-owned telephone company, its enabling legislation and its regulation through direct ministerial control were used to implement the government's policy of Sask Tel ownership of cable distribution hardware. In addition, Sask Tel was used initially to implement the co-operative ownership policy because the telephone company's signal delivery contracts were offered exclusively to the government-approved cable television applicants. While the Saskatchewan government did approach the federal actors to feel out their opinions of the provincial policy, the province developed the cable distribution system and assisted in the development of the cable co-operatives with apparent confidence that the policies would be implemented.

The DOC's objective of establishing a national telecommunications system likely emanated from the department's mandate to "coordinate, promote and recommend policies and programs with respect to communication services for

Canada...."[205] The means of implementing the policies of federal-provincial co-ordination set out in the Green and Grey papers were varied. For instance some policies, such as the transfer of CTC regulation of telecommunications to the CRTC, could be implemented through federal legislation. Policies to "coordinate" federal and provincial telecommunication objectives, however, required intergovernmental dialogue. The introduction of conferences of communications ministers provided a forum for discussion but was unsuccessful as a mechanism to facilitate the coordination because the agendas of the federal and provincial governments were at odds. Thus, the DOC's policies were initially directed at all the provinces and it was largely fortuitous that the route of multilateral discussion was replaced by bilateral negotiations at the time licensing decisions were being made for Saskatchewan.

The boundaries for negotiation, therefore, were set by all three actors and were formulated autonomously. The CRTC and the Saskatchewan government policies were not explicitly framed to challenge the existing framework of cable jurisdiction but incorporated national and provincial interests and priorities. However, the policies each developed conflicted. Sask Tel's control of cable distribution equipment conflicted with the CRTC's hardware ownership requirements for cable licensees. The provincial policy for co-operative ownership of cable undertakings, while it overlapped with CRTC policy for community programming, challenged the Commission's licensing authority.

The DOC, on the other hand, established an agenda for jurisdictional negotiation based upon a concept of co-ordination intended to reflect the national broadcasting objectives of the CRTC and provincial telecommunications objectives.

Mechanisms for Negotiation

By 1976 the boundaries for negotiation among the CRTC, the DOC and the Saskatchewan government had been framed. However, there were no tangible grounds on which to negotiate. Interaction between the CRTC and the Saskatchewan government before July 1976 resulted in reactions based on the concept of a "fair and equitable" hearing for Saskatchewan cable applicants. However, neither the CRTC nor the Saskatchewan government backed down on their respective policies as a result of the procedural accommodations. Interaction between the DOC and the Saskatchewan government was also apparent but, again, respective policy boundaries were expressed and maintained.

Thus, while intergovernmental discussion was evident before July 1976, the policy frameworks of each actor remained autonomous until the CRTC issued its licensing decisions for Saskatchewan. The Commission's decisions provided a common and concrete framework within which the interests and objectives of the three actors could be negotiated.

The Saskatchewan government reacted to the decisions in two ways. To build bargaining power with the CRTC over hardware ownership, cable operators were not allowed to use Sask Tel's

distribution system which effectively halted the introduction of cable services to the province. To build bargaining power with the DOC, the provincial government introduced pay television to the federal agenda by using the co-operatives that failed in bids for conventional cable television licences. Both initiatives provided routes for negotiations with the federal bodies.

It is important to note that the provincial objectives changed somewhat at this point. The Saskatchewan government's policies had not been successfully implemented with provincially-developed tools so a jurisdictional issue was introduced. Closed circuit pay television became less an objective than a pawn in the negotiations based on pay television jurisdiction. The major stake in the negotiation appears to have been one of the Saskatchewan government's original goals, Sask Tel hardware ownership.

Introduction of closed circuit pay television onto the negotiation agenda changed the relative bargaining powers of the DOC and the Saskatchewan government. Discussions with the DOC as early as December 1974 indicate that the federal minister was willing to accept Sask Tel hardware ownership. The Canada-Manitoba Agreement illustrated that the "practicable arrangements" proposed by the DOC would involve federal-provincial trade-offs. In Manitoba's case the trade-off for provincial hardware ownership was a guarantee of federal control over broadcast programming and pay television. Once

Saskatchewan introduced provincial pay television the stakes changed.

Negotiations indicate that the Saskatchewan government was bargaining for Sask Tel hardware ownership plus a guarantee of provincial programming input in a national pay TV network. Saskatchewan's stand on the programming issue had expanded from a policy directed at the development of community groups to provide local programming to a demand for provincial or regional programming within a national framework.

It is important to note that the issue of constitutional jurisdiction entered into the negotiations. For example, Sauve threatened to challenge Saskatchewan's pay TV initiative with court action or amendments to the Broadcasting Act. Saskatchewan passed the Community Cablecasters Act to claim statutory jurisdiction over closed circuit pay TV but the act was never proclaimed. Neither the DOC nor the Saskatchewan government carried through on legalistic routes. One might conclude, therefore, that the legal initiative simply served to emphasize boundaries in political negotiations.

While court interpretation of constitutional jurisdiction would not have precluded further political negotiation, each level of government risked a loss in such a decision. Legalistic endeavours, therefore, functioned more as boundary-setters in political negotiation than as a mechanism or route to reconcile jurisdictional questions.

Compromise

It is difficult to determine why (or if) negotiations with the DOC broke down. For instance, Shillington's April 1977 statement in the legislature implied a bargain had been struck with the DOC which recognized Sask Tel hardware ownership and that he was certain the CRTC, after going through the formal hearing process on the issue, would recognize the bargain. Until May 1977, however, DOC-Saskatchewan negotiation on the basis of shared jurisdiction appears to have continued. After May, these discussions were no longer apparent. One can only speculate that a deal based on a gradual phasing-out of Saskatchewan closed circuit TV had been worked out by all three actors. The Saskatchewan government's lack of support for CPN, discussed more fully below, is evidence that the province compromised the co-operative and closed circuit TV objective as a result of negotiations.

What is clear is that beginning in at least January 1977, the CRTC and the Saskatchewan government began to negotiate a compromise on the Commission's hardware ownership policy. Unlike the negotiation with the DOC, CRTC negotiations were not publicized. Evidence indicates that the basis of the compromise had been worked out by April 1977 when the Saskatchewan government asked cable operators to apply for licence amendments. If this was the case, one has to question the legitimacy of the Winnipeg hearings on the issue of hardware

ownership. Moreover, one has to question the unequal application of hardware ownership requirements in the Commission's August decisions for Manitoba and its September decision for Saskatchewan. Though the Commission eventually backed down on its hardware ownership policy for Manitoba, it is clear that Saskatchewan's bargaining position with the CRTC was significantly different from that of its neighbouring province.

Another factor to note in the Saskatchewan negotiations with the CRTC is that they continued after the decision to make Saskatchewan "a special case." Further negotiations over Sask Tel's contract terms in the fall of 1977 won Saskatchewan control of mid-band channel allocation, conventionally a CRTC interest.

If one examines readily available documents in the case, the CRTC's decisions for example, the fact that the Commission made a compromise is clear. One is then prompted to question the CRTC's procedure in the case. Perhaps a more important question, however, is the extent of the DOC's role in the compromise. The DOC's push for pay TV and pressures on the CRTC as a result of the proposed telecommunications legislation may have influenced the Commission's decision in Saskatchewan. One can only speculate about the federal minister's input; this turns a question about CRTC accountability in the Saskatchewan case on its head, so to speak.

Consequences

An argument has been made that post-negotiation regulatory circumstances must be assessed for a full understanding of the consequences of political negotiation. First, post-negotiation circumstances can provide further insights into the compromises made during negotiations. Second, the outcomes of federal-provincial interaction can be assessed in terms of post-negotiation developments in cable regulation.

By November 1977 it appeared that the Saskatchewan government had partially fulfilled its original objectives for cable television. Sask Tel had won CRTC approval on the issue of hardware ownership, two of the four licensees in the province were co-operative undertakings and the closed circuit pay television network was co-operatively owned. Moreover, the government appeared to have established jurisdictional precedent with pay television.

Upon examination of the post-negotiation period, however, it becomes clear that closed circuit pay TV and the co-operatives had lost their appeal to the provincial government. Once the CRTC compromised on hardware ownership, CPN was assessed on the basis of its financial viability rather than its potential as an instrument in provincial cultural policy. Lack of provincial support in funding indicates that the government was not intent upon the Network being a competitor. Sask Tel's timing in providing signal delivery agreements and

converters for CPN retarded the development of the closed circuit system during federal-provincial negotiations and during the period the network was supposed to prove its viability. Thus despite government direction, evidence indicates Sask Tel was not especially concerned about the Network's success. Lack of government support during court action over CPN's use of VHF channels leads one to conclude the stakes were not considered very high. This is especially clear when one compares the government's involvement in court action on another Sask Tel contract issue, satellite distribution. The fact that receivership was declared after allowing CPN to operate on a full scale basis for only three months is another indication that the government had abandoned the co-operatives and the co-operative ownership policy. Finally, the CRTC's tacit acceptance of Teletheatre until the national pay TV scheme was introduced is further evidence that closed circuit pay television was a trade-off in negotiations for Sask Tel hardware ownership.

The demise of CPN and the eventual introduction of federally-regulated pay television in Saskatchewan raises questions about the effects of the negotiations on closed circuit cable jurisdiction. The province may have established precedent because the closed circuit system operated for a number of years. However, the strength of the precedent is questionable because CPN and Teletheatre were political arrangements. The constitutional jurisdiction to operate closed

circuit television was not challenged and therefore remains uncertain.

The Saskatchewan government was successful in implementing its policy of Sask Tel ownership of the cable distribution system as a result of federal-provincial negotiations. Given a changed environment, however, the success appears to be qualified. First, satellite delivery of cable services provides a challenge for Sask Tel's terrestrial system. Second, cable operators, once service began, gained power to challenge Sask Tel control over cable distribution using satellite technology. Third, the CRTC's licensing of CANCOM has recently provided a federally-approved tool through which cable operators may bypass the provincial cable distribution system. Considering the financial stakes in the newly established provincial fibre optics system, it is unlikely the cable operators' satellite distribution schemes will go unchallenged.

Despite federal-provincial negotiations, the status of cable jurisdiction in Saskatchewan remains uncertain. The introduction of legislation to create a provincial regulatory body for cable services is evidence that the Progressive Conservative government in Saskatchewan is continuing to assert provincial control over the development of cable services in the province. Thus, although federal-provincial negotiations over cable jurisdiction resulted in compromises and affected the regulatory circumstances in the province, the negotiation did little to answer jurisdictional questions.

ENDNOTES

1. Unless otherwise indicated DOC refers to the activities of the federal Minister of Communication and senior Department officials.

2. Broadcasting Act, 1967-68, c.25. The Commission's powers were extended to regulate federally incorporated telecommunication carriers and transferred the powers of the minister under Part II and III of the Broadcasting Act from the Secretary of State to the Minister of Communication. See the Canadian Radio-television and Telecommunications Commission Act. S.C. 1975, c. 49.

3. Three of the public announcements dated 13 May 1969 and 10 April 1970 are found in an information booklet: CRTC, Cable Television in Canada, January 1971. The Commission notes on page 10 that the statements were proposed to guide cable operators until a more detailed policy was worked out. The fourth announcement, "The Integration of Cable Television in the Canadian Broadcastng System," 26 February 1971, was made in preparation for an April 26 1971 public hearing where the question of microwave importation was discussed.

4. CRTC, "Canadian Broadcasting 'A Single System'," Policy Statement on Cable Television, 16 July 1971.

5. CRTC, Public Announcement, "The Improvement and Development of Canadian Broadcasting and the Extension of US Coverage in Canada by CATV," 3 December 1969. Cited in Cable Television in Canada, p. 14.

6. "The Integration of Cable Television in the Canadian Broadcasting System," 26 February 1971, p. 23.

7. "Canadian Broadcasting 'A Single System'," p. 34.

8. Ibid., pp. 13, 17 & 18.

9. Cable Television Regulations, 10 November 1975, Section 6.

10. CRTC, "Policies Respecting Broadcasting Receiving Undertakings (Cable Television)," 16 December 1975.

11. While the Commission primarily used its power to request licensees to set aside a channel for community programming

as a means of implementing its policy, the concept of awarding a licence to a community group was not out of the question. The first example of a licence awarded to a co-operative group was in August 1973 when a second French language television service, Cooperative de Television de l'Outaouais, was licensed to operate on a UHF channel in the Ottawa-Hull area. See CRTC, Decision 73-391.

12. CRTC, Public Announcement, "Licensing Policy in Relation to Common Carriers," 3 December 1969.

13. The 1970 Order-in-Council was amended by a July 13 1972 Order-in-Council which allowed licences to be granted to "independent" (arm's length) corporations established by provincial governments for educational broadcasting. The ban on provincial government ownership of other undertakings was continued. Order-in-Council P.C. 1972-1569, 13 July 1972; SOR/72-261, Canada Gazette , Part II, July 1972, p. 1047. The 1972 ban is the current order.

14. CRTC, Public Announcement, "Guidelines for Applicants regarding Licences to Carry on CATV Undertakings," 10 April 1970. Cited in Cable Television in Canada, p. 19.

15. CRTC, Decision 70-191.

16. CRTC, Decision 73-395.

17. CRTC, Decision 74-164. The CRTC's stance on this matter was reiterated in Decision 74-418 when Northern Cablevision proposed to build another system in the province. The company suggested it would own the headend, amplifiers and drops and lease the remaining facilities from AGT. The licence was awarded on the condition Northern own the stated equipment and that it acquire access to the system for repairs and replacements.

18. CRTC, Public Announcement, "Request for Applications for Cable Television Services to Certain Areas of Saskatchewan," 1 August 1975.

19. Department of Telephones, Press Release, "Saskatchewan Policy on Cable Television," 3 October 1972, p.2. See also: "Sask Tel to operate cable TV utility," Regina Leader Post, 3 October 1972, p. 1.

20. Trans-Canada Telephone System, "History of Regulation and Current Regulatory Setting," Department of Communications, Telecommission Study 1(b), March 1970, p. 49.

21. The Saskatchewan Telecommunications Act, R.R.S., 1978, S-34.

22. The Public Utilities Review Commission Act, c. P-45.1.

23. The Saskatchewan Telecommunications Act.

24. Annual Report of the Department of Telephones, Province of Saskatchewan, for the Calendar Year 1970 (Regina: Queen's Printer, 1971), p. 5.

25. Saskatchewan Telecommunications, Annual Report, 1982, p. 7.

26. Saskatchewan Government Telephones, Annual Report, 1965, pp. 4 & 5.

27. "Man signs pact, Saskatchewan won't," Regina Leader Post, 12 November 1976, p. 25.

28. University of Saskatchewan, Saskatchewan Archives Board, Co-operative Programming Network, call No. A346, "Report on Cable Television (C.A.T.V.) in Saskatchewan," presented by Sask Tel, 18 October 1971, p. 2. The Saskatchewan Archives Board's collection of documents are uncatalogued. Hereafter, documents obtained from the collection will be identified by the letters CPN.

29. CPN, "Sask Tel's Role in C.A.T.V.," 8 August 1969.

30. CPN, "Report on Cable Television (C.A.T.V.) in Saskatchewan," pp. 2 & 3.

31. The medium/message distinction was the theme of Sask Tel's brief to the CRTC's April 1971 public hearing on the integration of cable television into the Canadian broadcasting system. The telephone company argued that the essence of the message function (the cable broadcaster's role) was creativity while the essence of the medium function (Sask Tel's role) was efficiency. The brief concluded that "the CATV broadcasters and all communication users will be most efficiently and economically served by an integrated medium for total communication provided by the telecommunication carriers." See "The Integration of Cable Television in the Canadian Broadcasting System," Submission by Saskatchewan Telecommunications at the CRTC Hearing, Montreal Canada, beginning April 26 1971, pp. 6 & 7.

32. See: "Sask Tel to operate cable utility," Regina Leader Post, 3 October 1972, p. 1, "Two centres still await word on cable," Regina Leader Post, 24 July 1976, "Cable television situation will take some unravelling," Regina Leader Post, 4 August 1976, p. 31 and "Cable plans made," Regina Leader Post, 29 September 1976, p. 4. In January 1984, the Estevan and Weyburn contracts were still under

negotiation. The CRTC granted the licensees an amendment to allow Sask Tel to own the equipment it requests in its signal delivery agreement in September 1983 (CRTC, Decision 82-826). The sale of the cable companies' equipment has not yet gone through, however, and the companies are still operating with their original contracts. The Prince Albert system, which was in the same situation, sold its equipment to Sask Tel in October 1982. Sask Tel continues to allow the systems in Eston and Mankota to own their own hardware.

33. "Cable duplication said unfair to competition," Regina Leader Post, 8 October 1976.

34. "Sask Tel stringing cable," Regina Leader Post, 22 July 1972, p. 3 and "Should government be able to deny people cable TV," Regina Leader Post, 4 August 1976, p. 31.

35. "For cablevision -- government control for hardware only," Regina Leader Post, 12 October 1972, p. 3.

36. "Major co-ops want hand in cablevision," Regina Leader Post, 2 May 1973, p. 4.

37. CPN, "Provincial Government Guidlelines for Cable Television in Saskatchewan," 30 May 1973.

38. Co-operatives Association Act, R.S.S., 1978, c. 34.

39. For a detailed analysis of the organization and development of cable co-operatives see: Kevin LaRoche, "Governments, Co-operatives and Conflict: Saskatchewan's Cable War, 1972-1979," MA Thesis, Departments of Education and Political Science, University of Saskatchewan, 1981.

40. See CPN, Sascable Television Ltd, undated, p. 2. The five co-operatives were the Saskatchewan Wheat Pool, Saskatchewan Co-operative Credit Association, Federated Co-operatives, Co-operative Insurance Services and Co-op Trust Company of Canada.

41. Ibid., pp. 1 & 2. See also: "Major co-ops want hand in cablevision," Regina Leader Post, 2 May 1973, p. 4 and LaRoche, pp. 33 & 34.

42. Details of the structure and finances for co-operatives were found in LaRoche, pp. 29-50. See also: "Cablevision creates opportunities for involvement," Sheaf, 23 January 1976.

43. The Co-operative Guarantee Board is established in the Co-operative Guarantee Act, R.S.S., 1978, c. 35. The Credit Union Central acts as a clearing house for all

cheguing, loans and investments made by Saskatchewan credit unions. All of the cable co-operatives negotiated through the two bodies.

44. For a discussion of the dispute see LaRoche, pp. 40-3.

45. The Regina Community Cable Association became incorporated as the Independent Video Association before its demise.

46. "Group to raise own funds," Regina Leader Post, 12 November 1975, p. 3.

47. For a discussion of the role of the Federation see LaRoche. For the government's rationale for the Federation see: CPN, "Presentation to the Local Co-operatives in Saskatoon, Regina and Moose Jaw on Cable Television Policy," John Brockelbank, July 1973.

48. "Group to raise own funds," Regina Leader Post, 12 November 1975, p. 3. The other co-operatives submitted the Penetration Dependent Agreement discussed below.

49. Department of Telephones, Press Release, "Saskatchewan Policy on Cable Television," 3 October 1972, p. 2.

50. "Private CATV idea surprises Romanow," Regina Leader Post, 6 October 1972.

51. "Presentation to the Local Co-operatives in Saskatoon, Regina and Moose Jaw on Cable Television Policy," July 1973, p. 7.

52. CPN, Saskatoon Cable Television Sponsoring Co-operative, Minutes of a Meeting of the Organization and Finance Committee, April 14 1974, p. 8.

53. Courville expressed uncertainty about the CRTC's role in broadcasting regulation in the future. He suggested that the CRTC might become part of the Canadian Transport Commission (CTC). By fall, however, it was clear that the CRTC would remain a significant actor in Saskatchewan cable negotiations. By that time, the CRTC, not the CTC, had been reorganized to assume authority over federally regulated telecommunication carriers and was expected to have new regulatory criteria by the following spring. See: CPN, Leo Courville, "Notes for the General Meeting of the Cable Television Sponsoring Co-operative," 9 October 1974, p. 3. For a discussion of the DOC's initiative to combine federal regulation of broadcasting and telecommunication under one body, see pp. 117 & 120 of this thesis.

54. CPN, Saskatoon Cable Television Sponsoring Co-operative, 9 October 1974, p. 4.

55. See CPN, "Outline of Proposed Carrier's (Sask Tel) Contract to be Offered to Approved Non-Profit Community Cable Television Operators," undated and Sask Tel, General Tariff, "Signal Delivery Service for Cable Television," October 1975. Negotiation of the signal delivery contract with Sask Tel was a major task of the Federation. The contract went through six revisions before the Federation and Sask Tel agreed on the terms.

56. CPN, Saskatoon Cable Television Sponsoring Co-operative, Minutes of a Meeting of the Board of Directors, 19 December 1974.

57. "Future unclear for cable groups," Regina Leader Post, 4 February 1975.

58. "Cable TV approval seen," Regina Leader Post, 13 February 1975, p.3.

59. "Private cable idea surprises Romanow," Regina Leader Post, 6 October 1972.

60. "Sask Tel seeks cable licence," Regina Leader Post, 3 December 1975. When Shillington became the minister responsible for cable, Neil Byers became the Minister of Telephones.

61. "Changes in cable policy urged," Regina Leader Post, 10 February 1976, p. 3.

62. CPN, Transcript of Telex Received 10 October 1975, To The Honourable John E. Brockelbank, Minister of Telephones, Government of Saskatchewan from Harry J. Boyle, Chairman, CRTC.

63. "Sask Tel seeks cable licence," Regina Leader Post, 3 December 1975.

64. "Jurisdictional battle shaping over cable control," Regina Leader Post, 15 December 1975, p. 4.

65. "Sask Tel seeks cable licence," Regina Leader Post, 3 December 1975 and "Many uncertainties in cable conflict," Regina Leader Post, 16 December 1975, p. 3.

66. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 2 January 1976.

67. "Many uncertainties in cable conflict," Regina Leader Post, 16 December 1975, p. 3.

68. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 2 January 1976.

69. The six stations were CKCK (Regina), CKOS (Yorkton), CFJB (Swift Current), CFQC (Saskatoon), CKBI (Prince Albert) and CKSA (Lloydminster).

70. See: "Television stations seek cable licences," Regina Leader Post, 25 November 1975, p. 3 and "Cable Policy Discussed," Regina Leader Post, 12 February 1976, p. 4.

71. "At least six firms seek licences," Regina Leader Post, 3 November 1975, p. 4.

72. See: "Cable applications shown to the public," Regina Leader Post, 8 January 1976, p. 8.

73. The controlling shares of Western World Communication Ltd. were handed over to Saskatoon Telecable in February 1978. See CRTC, Decision 78-93.

74. There appears to have been a pre-hearing corporate reorganization of Agra Industry interests in the province. Prior to 1976, the Estevan and Weyburn systems also operated under the name Co-ax Cable Ltd. By the time the hearing arrived they were operating under the name of CableNet but the ownership had not changed. Thus, with the two existing systems, the application by Agra Industries in Saskatoon and the Prairie Co-Ax application in Moose Jaw, there was potential that the same interest would have licences in four of Saskatchewan's ten major cities.

75. "Changes in policy urged," Regina Leader Post, 10 February 1976, p. 3.

76. Government of Saskatchewan, "Cable Television in Saskatchewan," Presentation to the CRTC Hearing, Regina, 9 February 1976. The provincial government pointed directly at Armadale's holdings in its presentation.

77. "Changes in cable policy urged," Regina Leader Post, 10 February 1976, p.3.

78. "Cable Policy Discussed," Regina Leader Post, 12 February 1976, p. 4.

79. For a discussion of the profit vs. non-profit status of co-operatives in relation to cable television in Saskatchewan see LaRoche, pp. 6-9 & 127-133 and "Changes in cable policy urged," Regina Leader Post, 10 February 1976, p. 3.

80. Proposals for a Communications Policy for Canada, (Ottawa: Department of Communications, 1973), p. 1 and Communications: Some Federal Proposals, (Ottawa: Department of Communications, 1975), p. 1.

81. Proposals for a Communications Policy for Canada, p. 5.

82. Public Utilities Commission v. Victoria Cablevision et al., (1965) 51 D.L.R.2, 716.

83. Proposals for a Communications Policy for Canada, p. 18.

84. Ibid, pp. 7 & 8.

85. Ibid., p. 21.

86. Premiers' Conference, Halifax, 3-4 August 1972, cited in Quebec Master Craftsman of its Own Communications Policy, p. 27.

87. Ibid., p. 28.

88. Joint Provincial Statement presented at the First Federal-Provincial Conference on Communications, 29-30 November 1973. Doc. no. Com-21.

89. Communications: Some Federal Proposals, p. 17.

90. Ibid, p. 14.

91. Ibid.

92. Statement delivered by the Hon. John R. Rhodes, Ontario Minister of Transportation and Communication, 14-15 May 1975, Doc. No. COM-49, pp. 7 & 8.

93. Ibid., p. 12.

94. Statement by the Hon. Gerard Pelletier, Federal Minister of Communications to the Second Federal-Provincial Conference of Ministers Responsible for Communications, (Ottawa, Communications Canada, July 1975), p. 7.

95. Ibid., p. 4. The Supreme Court of Canada's decision on Quebec's challenge to federal jurisdiction over cable television was rendered in November 1977. See Public Services Board v. Dionne, 1978, 2 R.C.S., 191.

96. Ibid., p. 3.

97. CRTC, Decisions 76-432 to 435.

98. The Moose Jaw licensee, Prairie Co-Ax Cable TV, was controlled by Cablecasting Ltd. The Company's application stated that Cablecasting would own 45 per cent of the shares and elect 40 per cent of the board of directors. However, the remaining shareholders elected 60 per cent of the board and represented 55 per cent of the shares

issued. At the time of the hearing 20 shares were owned by 13 Moose Jaw and 46 Saskatoon residents. The rest of the shares were to be offered to Moose Jaw residents. Apparently majority participation on the board of directors satisfied the CRTC's requirements. Cablecasting relinquished its shares in 1979. CRTC, Decision 79-227.

99. See CRTC, Decisions 76-434 (Regina) and 76-435 (Moose Jaw).

100. According to Fred Wagman, General Manager of Cable Regina, the Commission did not request that the co-operative status be changed. "The concern had to do with voting rights and representation by the individual members of the Co-operative. Changes were made to the bylaws which accomodated these concerns, and these were implemented following CRTC approval." Letter from Fred Wagman, 9 February 1984, p. 2.

101. The Appeals were launched July 27 1976. On September 17, Premier Blakeney received a telegram from Prime Minister Trudeau saying the CRTC would not review the decision on the Saskatchewan licences. Reference was made to the DOC's offers to negotiate on shared jurisdiction. "CRTC won't review decision on cable TV," Regina Leader Post, 17 September 1976.

102. Notes for a speech by Hon. Jeanne Sauve, Minister of Communications, to the Luncheon Meeting of the Saint-Laurent Kiwanis Club in Montreal, 17 March 1976, "Federal Involvement in Communications and Cultural Security in Quebec," p. 10.

103. "Cable issue partly resolved," Regina Leader Post, 31 March 1976, p. 1.

104. See CRTC, Policies Respecting Broadcasting Receiving Undertakings (Cable Television), 16 December 1975 and CRTC, Public Announcement, "A Review of Certain Cable Television Programming Issues," 26 March 1979.

105. "Non-profit pay television plans to be encouraged by province," Regina Leader Post, 31 July 1976.

106. "Shillington feels wait for cable will be worth it," Regina Leader Post, 7 May 1977, p. 14.

107. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 9 June 1976, p. 3.

108. CPN, Saskatoon Cablevision Co-operative, Minutes of the 4th Annual Meeting, 2 December 1976, pp. 5 & 6.

109. CPN, Leo Courville, "Report on a Closed Circuit Television System for Saskatchewan," 14 July 1976, p. 1.

110. See: CRTC, Public Announcement, "Pay Television," 30 June 1976.

111. "Ottawa to fight to finish to foil Sask pay TV plan," Regina Leader Post, 6 August 1976, p. 1.

112. "Ottawa expected to oppose provincial position on pay TV," Regina Leader Post, 31 July 1976.

113. "Province would pool some pay TV profit," Regina Leader Post, 1 September 1976.

114. The Canada-Manitoba Agreement, 10 November 1976. Article III, "Other Services" and Article II, "Programming Services."

115. "Man signs pay TV pact, Saskatchewan won't," Regina Leader Post, 12 November 1976, p. 25.

116. "Sask cable views gaining ground," Regina Leader Post, 30 November 1976, p. 1. Shillington's statement regarding the DOC's mandate was probably pointed at the CRTC who had questioned the legality of the agreement and said they would not be bound by it.

117. "Jurisdictional guarantee," Regina Leader Post, 10 December 1976.

118. "Cable Ruling Under Study," Regina Leader Post, 14 January 1977.

119. Bill C-43, An Act respecting telecommunications in Canada, First reading, 22 March 1977, second session Thirtieth Parliament, 25-26. Elizabeth II, 1976-77.

120. See Council of Communications Ministers, Proposed Resolution, Saskatchewan, Edmonton, 29-30 March 1977, Doc. no. 830-27/016.

121. "Possibility of cable before end of 1977," Regina Leader Post, 1 April 1977 and "Saskatchewan at centre of cable, pay TV talks," Regina Leader Post, 5 April 1977.

122. The Community Cablecasters Act, 1977, 1976-77, c. 12. Section 41(2) is a "jurisdictional disclaimer" which says that if any parts of the Act are found to be beyond provincial authority the remaining parts of the Act may be retained.

123. Section 2(d) of the Cablecasters Act excludes any service

using the radio frequency spectrum from the definition of "cablecast service."

124. Under the Act, rates for cablecast services are also regulated to a limited extent. Cablecasters receive a "toll" from subscribers which is set aside to provide services. A "fee," which is a percentage of the toll collected by the cablecaster and computed by the Saskatchewan Arts Board, is forwarded to the Minister of Finance. Thus, rates are regulated only with respect to the fee portion of the toll.

125. "Cable logjam may be easing," Regina Leader Post, 7 May 1977, p. 14.

126. CPN, Report of a Meeting at Cabinet Office, 26 January 1977.

127. "Progress noted in pay TV dispute," Regina Leader Post, 29 March 1977.

128. Saskatchewan Legislative Assembly Debates and Proceedings, Third Session, Eighteenth Legislative, 15 March 1977, pp. 771 & 772.

129. Ibid., 21 April 1977, p. 2394.

130. "Shillington asks licensees to ease stand on hardware," Regina Leader Post, 22 April 1977, p. 2.

131. "Cable group seeks fee increase," Regina Leader Post, 6 May 1977.

132. CPN, Minutes of a Meeting of the Board of Representatives of the Federation, 19 May 1977, p. 3.

133. See "Co-op requests assistance," Regina Leader Post, 10 June 1977, p. 9.

134. CRTC, Decisions 77-468 to 474 and CRTC, Public Announcement, "Cable Television Service to Certain Areas of Manitoba," 8 August 1977.

135. CRTC, Decision 77-585.

136. "Cable TV feud continues," Regina Leader Post, 1 November 1977.

137. "The cable TV situation," Regina Leader Post, 9 November 1977, p. 6.

138. "CRTC approves cable TV for Battlefords, Romanow says," Regina Leader Post, 19 November 1977, p.2. Also see:

Saskatchewan Government Information Press Release, "Battlefords cable TV to begin shortly," 18 November 1977.

139. Two of the VHF channels were being used for conventional television services.

140. CRTC, Decision 78-93.

141. "CRTC's latest decision described as a breakthrough," Regina Leader Post, 8 October, 1977 and "Cable operators taken by surprise," Regina Leader Post, 8 October 1977, p. 4.

142. See: CPN, Letter from Courtney Milne, Saskatoon Cablevision Co-operative Executive Director, to Board Members, 28 October 1976, p. 1.

143. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 5 November 1976, p. 2.

144. Letter from Courtney Milne to Board Members, 18 October 1976, pp. 1 & 2.

145. LaRoche, p. 80. The Regina arm of CPN had not yet been formed. A condition of the loan was that the Federation establish a closed circuit organization in Regina.

146. CPN, "Report of a Meeting with Roy Romanow," undated.

147. The meeting probably occurred shortly after a promising report on closed circuit marketability commission by the Saskatoon Cablevision Co-operative was completed. Romanow said he was not aware of the report. See: CPN, "Confidential Report on the Marketability of Closed-Circuit Television in Saskatoon," prepared by the Media Research Associates for the Board of Directors, Saskatoon Cablevision Co-operative, October 1976.

148. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 30 August 1976, p. 3, "Shillington feels wait for cable will be worth it," Regina Leader Post, 7 May 1977, p. 14 and LaRoche, p. 80.

149. See: Saskatchewan Legislative Debates and Proceedings, Third Session, Eighteenth Legislative, 21 April 1977, p. 2393. The Co-operative Guarantee Act, passed in 1937, gave the provincial treasurer the power to guarantee loans made by the Saskatchewan Co-operative Credit Society to the Confederation of Credit Unions and to co-ops. In 1950, Co-op Trust of Canada was approved as a lender. Northland Bank of Calgary had 556 bank shares owned by co-operatives and was therefore considered eligible to become an approved lender.

150. LaRoche, p. 81.

151. "Cable operators taken by suprise," Regina Leader Post, 8 October 1977, p. 4 and "Lack of loan as holdup," Regina Leader Post, 19 November 1977, p. 2.

152. CPN, Draft of letter to Honourable Ned Shillington, Minister of Communications from Courtney Milne, Executive Director, Saskatoon Cablevision Co-operative, 28 October 1976, p. 1.

153. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 19 November 1976, p. 1.

154. CPN, Report on Federation Activities, Gerry Parfeniuk, Executive Director, 11 January 1977, p. 2.

155. CPN, Report of Meeting at Cabinet Office, 26 January 1977, pp. 1 & 2.

156. "Choice of cable services said likely with Sask Tel equipment," Regina Leader Post, 20 April 1978.

157. CPN, Saskatoon Cablevision Co-operative, Minutes of a Meeting of the Board of Directors, 13 July 1977, p. 2.

158. CPN, Letter to MLA or Board Member from G.G. Dyck, Chairman of the CPN Board, 22 January 1979, p. 4.

159. See: CPN, "Closed Circuit Cable Television Signal Delivery Agreement," undated.

160. Saskatchewan Legislative Debates and Proceedings, Fifth Session, Eighteenth Legislative, 21 April 1978, pp. 2253-2254. See also: "Liberals fail in bid to debate cable TV," Regina Leader Post, 11 April 1978.

161. See: "CPN still broadcasting despite agreement end," Regina Leader Post, 7 April 1978, "Cable Regina waiting for word from CRTC," Regina Leader Post, 10 April 1976, and "Justification lacking for Sask Tel action," Regina Leader Post, 12 April 1978.

162. "Cable Regina has till Monday to clear CPN off Channel 3," Regina Leader Post, 8 April 1978, and "CRTC demands reasons for use of Channel by CPN," Regina Leader Post, 11 April 1978. See also: Saskatchewan Legislative Debates and Proceedings, Fifth Session, Eighteenth Legislative, 11 April 1978, p. 1295.

163. "Conventional cable operators take legal action," Regina Leader Post, 13 April 1978, "Legal action begun against CPN, Sask Tel," Regina Leader Post, 14 April 1978, and

"CPN launches countersuit," Regina Leader Post, 17 April 1978.

164. "Cable TV court battle adjourned to May 1," Regina Leader Post, 19 April 1978.

165. Saskatchewan Legislative Debates and Proceedings, Fifth Session, Eighteenth Legislative, 3 May 1978, pp. 2309 & 2310. See also CPN, Report by Brian Young, Marketing Director, Saskatchewan Cable Federation Ltd., to Federation Board Meeting, 19 May 1978, p. 1. The report states that: "Sask-Tel [sic] openly admits little if any effort was made in developing prototypes prior to CPN securing the Government loan guarantee. Once the loan was approved in January, 1978, Sask-Tel initiated enquiries throughout the industry in a usual search procedure. Because of the complexity of the units and the stringent specification Sask-Tel had developed, most manufacturers were not interested in participating."

166. "Cable TV legal battle adjourned until 7," Regina Leader Post, 5 May 1978, "Cable case adjourned again; Sask Tel hopes to meet target," Regina Leader Post, 7 June 1978, "Cable battle may end soon," Regina Leader Post, 28 June 1978 and "Cable TV battle is over," Regina Leader Post, 6 July 1978.

167. "CPN to cut off non-paying subscribers," Regina Leader Post, 28 November 1978 and LaRoche, p. 117.

168. "CPN to cut off non-paying subscribers," Regina Leader Post, 28 November 1978.

169. "CPN future remains in doubt, financial investigation ordered," Regina Leader Post, 12 January 1979.

170. "Cabinet decision on CPN expected by end of month," Regina Leader Post, 17 April 1979.

171. "Government to seek buyers for CPN TV system," Regina Leader Post, 18 April 1979.

172. "CPN offers exceeded $1.1 million," Regina Leader Post, 11 July 1979.

173. "Corporation formed to make bid for CPN," Regina Leader Post, 28 June 1979. The Crown Investment Corporation apparently bought out the co-operatives' share. The Crown Investment Corporation of Saskatchewan Annual Report for 1980 states that the Corporation owned 60 per cent of CableCom. See p. 11.

174. CRTC, Notice of Public Hearing 1982-66, p. 5 and CRTC,

Correction: Notice of Public Hearing 1982-85, 26 October 1982.

175. CRTC, Decision 83-5.

176. "They've seen it all before," Globe and Mail, 5 February 1983, p. 8.

177. "Sask reveals own Pay-TV licence scheme," Winnipeg Free Press, 24 January 1983, p. 20.

178. Interview with John Meldrum, Sask Tel Legal Counsel.

179. Sask Tel, Annual Report, 1980, p. 8.

180. See: Saskatchewan Telecommunications, Fibre Optics: the light fantastic, 1981, p. 10 and Northern Telecom, Lighttalk, Vol 1. No. 1, 31 March 1982, pp. 1 & 2. Sask Tel has been experimenting with a videotex service using Telidon in a field trial called "Pathfinder." See for example, Sask Tel, News Release, "Videotex Service Trial Announced by Sask Tel," 15 October 1981.

181. "CRTC holds local hearings on cable TV expansion, fees," Regina Leader Post, 28 November 1979.

182. CRTC, Decision 80-118 and 80-120.

183. CRTC, Public Announcement, "Distribution of the House of Commons Proceedings by Satellite," 1 April 1980. Both CBC and CSV were awarded temporary licences.

184. See: Saskatchewan Legislative Debates and Proceedings, Second Session, Nineteenth Legislative, 15 May 1980, pp. 3200-3209, "Sask Tel wants ground stations," Regina Leader Post, 16 April 1980, "Cable firms consider suing Sask Tel for jamming signals," Regina Leader Post, 16 April 1980 and "Sask Tel scrambles cable signal," Regina Leader Post, 22 April 1980.

185. CRTC, Decision 80-342. Apparently, DOC approval for the earth station did not come until April 30 1980, over two weeks after Telecable began to receive the CSN signal.

186. "Sask asks public hearing on CRTC cable decision," Regina Leader Post, 16 May 1980.

187. "Legal Action Against Sask Tel Begins," Saskatoon Star Phoenix, 27 October 1980, p. A3.

188. Broadcaster, December 1981, p. 13.

189. Saskatoon Telecable Ltd. v. Sask Tel, (Court of Queen's

Bench for Saskatchewan) 30 March 1982. Docket No: 410 CLIC Order No: B-198. Cited in CRR vol. 3, 1982, 3-10.

190. "Sask Telecable wins TVRO case," Canadian Communication Report, Vol 9, No. 7, 15 April 1982, pp. 8 & 9.

191. Saskatoon Telecable Ltd. v. Sask Tel, CRR vol. 3, 1982, 3-11.

192. Despite this observation, however, the cable companies apparently all have similar contracts. Provincial officials appear to have concern about the Court's decision even though the judgement was specifically made on Saskatoon Telecable's contract. See: "Telecable wins over Sask Tel," Saskatoon Star Phoenix, 3 April 1983.

193. CRTC, Decision 81-252.

194. CRTC, Decision 83-126.

195. CRTC, Notice of Public Hearing, 1983-55.

196. Ibid. According to a Sask Tel lawyer, the cable operators could have opted out of a portion of the agreement. In Sask Tel's original agreement with the cable operator two distant signals were supplied from the headend at Outram. Later, contracts were amended to add two more distant signals from Outram and Tolstoi, Manitoba. The operators agreed when the latter signals were supplied, that if they should terminate the signals they would have to pay Sask Tel the appropriate sliding rate until the contract terminated.

197. CRTC, Decision 83-957.

198. Letter from Fred Wagman, General Manager, Cable Regina, 9 February 1984, p.2.

199. Interview with John Meldrum, Sask Tel Legal Counsel.

200. CRTC, Decision 83-957.

201. CRTC, Decision 83-126.

202. Saskatchewan Legislative Debates and Proceedings, Second Session, Twentieth Legislative, 3 June 1983, p. 2939.

203. The Cable Services Act, Bill No. 70 of 1983, Second Session, Twentieth Legislative.

204. See: "Ottawa-Que. Showdown Coming?" Ottawa Journal, 24 February 1973.

205. Department of Communications Act, R.S.C., c. 24, Section 10(1)(a).

IV. WHY DID FEDERAL-PROVINCIAL NEGOTIATION OCCUR?

INTRODUCTION

Because federal-provincial negotiation over cable jurisdiction in Manitoba and Saskatchewan centred on the issue of hardware ownership, one might be tempted to conclude that negotiation was a result of the CRTC's decisions that had imposed minimum hardware ownership requirements for cable licensees in the two provinces. Indeed, because the CRTC decisions conflicted with provincial full lease policies, it was necessary for the provinces to negotiate on the question of cable jurisdiction. However, identifying the Commission's decisions as the sole cause of negotiation masks the qualitative differences in Manitoba's and Saskatchewan's incentives to enter negotiations. Moreover, by identifying the hardware conflict as the sole issue leading to negotiation one neglects important factors in the intergovernmental relations environment of the 1970s; factors which set the context in which negotiation occurred.

Other factors in the federal-provincial relations and regulatory environments must be considered to understand fully the source of negotiation. Intergovernmental activities on the part of the Federal Minister of Communications must be examined.

As well, why did provincial, CRTC and DOC objectives and policies conflict? In other words, given that the Commission's decisions acted as a catalyst for negotiation, one must ask why they did so.

OVERLAPS IN OBJECTIVES

i. The Province-Building Concept

The concept of "province-building" is a useful point of departure for an analysis of the effects of political negotiation on cable regulation in Manitoba and Saskatchewan. "Province-building," as the term implies, describes the role of provincial states in activities geared toward the management of provincially-oriented social and economic development.[1] The concept itself is simple, but it is fundamental for an explanation of intergovernmental relations in Canada. Its importance lies in a recognition and emphasis on the fact that, in the Canadian federal system, the provincial states possess the necessary institutional, bureaucratic and administrative powers to implement their own developmental policies. Thus, one must look beyond the federal arena to understand intergovernmental relations and regulation in the Canadian context.

The concept of "province-building" has been used to explain both a growth in provincialism and the source of federal-provincial conflict.[2] The broadening scope of province-building activities has resulted in overlaps between provincial and federal (or nation-building) activities and objectives. Provincial development policies have both caused federal-provincial conflict and, at the same time, provided a basis for provincial co-operation.

Province-/nation-building suggests that the classical view of the nature of federalism, a view which sees activities and responsibilities of the federal and provincial states as separate and autonomous, does not conform to the current status of Canadian federalism.[3] First, the overlap in provincial and federal activities has bridged the division of constitutional responsibilites of the two levels of government set out in the British North America Act. In the case of (tele)communications where the constitution is silent (with the exception of a reference to "telegraph lines"), the evolution of interjurisdictional activities, it seems, precludes a return to the classical view of a division of federal-provincial responsibilities.[4] Second, neither the federal nor provincial governments view their responsibilities in the classical sense. Based on their concept of the Canadian community, the provinces perceive a right and responsibility to represent provincial/regional interests. The federal government, on the other hand, recognizes provincial/regional interests and

responsibilities as part of a "national interest." However, that national interest, which is seen as representing the national community, is considered to prevail over the aggregate and/or individual interests of a region or province. Policies supporting an overriding "national interest" dictate the need for a form of centralized decision-making which implicitly (or through consultation) takes provincial/regional interests into account. The provincial concept of interests, on the other hand, assumes a decentralized process of decision-making in which the aggregate of provincial/regional interests represent the "national interest."[5]

In intergovernmental relations and negotiation the federal government and the provinces are operating with different assumptions about the nature of the federal system and about how interests are being represented in policy-making. These assumptions about rights and responsibilities underpin federal and provincial development activities and give them ideological justification.

ii. Application of the Province-Building Concept

Provincial Development

Since federal-provincial negotiation in Manitoba and Saskatchewan centred on the hardware ownership issue, one must ask why the provinces initiated full lease policies. The concept

of "province-building" offers a broad, but partial explanation. In both Manitoba and Saskatchewan the policy was introduced, in part, to ensure that cable technology would be developed to incorporate provincial interests and objectives.

The full lease policies would protect and expand MTS's and Sask Tel's traditional roles as suppliers of provincial telecommunication services. Further, because of the broadband capacity on cable distribution systems, crown corporation control of the distribution hardware could be used to foster the development of future telecommunications technology to meet provincial needs. The use of crown corporations to develop "an integrated telecommunications system" in Saskatchewan and an "electronic highway" in Manitoba were explicit goals in the provincial hardware ownership policies.

The DOC's Agenda

The notion that competing drives for province- and nation-building provides a basis for federal-provincial co-operation offers insights into the DOC's 1970s agenda. The introduction of federal-provincial conferences of communications ministers may be attributed partly to the general phenomenon of "executive federalism" which characterized the intergovernmental scene of the 1970s.[6]

However, the DOC's desire to develop a national telecommunications system required the co-operation of

provincial governments. The Department was faced with a majority of provincially-regulated telephone companies, provincial initiatives in telecommunications development and provincial demands for expanded authority over cable services. Thus, the policies set forth in the DOC's position papers and at the federal-provincial conferences established the federal Minister's agenda for consultation and co-operation. Provincial rejections of the federal scheme at the conference level created the agenda for bilateral negotiations based on administrative agreements for shared jurisdiction over cable services. The federal Minister's agenda was important in setting the context for negotiations in Manitoba and Saskatchewan. The DOC's desire to enlist provincial co-operation in national strategies for telecommunicatons may explain why the Department, despite established CRTC policies, was willing to consent to Manitoba's and Saskatchewan's hardware ownership policies.

An Alternative to Judicial Review

The drives for province- and nation-building may also explain why the two levels of government chose to negotiate on the question of cable jurisdiction rather than to use the courts to determine constitutional responsibility. As Donald Smiley has noted, "...the evolving patterns of judicial review have been somewhat unresponsive in re-delineating the respective powers of the two levels of government as circumstances change."[7] The BNA

Act, by its delegation of exclusive powers to the federal and provincial governments, does not provide for circumstances where both levels of government are active in the same area of development. The concept of exclusivity of constitutional jurisdiction is exemplified by Lord Atkin's famous interpretation in which he described the Act as a vessel which must retain "...the watertight compartments which are essential features of her original structure."[8]

Judicial review of radio jurisdiction in 1932 and cable television in 1965 determined that the federal government had exclusive jurisdiction over the new technologies. In both cases the concept of exclusivity was maintained when the courts rejected shared jurisdiction on the basis of the "confusion and inefficiency" that would result. Thus, in considering jurisdiction over the technologies, federal responsibility over "telegraphs" under section 91 of the BNA Act was extended to include radio and cable television.[9] The concept of exclusivity, however, does not always conform to political reality. Cable operations have features of both a broadcasting undertaking and a common carrier. Thus, any development in the field of cable presupposes an effect on broadcasting (a federal concern) and telecommunications carriers (in most cases in Canada, a provincial concern). Both levels of government, therefore, had an interest in cable development. The nature of judicial review may lead governments to seek political rather than legal answers to jurisdictional questions. As Garth Stevenson has noted, "...a

judicial solution tends to be clear cut and uncompromising; the winning side wins totally, and the losing side receives nothing."[10] By contrast, the success of negotiations at a political level is dependent upon a degree of conciliation. By engaging in political negotiation, the competing parties may achieve a satisfactory compromise whereby both provincial and federal interests are satisfied.

In addition, from a tactical standpoint, clear cut answers to the question of jurisdicton may suit neither level of government. As the DOC's Green and Grey papers illustrate, one of the reasons federal-provincial consultation was initiated was a federal interest in regulating interprovincial and international aspects of telephone systems and in closed circuit operations. In the case of telephone systems, federal jurisdiction is limited to Bell Canada and B.C. Tel. The courts have yet to decide on the question of closed circuit undertakings. Thus, political negotiation provided a mechanism for the federal government to become involved in areas where jurisdiction was unclear and in areas under provincial control.

The provinces, on the other hand, used political discussions to air their regional and provincial concerns and to express their rights to jurisdiction. At the 1973 and 1975 conferences, the "all or nothing" position maintained by the provinces indicated their desire and intent, despite previous court decisions, to expand their regulatory scope beyond common carrier aspects of telecommunications. As Alan Cairns has

observed,

> ...[t]he BNA Act, and particularly the division of powers, has always been approached in a spirit of political calculation by those who worked it. Attitudes to the courts and to judicial review have not been immune from strategy considerations determined by the possibility of winning or losing in that cloistered arena of decision-making.[11]

iii. Limitations of the Province-Building Concept

The broad concept of province-/nation-building offers only a partial explanation of the source of federal-provincial negotiation in Manitoba and Saskatchewan. The overlaps in DOC and provincial activities provided a basis for federal-provincial co-operation on the hardware ownership issue. For instance, the Saskatchewan government's full lease policy was accepted in principle by the DOC as early as 1974. Manitoba's full lease policy was recognized in the province's 1976 agreement with the DOC for shared authority over cable services.

However, federal-provincial conflict over hardware ownership policies did occur between the provinces and a third actor, the CRTC. Moreover, the issue of hardware ownership created conflict within the federal government between the policies and objectives of the DOC and the CRTC, a fact which cannot be ignored when considering the source of negotiation.

The province-/nation-building concept implies that intergovernmental relations involve only two actors, the federal

and the provincial governments. The concept, therefore, cannot explain the sources of federal-provincial conflict in the Manitoba and Saskatchewan cases. Further, the broad notion of development does not suit an analysis of the CRTC's interests and priorities. While the Commission possesses a nationally-oriented mandate to regulate the Canadian broadcasting system, it has neither the scope nor the powers vested in federal and provincial states.

At this point it is useful to depart from the broad concept of province- and nation-building and consider a derivative of the notion; the observation that federal and provincial governments have equivalent policy instruments. Inquiry along these lines helps to explain the finer details on the question of why federal-provincial negotiation occurred in Manitoba and Saskatchewan. A consideration of policy instruments also aids in an explanation of the CRTC's role in the question.

OVERLAPS IN THE USE OF POLICY INSTRUMENTS

An important aspect of province-building is the recognition of provincial government access to policy instruments similar to those used federally. Overlaps and conflicts in federal and provincial activities in a given area of development may well result from a situation where each is using policy instruments to achieve either national or provincial objectives. As Richard Simeon suggests, "[t]he reality today is that we have two levels

of aggressive governments, often pursuing competing goals, and seeking greater control over the whole range of contemporary policy instruments."[12] In this section, the overlap in the use of regulatory instruments for cable will be examined as a source of federal-provincial conflict and negotiation.

i. Regulation

One might suggest that the CRTC's hardware ownership policy was a mechanism through which the Commission could protect and expand its existing mandate to regulate "broadcasting receiving undertakings" but the policy also indirectly expanded the CRTC's existing regulatory scope. Since the amplifiers and service drops are keys to the provision of non-programming services, the Commission's hardware ownership requirements for cable television licensees guaranteed that new services would be initiated with a view to CRTC policies and objectives for the national broadcasting system. Moreover, the condition that cable licensee contracts with telephone companies required CRTC approval gave the Commission indirect regulatory authority over telephone/cable company relationships.

Thus, in the case of cable technology, the question was not whether to regulate its development but rather how regulation would or could be initiated. Questions of cost versus benefits of government intervention apparently did not enter into the picture. Richard Simeon has illustrated this tendency with the observation that as more areas become subject to intervention by

federal and provincial governments, the "politics of scarcity" or normative questions of "who gets what" predominate over objective questions of efficiency and effectiveness.[13]

The overlap of federal and provincial intervention in the area of telecommunications forces a broad definition of regulation both as a government function and as an instrument. Traditional economic definitions which see the regulatory function as "...a political-administrative process designed to correct market failure..." ignore the desires of governments in the Canadian federal system to expand and protect their roles in a given area of intervention.[14] To distinguish regulation from other policy instruments by narrow definitions of "economic regulation" masks the social and political rationales for government intervention in the federal system.[15] The Manitoba and Saskatchewan case studies indicate that regulation, as an instrument, may appear in many forms and may be implemented for reasons unrelated to market considerations.

Regulatory Instruments

With the introduction of cable technology, at least three regulatory instruments were apparent in Manitoba and Saskatchewan. First, the CRTC, a federal regulatory agency was established in 1968 with a predominantly social mandate to regulate cable television with a view to statutory policy set out in the Broadcasting Act. The Commission's tools to

accomplish this role were its licensing power and its powers to make policies and regulations with respect to "broadcasting receiving undertakings." Second, both provinces used existing crown corporations, Sask Tel and MTS, to regulate the development of cable. Although the enabling legislation of the two telephone companies differ in many important respects, their monopolies on rights of way and provision of the provincial telecommunications systems gave the provincial governments and the crown corporations substantial regulatory authority over the development of cable. This was particularly evident in Saskatchewan's case where signal delivery contracts were initially denied to private cable applicants. Underlying the provincial rationales to use the crown corporations was the socially-oriented "public utility" goal of extending cable services, on an equitable basis, throughout the provinces. Finally, the Saskatchewan government used a co-operative ownership scheme as a way to regulate the development of cable television in the province. Thus, indirect regulation of cable television through grants and loans to cable co-operatives, illustrates a third form of regulation.

ii. The Choice of Regulatory Instruments

Political rationales for regulating the development of cable technology have been explained in a broad sense as a desire to protect and expand existing regulatory scope. However,

one must ask why particular instruments of regulation were chosen and why particular policies were initiated to achieve regulatory objectives.

The choice in instruments may be explained in part by constitutional factors. For instance, Michael Trebilcock et al have suggested that in cases where the constitution (or judicial review) allocates regulatory authority to one level of government, direct regulation is substituted by the use of public enterprise.[16] While Pacific Western Airlines, a new crown corporation, was used as an example, the concept of substitutability is also useful in explaining the choice of instruments in the Manitoba and Saskatchewan cases where existing public enterprises were used as instruments of regulation.

The federal government, through judicial review, was given the authority to regulate broadcasting receiving undertakings. While judicial review of cable television jurisdiction had been limited to a lower court decision, federal jurisdiction was upheld. Thus, the CRTC was assigned the responsibility to regulate cable television in the 1968 Broadcasting Act. As the case studies indicate, neither the Saskatchewan nor Manitoba governments challenged the CRTC's right to license cable television. Conflict arose later on the hardware ownership conditions that the Commission attached to the licences. However, the two provinces used the provincial telephone companies to regulate the development of cable television to

suit provincial interests. Indirect regulation through signal delivery contracts with the cable operators provided a substitute for direct regulation.

Because the provincial telephone companies were not new policy instruments, however, the concept of substitutability of instruments provides only a partial explanation. Desires of the provinces to integrate cable services within the provincial telecommunications systems dictated a role for the existing telephone companies. Thus, the decision to use provincial telephone companies as an instrument of regulation also reflected provincial objectives to protect and expand Sask Tel's and MTS's roles as tools for provincial development. The hardware policies were both used to regulate the development of cable in the two provinces and to protect the telephone companies' historic autonomy from CRTC regulation. Conversely, CRTC's hardware ownership policy was both a means to regulate the cable licensees and to protect the Commission's control over cable companies from telephone company encroachment.

The use of co-operative enterprise in the Saskatchewan case fits more comfortably into the substitutability theme since the co-operative scheme was initiated as a part of the government's 1972 cable policy. Established rules regarding eligibility requirements of cable licensees prohibited both the Saskatchewan government and Sask Tel from obtaining cable licences. However, co-operative ownership, which had been used successfully as a substitute for nationalization in Saskatchewan for many years,

provided an alternative way to influence cable television development.[17] Indeed, Saskatchewan's development of co-operatively owned cable television applicants was identified by the minister responsible as a means of overcoming constitutional authority of the federal government in this area: "...because the Province has no jurisdiction in broadcasting, we have taken the position that we will facilitate, support and encourage the development of non-profit, community-controlled organizations for the provision of cable television services."[18] Both financial assistance to the co-ops and Sask Tel's monopoly on the provision of telecommunications services were used in an attempt to regulate the development of Saskatchewan's cable television system.

Finally, the DOC's policy of consultation may also be explained, in part, as a choice of instruments. As Bruce Doern has suggested, federal-provincial relations and the constitution may exhibit the use of direct regulation in some cases. Thus, "[i]in some areas of policy it is politically (and legally) easier for the federal government to 'spend' its way into involvement by, for example, funding research or carrying out research, or by exhorting through consultation and information gathering mechanisms."[19] One might consider the DOC's choice to issue position papers and to initiate conferences as a choice in policy instruments to achieve its goal of establishing a national telecommunications system; a choice dictated in part by constitutional uncertainty and by a need to solicit provincial

co-operation in the national plan.

Thus, overlaps in federal and provincial uses of regulatory instruments were apparent with the introduction of cable technology in Manitoba and Saskatchewan. However, the CRTC and the provincial governments had different objectives with respect to the development of cable services. The types of regulatory instruments involved on the federal and provincial levels dictated different policies to achieve these objectives. Thus, federal-provincial regulatory conflict was framed by the way regulation would be used to develop cable services and by the policies established to implement that regulation. At this point it becomes clear that the hardware ownership issue was not the only issue involved in the Manitoba and Saskachewan cases. The central issue was how cable services would be regulated and which form of regulation would dominate.

PROVINCIAL REGULATORY ENVIRONMENTS

Although the full lease policies introduced in Manitoba and Saskatchewan shared a common developmental rationale, they were introduced under different circumstances in each province. The case studies indicate that the Saskatchewan and Manitoba governments had different incentives to enter into negotiations over cable jurisdiction. Therefore, one must ask what factors specific to Saskatchewan's and Manitoba's regulatory environments may have influenced their choices in policies and

why the CRTC's policies and decisions created a need for federal-provincial negotiation.

Manitoba

The Manitoba case study indicates that federal-provincial negotiation resulted from two factors. First, the Manitoba government sought to resolve a conflict of economic interests between the Winnipeg cable operators and the MTS. The conflict was framed by a desire of both the cable operators and the telephone company to provide distribution equipment to serve rural cable operators and to deliver non-programming services. Both MTS and the cable operators wanted to expand their existing roles in the Manitoba telecommunications environment. The Manitoba government reacted by introducing a full lease policy based on the rationale of provincial telephone system integration with MTS continuing its historic role as sole provider of the telecommunications system. Second, since the cable companies were regulated by the CRTC, the economic conflict turned into a federal-provincial conflict. The CRTC's policies, established on a national basis, were seen as a direct encroachment on Manitoba's policies and objectives. It is important to note that Manitoba's conflict with the cable companies appears to be repeating itself in Saskatchewan with the current issue of fibre optics versus satellite distribution of services.

The conflict of economic interests between provincially-owned telephone companies and federally-regulated cable operators underlines the importance of recognizing the mix of public and private enterprises operating in the same environment as a prominent characteristic of the Canadian economy. While it is beyond the scope of this thesis, further investigation of the economic conflict between public enterprises (either federal or provincial) and private enterprises as they are manifested as intergovernmental conflict would be a useful contribution to the literature on federal-provincial relations and regulation. Current developments in the area of non-programming services in the three prairie provinces where telephone systems are government-owned would provide a data-base for such an investigation.

For the purpose of this analysis, however, the important point is that the conflict of economic interests between MTS and the cable companies must be identified as a source of federal-provincial conflict. Aspects of the CRTC's policies and the Commission's eventual choices for cable licensees for rural Manitoba made it necessary for the Manitoba government to negotiate an agreement with the DOC. The agreement was necessary because the Commission's decisions conflicted with Manitoba's full lease policy that had been established in reaction to the cable companies' expansion plans. The DOC's agenda to negotiate bilateral agreements must also be identified as a cause for

negotiation in the Manitoba case. Finally it should be recognized that open conflict with the CRTC over hardware ownership occurred after negotiations with the DOC resulted in the Candada-Manitoba Agreement. The CRTC's second set of decisions, where the terms of the Agreement were repudiated, led to a second stage of federal-provincial negotiation. Thus, one might argue that the DOC-provincial accord was as much a cause of federal-provincial conflict and negotiations as the CRTC's policies and decisions for Manitoba cable licensees.

Saskatchewan

The Saskatchewan case indicates that federal-provincial negotiation resulted from different circumstances than in Manitoba. The evidence presented indicates that Sask Tel had developed a full lease policy by 1971. That policy may be attributed to a broad desire to protect and expand the role and economic viability of the provincial telephone company. However, unlike the Manitoba situation, cable television in Saskatchewan was limited to a few small rural systems. The CRTC's lift on the microwave ban presented an opportunity for the Saskatchewan government to introduce a comprehensive plan to influence the manner in which cable television was to develop in the province. Thus, in the government's 1972 cable initiative the hardware ownership policy was adapted to much broader social and cultural objectives.

The co-operative ownership policy was designed to ensure community access to the cable television system which the government felt would be inhibited if licences were awarded to private companies. The ideological basis of the NDP government's policy was pointed out by Saskatchewan's Minister of Telephones, John Brockelbank in his October 3, 1972 statement: "...freedom of speech also means freedom of access to the media, and this government, for one, wants a democratic approach to cable television."[20] The non-profit status of the co-operative system would ensure profits would go back into programming and the government's intent to treat cable television as a public utility would ensure extension of services to smaller communities throughout the province.

Sask Tel's ownership of the cable distribution system, therefore, was tied to the provincial objectives for cable television development. Initial costs for the co-operatives would be reduced because the provincial crown corporation would supply the distribution system, including expensive amplifiers and service drops. Because Saskatchewan's hardware ownership policy was introduced in conjunction with the co-operative ownership scheme, the provincial government's relationship with the CRTC was different from that of Manitoba's. Indeed, the province and the Commission shared the community access objective although the means through which the objective would be met were different. Pre-decision conflict with the CRTC was limited to Saskatchewan's policy that denied private applicants

access to Sask Tel signal delivery agreements which the Commission perceived as an encroachment on its licensing authority. However, this procedural conflict was rectified before the Commission's February 1976 hearings.

Thus, the regulatory environment in Saskatchewan was quite different from Manitoba's. The province was apparently confident that the cable television policy, both with respect to Sask Tel hardware ownership and co-operative ownership, would be accepted by the Commission. Indeed, one might argue that until the CRTC's July 1976 decisions it was not necessary for the province to negotiate on the question of jurisdiction. This resulted in a different attitude to the DOC's agenda to enter into agreements for shared jurisdiction. Finally, although the CRTC's decisions, like its decision for Manitoba, acted as a catalyst for negotiation, Saskatchewan's initial cable policy put the province in a very different bargaining position. Through its cable television policy, the Saskatchewan government had built an important resource which could be used in negotiations with both the CRTC and the DOC.

When the CRTC rejected provincial ownership of the cable distribution system and awarded licences to only two of the provincially-developed co-ops, Saskatchewan decided to enter into federal-provincial negotiations over jurisdiction. Like Manitoba, Saskatchewan's incentive to negotiate was based partly on the hardware ownership issue. However, Saskatchewan's co-operative scheme was reformulated into a closed circuit pay

TV plan. A new issue, pay television jurisdiction, was introduced and the Saskatchewan government's incentives to negotiate broadened. Thus, the stakes involved in the negotiations with Saskatchewan differed substantially from those in Manitoba.

CONCLUSION

The Manitoba and Saskatchewan case studies illustrate that negotiation over cable jurisdiction resulted from a combination of factors in the federal-provincial relations and regulatory environments. Three factors have been identified as significant.

First, and most important, were the overlaps and conflicts among the DOC, provincial and CRTC regulation and policies for cable development. This has been identified as the most crucial variable because it set the context for negotiations. Moreover, while broad similarities have been identified in Manitoba and Saskatchewan regulatory initiatives, important differences in those initiatives created different incentives for the two provinces to enter into negotiations.

The second important variable was the DOC's agenda to negotiate administrative agreements with the provinces on shared jurisdiction. Had bilateral negotiation not been on the federal Minister's agenda, the provinces would have been left to the traditional procedure of appeals to federal cabinet and the federal court to air their complaints. Furthermore, the DOC's

policies to co-ordinate the national telecommunications system caused conflict between DOC and CRTC activities and policies which became significant as negotiations with the two provinces proceeded.

Finally, the CRTC's decisions for cable television licensees in Manitoba and Saskatchewan provided a catalyst for negotiation among the Commission, the DOC and the provinces. It may be argued that the conditions for federal-provincial regulatory conflict were there before the Commission issued those decisions. Thus, given the federal-provincial relations and regulatory environments existing in the two provinces, the decisions brought the conflict to a head and created a need for the provinces to enter into negotiations.

ENDNOTES

1. The concept of "province-building" is introduced in Edwin R. Black and Alan C. Cairns, "A Different Perspective on Canadian Federalism," in J. Peter Meekison (ed.), Canadian Federalism Myth or Reality, (Toronto: Methuen, 1968), pp. 81-97.

2. The "province-building" concept has been used most often with reference to provincial resource-based development and industrial development. The concept has also been employed from a number of different perspectives. See for example: John Richards and Larry Pratt, Prairie Capitalism: Power and Influence in the New West, (Toronto: McClelland and Stewart Ltd., 1979); Garth Stevenson, "Political Constraints and the Province-Building Objective," Canadian Public Policy, VI Supplement, (1980) , pp. 265-274; Alan Tupper, Public Money in the Private Sector, (Kingston: Institute of Intergovernmental Relations, Queen's University, 1982); Richard Simeon, "Natural Resource Revenues and Canadian Federalism: A Survey of the Issues," Canadian Public Policy, VI Supplement, (1980), pp. 182-191; and Alan C. Cairns, "The Other Crisis of Canadian Federalism," Canadian Public Administration, Vol. 22, No. 2, (1979), pp. 175-195.

3. For different notions about the nature of the federal and provincial division of powers see: Edwin R. Black, Divided Loyalties: Canadian Concepts of Federalism, (Montreal: McGill-Queen's University Press, 1975); J.R. Mallory, "The Five Faces of Federalism," in P.A. Crepeau and C.B. Macpherson (eds.), The Future of Canadian Federalism, (Toronto: University of Toronto Press, 1965), pp. 2-15; Garth Stevenson, Unfulfilled Union, (Toronto: Gage Publishing Ltd., 1982), Chapter 3, "Two Concepts of Canadian Federalism," pp. 40-63; and Pratt and Richards, Prairie Capitalism, pp. 3-9.

4. The British North America Act sets out responsibilities for the federal and provincial governments in Sections 91 and 92. At the time the Act was drafted telegraph lines were the only existing form of telecommunications. Authority over "telegraph lines" was assigned to the federal government. Subsequent technological advances in telecommunications have necessitated judicial review to determine constitutional jurisdiction.

5. See: Richard Simeon, "Intergovernmental Relations and Challenges to Canadian Federalism," Canadian Public Administration, Vol. XXIII, No. 1, (1980), pp. 20-29.

6. The term "executive federalism" was coined by Donald Smiley who defines it as "...the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial interactions." See D.V. Smiley, Canada in Question: Federalism in the Eighties, third edition, (Toronto: McGraw-Hill Ryerson Ltd., 1980), p. 91.

7. Ibid., p. 39.

8. Cited in Black, Divided Loyalites, p. 63.

9. See: In the Matter of a Reference as to the Jurisdiction of Parliament to Regulate and Control Radio Communications, S.C.R., p. 544; Re. Regulation and the Control of Radio Communication A.-G. Can. et al, (1932) 2 D.L.R. 84; and Public Utilities Commission v. Victoria Cablevision et al, (1965) 51 D.L.R. 2d 716. For discussion of judicial review of communication jurisdiction see: Martha Fletcher and Fedrick J. Fletcher, "Communications and Confederation: Jurisdiction and Beyond," in R.B. Byers and Robert W. Redford (eds.), Canada Challenged: The Viability of Confederation, (Toronto: Canadian Institute of International Affairs, 1979), pp. 158-187; David Mullan and Roger Beaman, "The Constitutional Implications of the Regulation of Telecommunications," Queen's Law Journal, 1:4, (1973), pp. 67-92; and J. Fine, "Whither Goes the Wire? The Extent of Federal Competence to Regulate CATV," McGill Law Journal, vol. 18, (1972), pp. 615-623.

10. Stevenson, Unfulfilled Union, p. 194.

11. Cairns, "The Other Crisis in Canadian Federalism," p. 186.

12. Simeon, "Intergovernmental Relations and Challenges to Canadian Federalism," p. 20.

13. Simeon, "Natural Resource Revenues and Canadian Federalism: A Survey of Issues," p. 182.

14. Economic Council of Canada, Reforming Regulation, 1981, xi.

15. For variations on definitions of "economic regulation" see, for example: W.T. Stanbury (ed.), Government Regulation: Scope, Growth and Process, (Institute for Research on Public Policy, 1980), p. 5; Richard J. Schultz, Federalism and the Regulatory Process, (Montreal: Institute for Research on Public Policy, 1979), p. 8; and G. Bruce Doern,

"Regulatory Processes and Regulatory Agencies," in G. Bruce Doern and Peter Aucoin (eds.), Public Policy in Canada, (Toronto: The Macmillan Company of Canada, 1979), p. 160.

16. Michael J. Trebilcock, Douglas G. Hartle, J. Robert S. Prichard and Donald N. Dewees, The Choice of Governing Instrument, (Ottawa: Ministry of Supply and Services, 1982), p. 78. See also: J. Robert Prichard, "The Impact of Regulation," Panel Discussion, Canadian Public Policy, V:4, (1979), pp. 482-485.

17. See: S.M. Lipset, Agrarian Socialism: The Cooperative Commonwealth Federation in Saskatchewan, (Berkeley and Los Angeles: University of California Press, 1950).

18. Department of Telephones, Press Release, "Saskatchewan Policy on Cable Television," 3 October 1972.

19. G. Bruce Doern (ed.), The Regulatory Process in Canada, (Toronto: Macmillan of Canada, 1979), p. 14.

20. Department of Telephones, Press Release, "Saskatchewan Policy on Cable Television."

V. HOW DID NEGOTIATIONS OCCUR?

INTRODUCTION

The preceding analysis suggested that Manitoba and Saskatchewan had different incentives to enter into federal-provincial negotiations over cable jurisdiction. Provincial incentives to negotiate reflected the regulatory environments in each province, including why and how regulatory policies were introduced and developed. Therefore, while both provinces entered into negotiations in reaction to the CRTC's policies and decisions and both had the DOC's offer of an administrative agreement for shared jurisdiction, negotiations occurred differently in Manitoba and Saskatchewan. Manitoba signed an agreement with the DOC and Saskatchewan did not. Yet in both cases, the CRTC was forced to make a major policy compromise on the question of hardware ownership. Also, despite Manitoba's agreement with the DOC stating that MTS could own all the distribution hardware for cable services, it took Manitoba a full year longer than Saskatchewan to attain the CRTC concession.

In this chapter, federal-provincial negotiation over cable jurisdiction in Manitoba and Saskatchewan will be compared. Special attention will be given to the fact that each province

entered into negotiations under different circumstances and with different incentives. How did provincial regulatory circumstances affect the pattern of federal-provincial negotiations in Manitoba and Saskatchewan? Also, why, despite these differences, was the CRTC the actor in the negotiation process to make regulatory compromises on the hardware ownership issue?

ROUTES TO NEGOTIATION

Bruce Doern has recently pointed out that attention to the notion of "province-building" suggests a need to examine bilateral relations between the federal government and individual provinces.[1] He suggests, as the preceding analysis has, that the need for bilateral negotiations in each province reflects different policy circumstances. The Manitoba and Saskatchewan case studies indicate that regulatory circumstances in the two provinces influenced the option for and methods of federal-provincial negotiation over cable jurisdiction.

Manitoba - The Agreement Route

Regulatory circumstances in Manitoba effectively made an agreement with the DOC necessary in order to ensure the CRTC's September 1976 decisions for rural licences would be set aside by the federal Minister of Communications. The Agreement

purported to "delegate" authority over cable hardware and non-programming services to Manitoba and programming services, including pay television, to the federal government.

It is important to note, however, that neither pay television nor non-programming jurisdiction had been clarified by judicial review. Therefore, the Agreement was simply a recognition of federal (DOC) and Manitoba interests and represented a formal understanding by the two parties of their regulatory boundaries. It was an agreement to co-operate.

The Canada-Manitoba Agreement was signed as a result of negotiations between the province and the DOC. The CRTC was not consulted in the negotiations but the DOC planned to introduce telecommunications legislation to secure the CRTC's co-operation through binding cabinet directives. The Canada-Manitoba Agreement, or so it seemed, assured that the "electronic highway" would be developed by the provincially-owned telephone company and that the cable companies' expansion plans would be halted.

Saskatchewan - The 'Non-Agreement' Route

Saskatchewan did not need an immediate solution to counteract the CRTC's July 1976 decisions for the four urban licences so that the province's 1972 regulatory objectives would be fulfilled. Instead, the Saskatchewan government employed two strategies, the freeze on cable television services and the

closed circuit pay television scheme, to open up routes for negotiations with the federal actors.

Refusal to allow any cable licensees access to Sask Tel's distribution system effectively meant that conventional cable television in Saskatchewan would not proceed until negotiations reached a suitable conclusion. This opened up a route to negotiation with the CRTC. The July 1976 closed circuit initiative provided an alternate method of achieving the province's objective for co-operative ownership of cable television. The initiative also opened a route for negotiation for an agreement with the DOC which would embody more than "co-operation." The threat of a provincial pay television system introduced a new jurisdictional issue to the DOC's negotiation agenda. The pay television scheme also indicated a broadening of Saskatchewan's regulatory objectives for cable television. Saskatchewan wanted to establish a basis for provincial jurisdiction over closed circuit cable television. Thus, whereas the stated objectives in the province's 1972 policy were incorporated in the 1976 policy, the goals were much wider.

RESOURCES IN NEGOTIATION

'Executive Federalism'

Examination of the day-to-day process of federal-provincial negotiation has been rather limited in Canadian public policy

literature. While it has been generally accepted that federal-provincial relations involve aspects of both "confrontation and collaboration" and have varying degrees of effectiveness, the negotiation process is seldom examined in its own right. Instead, the "model" of executive federalism is used to describe the administrative machinery for intergovernmental interaction.[2] The institutions which have developed to accommodate federal-provincial interaction, most notably the federal-provincial conference, have been assessed in terms of their effectiveness in federal-provincial "conflict management" or their effect on federal policy-making and the cabinet-parliamentary system of government.[3] Where the negotiation process has been examined in depth, analysis has been on the federal-provincial conference or activities which involve the federal government and "the provinces."[4]

Federal-provincial negotiations over cable jurisdiction in Manitoba and Saskatchewan occurred on a bilateral basis. Also, a third actor, the CRTC, was involved in the negotiations. Factors specific to Manitoba and Saskatchewan's regulatory environments had a significant effect on the manner in which negotiations occurred in each province. Therefore, the general model of executive federalism as diplomacy and/or bargaining among all eleven governments cannot adequately explain why negotiations occurred differently in Manitoba and Saskatchewan. However, Richard Simeon's observation that actors involved in federal-provincial negotiations have varying "political

resources" offers insights into the way negotiations occurred in the two provinces.

Objective and Subjective Political Resources

Simeon suggests that the actors in federal-provincial negotiations hold "political resources" which are used in certain strategies and tactics in the negotiation process.[5] Here Robert Dahl's definition of a political resource as "...anything that can be used to sway the specific choices or strategies of another individual..." has been adopted by Simeon.[6] Further, he suggests both "objective" and "subjective" political resources are employed in the negotiation process.[7] An example of an objective resource would be legal authority such as the provincial telephone companies' statutory rights of way or the CRTC's power to grant licences to cable operators. Subjective resources, says Simeon, are the most common resources in the negotiation process. They represent a psychological dimension in the process and depend upon the perception and beliefs of the participants about what resources they or other actors in the negotiations actually hold. In comparing the Manitoba and Saskatchewan cases, it is useful to ask what political resources each actor possessed and how these resources were used in negotiations.

Routes and Resources

Manitoba's bilateral agreement with the DOC limited its resources in the negotiation process. For example, each province used the telephone companies' statutory monopolies as "objective resources" in the negotiations. Both Manitoba and Saskatchewan used the resource to freeze cable television services until the CRTC conceded its policy on hardware ownership. However, MTS could not deny access to its system until the CRTC re-issued the licences set aside by Cabinet as a result of the Canada-Manitoba Agreement. Second, since the Agreement "delegated" authority over pay television to the federal government, Manitoba could not bring the issue of pay television jurisdiction into the negotiation process.

On the other hand, the pay television issue became Saskatchewan's most valuable resource. Closed circuit pay television provided a variety of options for the province in its negotiations with federal authorities. First, if federal-provincial negotiations failed, Saskatchewan could use the scheme to achieve the original provincial objectives by developing the closed circuit co-operatively-owned pay television network and refusing access to the CRTC licensees. Second, the establishment of the pay television network provided a basis to claim provincial jurisdiction over closed circuit cable services. Finally, the initiative provided a resource in negotiations with the DOC and later with the CRTC.

It is difficult to assess whether CPN was a subjective or objective resource. To the extent that the co-operatives who had failed in bids for CRTC licences formed the network and proceeded with plans for its implementation, CPN was an objective resource in Saskatchewan's negotiations. However, CPN's status was uncertain during the negotiation process. The government appears to have retarded the network's development until negotiations with the DOC and the CRTC on the hardware ownership issue were completed. Delays with the loan guarantee and Sask Tel's delivery agreement are examples. In this sense, the threat of a provincial pay television network was a subjective resource in the negotiations. One might argue that CPN would have been less valuable as a resource in the negotiation process if it had been fully established before the Sask Tel hardware ownership issue was resolved through negotiations. In order for the pay television issue to be a resource in federal-provincial negotiations, development of CPN had to continue. But if CPN began full-scale operations before negotiations over hardware ownership were concluded, the pay TV scheme would lose its value as a resource. Unlike the 1972 cable development plan, the ideological component of co-operative ownership appears to have been subsumed by the provincial government's desire to attain the goal of an integrated telecommunication system.

The CRTC also possessed objective resources. First, the Commission's statutory mandate in the Broadcasting Act and its

powers to establish policies and regulations to implement the objectives set out in the Act can be considered objective resources. The Commission was also empowered to grant and set conditions of licence for cable television undertakings. The CRTC's statutory resources were limited in one respect. Under the Broadcasting Act the federal Minister of Communications could set aside a CRTC licensing decision.

Legislation introduced by both the DOC and the Saskatchewan government were used as resources in federal-provincial negotiations. In the sense that the Telecommunications and Cablecasters Acts did not become law, they were subjective resources. The DOC's promise of legislation to give the federal minister statutory authority to delegate responsibilities to provincial governments and to issue binding directions to the CRTC was a resource in its negotiations with Manitoba. The legislation was also a resource in the DOC's policy conflicts with the CRTC to the extent that the Commission was uncertain of its future role in regulation. The Cablecasters legislation, in claiming statutory jurisdiction over closed circuit cable, was used by Saskatchewan to underline its intentions to proceed with CPN.

PATTERNS IN NEGOTIATION

Manitoba - Intragovernmental Conflict

The CRTC reacted to the Canada-Manitoba Agreement by questioning its legality and refusing to be bound by its terms. Intragovernmental conflict between the CRTC and the DOC's policies on hardware ownership might have been resolved had the federal telecommunications legislation become law. However, once the federal Minister had set aside the CRTC's licences for Brandon, Selkirk and Portage la Prairie, the DOC's existing statutory control over the Commission's activities had been spent. Thus, negotiations in Manitoba were suspended until the CRTC issued new licences for rural Manitoba communities in August 1977. In these decisions, the Commission modified its hardware ownership policy to allow MTS ownership of amplifiers but insisted that cable licensees retain ownership of the service drops. The Commission rejected the DOC-Manitoba accord by stating that its statutory authority and responsibility could not be subjected to limitations imposed by other sources unless they were in conformity with the mandate set out in the Broadcasting Act. The Manitoba government then reacted, as Saskatchewan had a year earlier, by refusing to allow rural licensees access to MTS's distribution system until the regulatory conflict was resolved. In doing so, the Manitoba government changed its negotiation route from the DOC to the

CRTC.

Saskatchewan - Trilateral Negotiations

In Saskatchewan, negotiations with both the DOC and the CRTC continued until the province achieved its goal of Sask Tel hardware ownership in September 1977. Saskatchewan's "non-agreement" strategies resulted in a substantially different negotiation pattern than in the Manitoba case. Saskatchewan was not willing, as Manitoba had been, to give up authority over pay television. The closed circuit initiative resulted in negotiations with the DOC where the province demanded more than a formal recognition of federal rights to regulate national aspects of programming; Saskatchewan wanted a role in the regulation of regional aspects of programming.

The CRTC's position in the Saskatchewan negotiations was also different than in the Manitoba case. First, the development of a closed circuit network meant Sask Tel might continue to refuse CRTC licensees access to the cable distribution system and effectively circumscribe federal regulation. Second, the federal Minister was applying pressure on the Commission to speed up the introduction of a national pay telelvision system.

After a December 1975 hearing, the Commission had concluded that the extensive development of pay television would be premature. The federal Communications Minister disagreed and in June 1976, one month before Saskatchewan revealed its pay TV

plan, set out a series of conditions for the introduction of a national pay television system. The Commission held another hearing and on the "advice" of the Minister was conducting a study on the subject of pay TV during the period of negotiations with Saskatchewan.[8] Thus, the Saskatchewan pay TV initiative put the CRTC in a rather awkward position in dealing with the question of a national pay television system. This, coupled with the Saskatchewan freeze on conventional cable television, the Saskatchewan-DOC negotiations for shared jurisdiction and the introduction of the federal telecommunications legislation, imposed pressures on the Commission that were absent in the Manitoba negotiations. This may explain why the CRTC entered into direct negotiations with the Saskatchewan government which were apparently concluded two months before the Commission's June 1977 hearing on the hardware ownership issue. Furthermore, the Saskatchewan Minister's statements in the legislature and the abrupt end to Saskatchewan's bilateral negotiations with the DOC suggest a pattern of trilateral consultation among the three actors. By September 1977, Saskatchewan had achieved what Manitoba had been denied by the Commission one month before: Sask Tel ownership of the cable distribution system. Manitoba's freeze on rural cable television services eventually led the CRTC to compromise its hardware ownership policy for licensees in the province. However, the CRTC's decision to allow MTS ownership of the cable distribution system was not made until September 1978, a full year after the Saskatchewan concession.

THE OUTCOMES OF NEGOTIATION

Although Manitoba and Saskatchewan entered into negotiations under different circumstances and negotiations occurred differently in each province, the outcomes of federal-provincial negotiation were similar. The CRTC, despite its regulatory objectives, compromised its policy on hardware ownership for cable licensees in Manitoba and Saskatchewan. One must consider why the federal regulatory body became the actor in the negotiation process to resolve federal-provincial jurisdictional conflict by making a major policy compromise.

The CRTC's Status in Negotiations

Canada's cabinet-parliamentary system of government is characterized by a centralization of decision-making in the executive. The CRTC is an anomaly in the system in the sense that its status as an "independent" regulatory agency does not conform to traditional cabinet or departmental government structures. However, it is equally important to realize that the CRTC's "independence" is a relative one since cabinet does have certain controls over the Commission's activities. One must consider how the Commission's "relative independence" affected the negotiation process and its outcomes.

The Manitoba and Saskatchewan case studies illustrate that governments cannot be viewed as cohesive and indivisible units in the negotiation process. Policy conflicts between the two federal actors, and DOC and the CRTC, had significant effects upon the negotiations. Thus, as Richard Schultz has suggested, one must be aware of the effects of intragovernmental activities upon the process of intergovernmental negotiation. The CRTC's independence in policy- and decision-making created patterns of trilateral negotiations in both Manitoba and Saskatchewan. However, despite the CRTC's independence and intragovernmental conflict, it was the Commission that compromised its policies on hardware ownership.

In a statutory sense, the CRTC's relative independence was illustrated when the federal Minister set aside the Commission's decision for rural Manitoba licences as a result of the Canada-Manitoba Agreement. But the CRTC rejected the Manitoba-DOC accord both by questioning its legality and by maintaining a modified hardware ownership requirement in a second set of decisions for rural licences. Thus, the Minister's statutory authority over the CRTC does not adequately explain why the Commission eventually compromised its hardware ownership policy.

Indirect Hierarchical Control

The outcomes of negotiations in Manitoba and Saskatchewan cannot be directly attributed to the CRTC's status as a "relatively independent" regulatory agency. However, a number of other suggestions can be offered which might explain the CRTC's position in the negotiation process and why it ended up compromising its policy.

First, despite its non-departmental structure, the CRTC is tied to the federal bureaucracy. It was created by legislation and is subject to changes through legislation. Thus, the introduction of telecommunications legislation made the Commission's future role uncertain. Moreover, while the Commission was not bound to follow DOC "advice" such as that offered for the introduction of pay TV, it was obliged to react to the Department's suggestions. Thus, the Commission's bureaucratic relationship with the DOC provided a form of indirect hierarchical control.

Second, the Commission was in a substantially different position than the DOC and the provinces in the negotiations. The CRTC's only resources in the negotiations were its statutory mandate and its powers to grant licences and make policy with respect to its mandate. Thus, whereas the provinces and the DOC could use their respective resources in negotiation strategies, the Commission was limited to two choices with respect to the

hardware ownership issue. It could either continue to impose its hardware ownership requirements on licensees in the two provinces or it could compromise its policy.

Finally, the provinces could freeze cable services with the justification that they were doing so in the long-run interest of provincial development in the area of telecommunications which could occur only if MTS and Sask Tel owned the distribution system. Indeed, crown corporation control of the cable distribution system was the means through which the Manitoba and Saskatchewan governments intended to regulate the development of cable technology. Therefore, it is unlikely they would have given up on the hardware ownership issue had the Commission continued to impose its conditions on cable operators in the two provinces. It was a stalemate situation.

The CRTC, on the other hand, could not halt the regulatory process in the interest of maintaining its hardware ownership policy. Since the provinces were not going to give in, the Commission was forced to adopt "alternative means" of achieving its policy objectives. Thus, when cable operators petitioned the CRTC to amend their licences, the Commission responded by compromising its policy because of the "special circumstances" in Manitoba and Saskatchewan and to avoid further delays in service.

CONCLUSION: WHAT WERE THE EFFECTS OF NEGOTIATIONS?

The Manitoba and Saskatchewan case studies illustrate the importance of examining post-negotiation regulatory environments to understand the effects of federal-provincial negotiations on regulatory practice. Here, the effects of negotiation will be examined from a broader perspective. It has been suggested that jurisdictional negotiation over cable in Manitoba and Saskatchewan occurred because of overlaps and conflicts in federal and provincial objectives and in the use of regulatory instruments. This, coupled with the DOC's agenda for bilateral negotiations and the CRTC's decisions in Manitoba and Saskatchewan, shaped the process of negotiations. Given these observations, the central focus in the analysis will be to examine what negotiation and the CRTC's compromise did to resolve interjurisdictional regulatory conflict.

The Hardware Onwership Issue Revisited

Federal-provincial negotiation centred on the hardware ownership issue. As a result of federal-provincial negotiations, the CRTC was forced to compromise its policy on hardware ownership for cable licensees in Manitoba and Saskatchewan. The CRTC's policy that cable licensees own their own amplifiers and service drops to ensure compliance with federal regulation is no longer applied in the two provinces. MTS and Sask Tel own and

control the provincial cable distribution systems. Thus, the CRTC's compromise resolved the jurisdictional conflict arising from provincial full lease policies.

Examination of the post-negotiation period reveals that with the advent of satellite distribution technology, the hardware ownership issue has been manifested in new forms in Manitoba and Saskatchewan. In Manitoba, the issue is being revisited as a conflict over the ownership of security and control devices for the reception of pay television signal via satellite. Ownership of TVRO's and satellite distribution of cable programming have been and are the focus of dispute in Saskatchewan.

The roles of the provincially-owned telephone companies as sole suppliers of the provincial telecommunications systems are again being threatened. Moreover, the conflict involves the telephone companies and federally-regulated cable operators. Finally, in both Manitoba and Saskatchewan, CRTC decisions regarding satellite distribution are playing into the new scenarios. The CRTC has stated that security and control devices should be owned by cable operators as a condition of licence. The Commission's decisions regarding satellite distribution of American programming have provided an opportunity for cable operators in Saskatchewan to challenge Sask Tel's role as supplier of cable television signals on the newly established fibre optics distribution system.

The Manitoba and Saskatchewan governments maintain their objective of influencing the development of cable services through the integration of the provincial telecommunications systems. The CRTC maintains its statutory objectives set out in the Broadcasting Act which dictates that its policies and decisions are made with a view toward an integrated Canadian broadcasting system. Thus, despite the Commission's compromise, conflicts between federal and provincial objectives remain.

Provincial Regulatory Environments

Provincial regulatory environments have changed significantly since the early 1970s when Manitoba and Saskatchewan introduced their full lease policies. In addition to technological developments such as satellites and fibre optics, advances in new cable services are evident. The CRTC has introduced a national scheme for pay television services and has begun to consider how services of a non-programming nature will be integrated into the national broadcasting system.

In Saskatchewan, the NDP's 1972 co-operative ownership objective was curtailed by the CRTC's licensing decisions for the province's four major cities. Only two of the four government-sponsored co-ops received federal licences. The 1976 closed circuit co-operative pay television objective became subordinate as federal-provincial negotiations over Sask Tel hardware ownership and shared jurisdiction proceeded. When the

province won the CRTC concession on the hardware ownership issue, CPN ceased to be an instrument of government policy and was relegated to the position of competitor with federally-licensed cable operators. The Teletheatre network was an interim compromise between federal and provincial pay television jurisdiction and consisted of a mix between co-operative and private ownership. The provincially-based pay TV network ceased operations when the CRTC's national network began services. Saskatchewan's initiatives to influence the development of cable services in the province are continuing in another form. The Progressive Conservative government which came to power in 1981 is renewing the challenge to federal jurisdiction over cable development with the introduction of a new regulatory instrument. The proposed Cable Services Act declares Saskatchewan's rights to regulate both conventional cable television services and non-programming services. Unlike the NDP's policy to use co-operatives and Sask Tel as forms of indirect regulation, the PC's choice of instrument would institute direct regulation with the establishment of a Cable Services Commission. The provincial regulatory body would have licensing powers similar to those of its federal counterpart, the CRTC.

Changes in Manitoba's regulatory environment are also apparent. With advancements in the area of non-programming services the MTS and the CRTC are initiating experiments. The CRTC has issued experimental licences for non-programming

services with a view to the effects of the new services on the broadcasting system as a whole. MTS's projects, on the other hand, are being implemented with provincial developmental objectives in mind.

Post-negotiation developments in the area of non-programming in Manitoba also provide insights into the DOC's agenda. MTS's non-programming projects are being backed by significant financial assistance from the federal DOC. Thus, unlike the early-to-mid-1970s agenda of federal-provincial co-operation through consultation, the DOC's new agenda appears to have taken the form of co-operation through research and development contributions. The DOC's activities in Manitoba also illustrate an overlap and conflict in regulatory agendas on the federal level. One must ask how the Department's support of MTS endeavours in non-programming services will influence the CRTC's policies and decisions in the area.

Provincial regulatory environments in the post-negotiation period reveal new manifestations of interjurisdictional conflict both in federal and provincial objectives for cable services and in the use of instruments for their development.

The Central Issue

Negotiation over cable jurisdiction in Manitoba and Saskatchewan did little to resolve the question of jurisdiction over cable services in the two provinces. Because negotiation

centred on the hardware ownership issue (in its earlier form), the basic differences in federal and provincial perspectives of and objectives for cable regulation were not addressed. The conflict over provincial full lease policies and the CRTC's hardware ownership requirement was a symptom, not the cause, of interjurisdictional conflict. Overlaps and conflicts among the regulatory agendas of the provinces, the CRTC and the DOC are still apparent.

Changes in the regulatory environments for cable services in Manitoba and Saskatchewan have set a new context for interjurisdictional disputes. The federal-provincial relations environment, including the DOC's agenda, has also changed. However, the central issue of who will regulate the development of cable, for what purposes and which form of regulation will dominate remains the central issue. One might suggest that until this basic issue is addressed in policy-making on both the federal and provincial levels, jurisdictional conflict over cable regulation will not be resolved.

ENDNOTES

1. G. Bruce Doern and Richard W. Phidd, Canadian Public Policy: Ideas, Structure and Process, (Toronto: Methuen, 1983), pp. 63-65.

2. See, for example: Audrey D. Doerr, The Machinery of Government in Canada, (Toronto: Methuen, 1981), pp. 165-189; D.V.Smiley, Canada in Question: Federalism in the Eighties, (Toronto: McGraw-Hill Ryerson Ltd., 1980), Chapter 4, "Executive Federalism," pp. 91-119; Gerard Vieleux, "Intergovernmental Canada: government by conference? A fiscal and economic perspective," Canada Public Administration, Vol. XXIII, No. 1, (1980), pp. 33-53.

3. See, for example: V. Seymour Wilson, "Federal-Provincial Relations and Federal-Policy Processes," in G. Bruce Doern and Peter Aucoin (eds.), Public Policy in Canada, (Toronto: The Macmillan Company of Canada Ltd., 1979), pp. 190-212; and Richard Simeon (ed.), Confrontation and Collaboration--Intergovernmental Relations in Canada Today, (Toronto: Institute of Public Administration, 1979).

4. See: Richard Simeon, Federal-Provincial Diplomacy: The making of recent policy in Canada, (Toronto: University of Toronto Press, 1972).

5. Ibid., p. 11.

6. Ibid., p. 201.

7. Ibid. See: pp. 201-227.

8. See: CRTC, Position Paper on Pay Television Services, (Ottawa, 1978); CRTC, Public Announcement, "Pay Television," 30 June 1976. The CRTC's studies on pay television culminated with a report where the Commission concluded that pay television services were premature. See: CRTC, Report on Pay Television, (Ottawa, 1975).

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