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ADVERTISING AND CANADIAN CABLE TELEVISION — A PROBLEM IN INTERNATIONAL COMMUNICATIONS LAW

By KATHERINE SWINTON*

A. INTRODUCTION

While both Canadians and Americans are generous with rhetoric about good neighbourliness and “the longest undefended border in the world,” there have been periods in which such words are said with tightened lips, as one side or the other pursues unilateral policies that seem to bely belief in the undefended border myth and indicate, instead, support for Robert Frost’s statement that “[g]ood fences make good neighbours.”¹ The last few years have witnessed several examples of unilateral action by Canada in various sectors of the economy aimed at controlling foreign investment and resource export, nationalization of key industries, and regulation of broadcasting in ways that appear inimical to the traditional open relationship with the United States. The purpose of this article is to study one facet of the Canadian-American relationship—specifically, Canadian action taken to regulate cable television operation in Canada and the American reaction to the measures adopted.

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¹ Robert Frost, “Mending A Wall” in *Selected Poems* (Toronto: Holt, Rinehart & Winston, 1966) at 23.

On December 21, 1972, the Canadian Radio-Television Commission² granted an application to amend the broadcasting licence of a Calgary cable television company carrying television signals from a station in Spokane, Washington. In issuing its order, the CRTC included a novel condition in the licence, requiring the applicant to delete or permit the deletion of commercial advertisements received from broadcasting stations not licensed to broadcast in Canada (that is, American stations) on the request of local broadcasting stations with whom it had entered into an agreement on this subject approved by the CRTC. In the vacated spots, the licensee was to substitute advertisements from the local broadcaster or other appropriate replacement material.³ The imposition of this condition was a significant event, which the United States Department of State had awaited with some apprehension since July, 1971, when the CRTC had issued a comprehensive policy statement on cable television in Canada.⁴ The most controversial component of that policy was the termination of the prohibition on altering received broadcast signals. The CRTC would now permit cable television⁵ operators to remove commercial advertising from the signals of stations not licensed to serve Canada and to substitute other material. In the reality of Canadian broadcasting, the unlicensed station was a euphemism for American television broadcasters.

Shortly after the order, on February 13, 1973, the State Department issued a protest to the Canadian government with regard to the Calgary licence. A widespread implementation of this policy, or any other communications policy bearing upon advertising carried by United States television stations, carries grave implications. Canadians are the heaviest users of cable television in the world, and most of the CATV operations rely on American television stations for their signals. Certain border stations in the United States have come to rely on the access provided to Canadian markets by CATV in order to attract an advertising clientele wishing to reach Canadians. The commercial deletion policy and other governmental policies threatened this established situation.

The State Department's protest was the first of many interchanges on the issue of advertising and cable television between Canada and the United States over the next few years. In that period, a wide variety of participants, including domestic courts, regulatory agencies, legislative bodies, and private corporations, had an impact on the dispute and the evolution of cable television policy and law. Their roles and contributions provide an interesting basis for studying the international decision-making process in operation.

The word "international" is used advisedly, despite a tendency towards parochialism which often emerges in studies of Canadian-American relations. Frequently, the relationship is described as unique and isolated from the inter-

² Now the Canadian Radio-Television and Telecommunications Commission, established by S.C. 1974-75-76, c. 49, s. 3(1). Hereinafter referred to as CRTC.

³ Calgary Cable TV Ltd., *Community Antenna Television Ltd.*, 72 CRTC Decisions 364.

⁴ CRTC, *Canadian Broadcasting: A Single System* (July 16, 1971). The contents of this policy will be discussed in the text, *infra*, following footnote 100.

⁵ Hereafter referred to as CATV.

national system. Indeed, while sometimes contentious, the relationship is far more cordial than that between most states. A recognition of interdependency, coupled with a similarity of cultures and, in the past, a Canadian deference to American policy, has led to cooperative efforts to address problems, either institutionally or informally.⁶ While the current broadcasting dispute is geographically a Canadian-American problem that will be worked out through dialogue and cooperation, it cannot be regarded in isolation from the larger system of international relations. The issue involved is communications—who, if anyone, should control the flow of communications in the world and to what extent. There is currently an avid global interest in communications, and that consciousness, plus decisions taken in this larger system, affect the positions adopted by various participants in the Canadian-American dispute. Any decisions taken in the regional context similarly have an impact upon international communications law. In an interdependent world, no regional problem is insulated from the global arena.⁷

B. THE SIGNIFICANCE OF COMMUNICATIONS

Communications is an especially sensitive concern in the world today. Various elite groups seek to dominate the media because of their multiple uses for economic, political, cultural, military, and educational purposes. Any resource which is in limited supply and capable of many uses is valuable because of the law of supply and demand. Telecommunications media fall within such a category of valuable resources because of their scarcity. The number of frequencies available for broadcast use is limited, and excessive demand by any one state for control of the radio spectrum, or large parts thereof, creates the risk of serious interference with the broadcast demands of another state, either by preventing access to the spectrum by that state or by causing technical interference with actual broadcasts of programmes.⁸

Elites in societies today realize the advantages that derive from the control of telecommunications media. Before discussing the uses to which control can be put, one should first consider the impact of telecommunications. The impact of television, and to a much lesser degree of radio, is instantaneous and not delayed, as in the print medium. While the reader must use his ima-

⁶ The International Joint Commission, established by the *Boundary Waters Treaty of 1909* R.S.C. 1970, c. I-20, Sch., is often cited as a prime example of such cooperation. See, for example, M. Cohen, *The Regime of Boundary Waters — The Canadian-United States Experience* (1975), 146 *Receuil des Cours* 219.

⁷ The problem, from one perspective, is communications, since advertisements, which are the focus of the Canadian restrictions, can be regarded as both an integral part of the broadcast and as a vital way to finance programming. Yet from another perspective, the problem is an economic one, with the Canadian measures no more than a commonplace trading measure designed to restrict the flow of a certain class of goods (in this case, advertisements) across the border. It is difficult to regard the economic issue divorced from the communications issue, as further discussion will demonstrate.

⁸ D. Leive, *International Telecommunications and International Law: The Regulation of the Radio Spectrum* (Leyden: Sijthoff, 1970) at 1, 16; H. Leroy, *Treaty Regulation of International Radio and Short Wave Broadcasting* (1938), 32 *Am. J. of Int. L.* 719. As both Leive and Leroy point out, the first efforts to regulate telecommunications at an international level focused on questions of frequency allocation and reduction of interference with broadcast signals.

gination to concretize the information conveyed by print, the television viewer is presented with a picture of reality that he can internalize with little effort. The picture presented may be one which he could actually experience or see in his community, but more significantly, television can extend the viewer's perception of reality from his actual surroundings to environments far beyond his immediate vicinity. As Marshall McLuhan has pointed out, television can create a global village.⁹

A further reason for wishing to control telecommunications lies in the extent of its geographical coverage. With the present state of technology, telecommunications knows no political boundaries in the way that print or telephone does. While a state can prohibit importation of magazines or extension of telephone cables, it is faced with difficulties when radio or television are to be kept out.¹⁰ The state of the art is not yet sufficiently developed to eliminate unintentional spillover of signals from one nation to another. To prevent spillover, intentional or unintentional, a state can only resort to costly and inconvenient jamming methods, which are not totally effective.¹¹

Television, in its conventional form in which signals are transmitted from the broadcasting station directly to home receivers, is a resource with great influence on world order. Coupled with new technologies such as cable television and direct broadcasting by satellites, its range of coverage is extended and its potential uses vastly expanded. For some, the development can only be viewed with foreboding or alarm. Although the technology is not yet sufficiently advanced to permit direct broadcasting from satellites to receivers in a way which is economical, this development will come in the not too distant future.¹² Already satellites can be used for direct broadcasting to community receivers.¹³ Thus, there is an increased international awareness of the importance of telecommunications and a concern for their regulation.

It is a recognition of this potential impact of the telecommunications media and of the uses to which these media can be put that has led various groups to seek control over the media. Clearly, telecommunications are an important tool for acculturation: for introducing and emphasizing the norms of the society and its heritage. In tribal societies, a story-teller—whether a nurse, mother, or village leader—would relate folktales that told of societal norms in a compelling way and within a concrete situation that illustrated the application of norms and dramatized history.¹⁴ Television and radio, while

⁹ M. McLuhan, *Understanding Media: The Extension of Man* (Toronto: Signet Books, 1964), particular chapter 31.

¹⁰ D. Abshire, *International Broadcasting: A New Dimension of Western Diplomacy*, The Washington Papers No. 35 (Beverly Hills: Sage Publications) at 44-45.

¹¹ *Id.* at 47-48.

¹² The year 1985 has been mentioned as a possibility. See Canada/Sweden Working Paper to the Direct Broadcasting Satellite Working Group, A/AC 105/WG. 3/L 1 (April 24, 1970) at 2.

¹³ India and the United States signed the first international agreement to develop a direct satellite broadcasting programme for educational purposes. Signals from the satellite will be received by community receivers without intervention of ground relay stations (A/AC 105/72).

¹⁴ See M. Reisman, "Foreword" to F. Deng, *Dinka Folktales* (New York: Africana Publishing Co., 1974).

used for many purposes, can play to a great extent the same role as the storyteller, relating information about the society and emphasizing what are perceived by at least some elites to be the acceptable norms for that society. The analogy to folktales must not be too closely drawn, for local villagers often had an input into the tales and adapted them, keeping them harmonious with society, whereas television is a passive medium demanding no input from the viewer and often portraying a society that is perceived or desired by the controlling members of society without ever capturing changes in the real world. Furthermore, acculturation in the twentieth century, while greatly dependent on media, also relies on institutions such as schools to inculcate norms and culture.

Nevertheless, telecommunications, because of its predominance, is inevitably an important tool for acculturation. Related to this is its importance as a political tool, whether for forging national unity, or fostering internationalism, or for military purposes. On a national level, telecommunications serve an important role in introducing political leaders, and in promoting awareness of domestic political issues and a common political future. This is closely allied to acculturation, for the norms which one inculcates may include political norms such as respect for individual rights.¹⁵ This is true for developed countries and even more so for developing countries that are newly independent and trying to create a national identity in the face of centrifugal forces such as tribal loyalties or geographical barriers. A national television system can then be a strategic government resource.¹⁶

On an international level, telecommunications can also be a potential political force, this time for promoting international political awareness. The media can be used to facilitate international exchanges of cultural, educational, and technical information in the hope that increased international cooperation and understanding will result.¹⁷ Just as easily, telecommunications on an international level can be used in a manner inimical to peace and security. Rather than use telecommunications to promote internationalism, a political elite in one state may use media for propaganda purposes in an effort to weaken another regime and to acquire political dominance.¹⁸

¹⁵ The importance of telecommunications in this sense is recognized by a recent Canadian government publication, which stated,

The social identity of a country resides in a community of thoughts and ideas, of values, of social and political institutions, a community which can be maintained and developed only through the free flow of expression and the easy dissemination and exchange of information.

Canada, Department of Communications, *Proposals for a Communications Policy of Canada* (Ottawa: Information Canada, 1973) at 8.

¹⁶ P. Laskin and A. Chayes, "Report of the Panel on International Telecommunications Policy" in Am. Soc. of Int. L., *Direct Broadcasting from Satellites: Policies and Problems* (Washington: West Publishing Co., 1975) at 6.

¹⁷ See, for example, Canada/Sweden, Working Paper, *supra*, note 12 at 12, setting out the objectives of an international policy on direct broadcasting from satellites.

¹⁸ Propaganda uses for radio were discovered early, as Leroy shows in his discussion of Germany and other European states in the 1930's (*supra*, note 8 at 728-30). Radio Free Europe, Voice of America and BBC External Service are continuing examples of uses of the media to broadcast information suppressed by the state of the hearers. See also Abshire, *supra*, note 10 at 19-20 (re: German propaganda) and at 22-35 for a discussion of international broadcasting services.

There are groups, other than political elites, that realize the important uses of telecommunications. Telecommunications can also be an important source of economic power. Broadcasting, when carried on as a commercial undertaking, is lucrative for those who own the broadcasting operations, whether networks or individual stations, because of the profits from advertising. It is also profitable for those who advertise on broadcasting outlets. On an immediate level, advertising allows a commercial enterprise to expand its markets, by attracting new customers for its products or by introducing new products to an existing mass market.¹⁹ It also allows the advertiser to economize by creating greater uniformity in demand for products, allowing standardization of products.

In addition, the dependence of the broadcasting industry on advertising, in certain countries such as the United States, allows a business enterprise to structure the output of the communications industry. The adage, "he who pays the piper calls the tune," can be aptly applied to the broadcasting industry.²⁰ The leverage of his economic power allows the advertiser to control the content of what is televised. He can demand that programmes appeal to the widest possible audience even though this may involve stifling controversial material or portraying material in the manner most favourable to his product and his economic system. Thus, the economic elite can have a significant input into the acculturation as well as the consumption pattern of the individual.

Finally, the value of telecommunications for many other uses is easily deduced—to broadcast comprehensive programmes to combat illiteracy and to inform about health care, agriculture, family planning, community programmes, and other priorities of governments or interest groups. It is understandable, therefore, that many claimants wish to share in the development of a policy dealing with the broadcast media. It is clearly in the interest of a nation state to seek to control the media, either to protect its citizens from subversive outside information and cultural intrusion or to foster cultural identity and integration. Some states may wish to see an absence of government controls in order to promote internationalism or benefit their broadcasters financially.²¹ There are also claims from military groups who wish to control the media for propaganda purposes, from corporations who realize the value of the media to expand and structure markets, from skill groups who wish to protect moral values from derogation. Some of these claimants demand national control of the media; others oppose it. Even within one state claimants may vary in the degree to which they advocate state control of the media.

C. POLICIES

While many groups wish to have an input into telecommunications policy,

¹⁹ M. Jones, *The Cultural and Social Impact of Advertising on American Society* (1970), 8 Osgoode Hall L. J. 65 at 67.

²⁰ M. Johnson, *Freedom to Create: The Implications of Anti-Trust Policy for Television Programming Content* (1970), 8 Osgoode Hall L.J. 11; H. Schiller, *Mass Communications and American Empire* (New York: Augustus Kelley, 1969); S. Cohen, *The Advertiser's Influence in TV Programming* (1970), 8 Osgoode Hall L.J. 91 at 109.

²¹ This is the fear expressed with regard to the U.S. See Schiller, *id.*; Laskin and Chayes, *supra*, note 16.

there is little agreement on the scope of the policy that should be formulated. Although the focus in this paper is on a dispute over advertising on Canadian cable television, the positions taken by Canada and the United States are in part shaped by larger considerations about telecommunications policy. International interest in telecommunications, evidenced as early as the 1860's,²² has increased in intensity during the last decade with the development of direct satellite broadcasting. The issue of control over the content of telecommunications, while a subject of discussion with regard to radio,²³ is perceived as much more urgent now. Policy positions that have emerged from discussions tend to reflect one of two biases: either "free flow of information" or "territorial sovereignty."²⁴ In choosing a policy for regulation of telecommunications, one's goal should be to devise a policy that promotes the dignity of the individual. The following pages will discuss the alternative policies presently advocated in an effort to define a policy that favours individual freedom and dignity.

The free flow of information position is founded on a belief that an individual has a right to freedom of information in order to promote his or her personal liberty. As in domestic constitutions which recognize a right to freedom of information, there is an underlying assumption that individual freedom of speech is a fundamental value to be safeguarded in society. Freedom is fostered by the unfettered exchange of ideas, for, in Mr. Justice Holme's oft-repeated words:

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by the free trade in ideas — that the best truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.²⁵

In functional terms, the proponents of this position argue that an absence of controls is required in order to foster the interchange of ideas necessary for increased mutual understanding. It is assumed that this understanding will, in turn, contribute to international peace and security. Finally, it is said that free flow of information is necessary to international social and economic development, allowing less developed countries to have access to technical and scientific information.

One can draw support for the free flow of information position from many sources, including Article I of the *United Nations Charter*, with its reference to the institution's goal of achieving international cooperation.²⁶

²² In 1865 the International Telegraphic Union, the first international regulatory body for communications, was established. See Leroy and Leive, *supra*, note 8.

²³ Leroy refers to the concern over the use of propaganda by radio in the 1930's, particularly by Germany, *supra*, note 8 at 728, 736.

²⁴ Discussion has occurred largely in the United Nations Committee on the Peaceful Uses of Outer Space and its Working Group on Direct Broadcast Satellites.

²⁵ *Abrams v. United States* (1919), 250 U.S. 616 *per* Holmes J. dissenting, at 630.

²⁶ Article 1 states that the purposes of the United Nations include:

3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .

More explicitly, the U.N. *Declaration on Human Rights* expressly recognizes a right to freedom of information.²⁷ The *International Covenant on Civil and Political Rights* expresses this right as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.²⁸

While freedom of speech is a right that many states advocate at least verbally, if not by conduct, there is little support for total, unregulated exercise of this right. In international telecommunications law, even states that favour a right of freedom of expression²⁹ feel that it must be restricted at times because of competing policies and rights. Television or radio broadcasts from the territory of one state into that of another may be viewed as an invasion of "national privacy."³⁰ Such broadcasting is perceived as a violation of a state's territorial sovereignty, as recognized in Article 2(1) of the *U.N. Charter*. Broadcasting need not be directly aimed at foreign territory in order to be regarded as offensive. Unintentional spillover of television signals cannot be prevented within the current state of technology and, in irregularly shaped territories, may never reach such a stage of precision.³¹

There are many reasons that lead states to claim the right to control the content of television broadcasting, as an earlier discussion of the uses of television leads one to realize. To some extent, one can postulate that the motivation for regulation expressed by the various elites in a state will have a direct bearing on the type and degree of regulation resulting. For some political elites, survival may depend on total control of the media, both of plant

²⁷ See Preamble and Article 19:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers.

²⁸ Article 19(2), Resolution 2200 (XXI), December 16, 1966. While Article 19 seems to recognize an extensive right to freedom of information, it must read *in toto*. Subsection 3 provides for curtailment of the freedom in the following words:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

If this is a self-judging provision, it would tend to undercut much of the efficiency of subsection 2.

The U.N.'s concern with freedom of information dates back to 1946, when the General Assembly declared freedom of information to be a fundamental human right and authorized the holding of an international conference on the issue (Resolutions 31(I) and 59(I), December 14, 1946). Subsequent efforts to obtain the adoption of a "Draft Convention on Freedom of Information" proved abortive. A brief history of the U.N. action in this area can be found in a document of the Secretariat, "Draft Convention on Freedom of Information," Note by the Secretariat, A/AC 105/WG 3/L. 2 (April 10, 1973).

²⁹ For example, Canada, Sweden, and the United Kingdom.

³⁰ The expression is used by C. Dalfen in *The International Legislative Process: Direct Broadcasting and Remote Earth Sensing by Satellite Compared* (1972), 10 *Can. Y.B. of Int. L.* 186 at 192.

³¹ Laskin and Chayes, *supra*, note 16 at 4.

and content, in order to prevent criticism and expression of competing policies. International broadcasting is seen as a threat to national security by such elites. For other political elites, particularly in developing countries, control of the national media may seem necessary for the presentation of a comprehensive development plan. Commercial programming from another culture may distort economic priorities by inducing demand for consumer products that the domestic market is unable or unwilling to provide at that time. Such programming may threaten cultural identity, jeopardize educational programmes, and engender frustration when different lifestyles are shown.

Foreign programming will reflect the priorities, values, and assumptions of foreign states. Even "impartial" news reporting may reflect the biases of foreign governments,³² while programmes will reflect the mores and norms of that society. Not only may these mores be inconsistent with government priorities of the recipient state—for example, by advocating consumerism in a socialist economy—but they may also be offensive.³³

What begins to emerge from discussions about the free flow of broadcasting is a realization that most states—open or closed, developing or developed—fear that the flow of broadcasting will be in only one direction, that is, from the United States to other nations. Monroe Price describes this phenomenon as "information imperialism."³⁴ Since the United States is the most technologically advanced state in television broadcasting and already by far the largest exporter of television programming,³⁵ the United States appears to be the prime beneficiary of free flow in information. As Schiller says,

Information moving between nations on the basis of "economic opportunities" and "competition" unimpeded by other national or cultural considerations, affords American communications media the same advantages American commerce now receives from "free" world trade patterns that are also minimally controlled by national states.³⁶

³² This results from the reporter's dependence on government sources for much of his information, as well as his reliance on colleagues who tap the same sources. This can have consequences, including co-optation to the government's viewpoint and reluctance to use certain information for fear of being denied access to channels of information. See T. Crouse, *The Boys on the Bus* (New York: Ballantine Books, 1972) at 7-8, 233-35; Johnson, *supra*, note 20 at 41-42.

³³ C. Dalfen in *Direct Satellite Broadcasting: Towards International Arrangements to Transcend and Marshall the Political Realities* (1970), 20 U. of T. L.J. 366, refers to the example of an advertisement for Maidenform bras in Moslem countries. Less dramatic, but perhaps just as disruptive or offensive, may be programmes dealing with subjects such as abortion, homosexuality or even divorce in states where such practices are prohibited. In the Canadian-American context, one can point to Canadian preoccupation with the Vietnam war or racial issues prevalent in the U.S. as examples of the effect of relying on foreign news sources.

³⁴ M. Price, *First Amendment Constraints and the Direct Satellite Controversy in Am. Soc. of Int. L., Direct Broadcasting from Satellites: Policies and Problems, supra*, note 16 at 38-39.

³⁵ J. Powell in *Direct Broadcast Satellites, The Conceptual Convergence of the Free Flow of Information and National Sovereignty* (1975), 6 Calif. W. Int. L. J. 1 at 18 n. 49 says that four nations lead the world in the export of television programmes. In the early 1970's, the U.S. led with 150,000 hours while the U.K. and France, tied in second place, had only 20,000 hours. See, also, Schiller, *supra*, note 20 at 82; Friendly et al., *The Control of Program Content in International Telecommunications: A Discussion of General Principles* (1974), 13 Colum. J. of Transnat. L. 40.

³⁶ Schiller, *supra*, note 20 at 6. See also, Laskin & Chayes, *supra*, note 16 at 8-9.

Current American programming is frequently criticized for its banality, violence, and insipidity—all characteristics that are usually attributed to the commercial model on which the United States broadcasting industry is structured.³⁷ The advertiser's concern with high ratings demands programmes with wide appeal. Other states may wish to aim programming at more than the lowest common denominator out of a desire to reach various minority audiences, or they may prefer a portrayal of different values. Furthermore, they may wish to avoid the commercial model of broadcasting altogether, for fear that the market for local products will be endangered by multinational corporations advertising internationally, or that development plans will be jeopardized, or because it is national policy not to have commercial broadcasting.³⁸

What is emerging in discussions of broadcasting in the international sphere is a recognition of the need for some state role in regulating signals that cross its borders. In various international bodies discussing telecommunications, particularly the Working Group on Direct Broadcast Satellites³⁹ of the U.N. Committee on the Peaceful Uses of Outer Space, UNESCO, and the International Telecommunications Union, there is support for a system of "prior consent" from states.⁴⁰ According to this principle, a state must consent in advance to programmes broadcast into its territory from another state. Coupled with the right of consent may be an emerging right of participation—as recommended by Canada and Sweden in their "Draft Principles Governing Direct Television Broadcasting by Satellite" contained in their submission to the DBS Working Group—which would allow a state consenting to foreign broadcasts to participate in activities involving coverage of its territory.⁴¹

The precise limits of the prior consent principle are still the subject of debate. The United States continues to advocate the free flow of information, opposing state control of broadcast content.⁴² Other states, such as Canada

³⁷ Johnson, *supra*, note 20 at 18-26, discusses various goals to seek in a television programming policy: creativity, diversity, flexibility, competition, individual participation, and prevention of excessive power. He concludes that the commercial structure of the U.S. industry leads instead to self-censorship, excessive orthodoxy, cultural lag, and lack of creativity.

Jones, *supra*, note 19 at 71, discusses the values emerging from advertising: materialism, reliance on externally derived solutions, and the assumption that individuals are externally motivated.

³⁸ As in France or the United Kingdom. See Laskin and Chayes, *supra*, note 16 at 9.

³⁹ Hereinafter referred to as DBS.

⁴⁰ In the UNESCO *Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange*, Article IX states:

1. In order to further the objectives set out in the preceding articles, it is necessary that States, taking into account the principle of freedom of information, reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission.

UNESCO, Doc. 17 C/76, adopted November 15, 1972.

⁴¹ Article V, found in the Working Paper submitted to the Fourth Session of the Working Group, A/AC 105/WG 3/L. 4 at 15. The proposal is further discussed in the Working Paper to the Fifth Session, A/AC 105/WG 3/L. 8 (February 13, 1974) at 8.

⁴² The United States was alone in voting against Resolution 2916 (XXVII) of the General Assembly which requested the Committee on the Peaceful Uses of Outer Space to undertake the elaboration of principles governing the use of DBS.

and Sweden, favour a system of prior consent and participation, while states such as the U.S.S.R. favour strict controls over international broadcasting. With such a situation of flux in international telecommunications law, the Canadian-American dispute over CATV has implications far beyond the North American continent. Canada's policy is one that asserts a state's right to control the content of television signals beamed across its borders. The United States, partly because of its predominant power position in the world, must be alert to the impact that any decision recognizing a Canadian right to control would have on the larger question of state control of television broadcasting in international law.

If one were to evaluate the conflicting policy proposals in terms of their conformity to goals of human dignity, it would seem that a policy with controls on information should be sought. An individual is subject to multiple loyalties—to family, to province or regional unit, to nation, and perhaps to the world community. The fact that an individual does feel identity with and loyalty to a nation state does not prevent him from developing a loyalty to the international community. Loyalty is not a zero-sum game, although admittedly loyalties introduce the possibility of conflicts. It is beneficial to an individual to identify with groups for purposes of self-definition, as means to achieve desired ends, or as a value in and of itself.⁴³ There is no reason to believe that the destruction or undermining of a national identity in order to produce some bland "international citizen" is feasible or even desirable. The disorientation and anomie which would likely result would probably be more destructive of world peace than a fostering of the present mix of identities.⁴⁴

The ideal international telecommunications policy will take account of the benefit of national loyalties and the contribution of telecommunications to their development, as discussed above. Simultaneously, account must be taken of the use of telecommunications to foster international understanding. The goal must be to provide access to the telecommunications media by national groups, a fact that requires some degree of nation-state control of the broadcast's content. This control should not, however, extend to wholesale control of content, for the free flow of ideas from outside the borders is necessary to introduce competing ideas and to allow the individual some freedom of choice in forming his opinions. Some broadcast time should be open to outside programming, perhaps with the caveat that the content not be "morally offensive." This phrase is dangerous and open to misinterpretation,

⁴³ H. Guetzkow, in *Multiple Loyalties: Theoretical Approach to a Problem in International Organization* (Princeton: Center for Research on World Political Institutions, No. 4, 1955) at 16-26, 37, 54, discusses the various bases of individual loyalty. They include:

- (a) loyalty as a means to an end, such as the obtaining of personal goals or the enhancement of self-image, and
- (b) loyalty as an end in itself, for self-avoidance or in order to lose oneself in the totality, and
- (c) loyalty as part of a "pattern" of loyalties, with loyalty to a sub-unit fostering loyalty to units broader than that region.

⁴⁴ Group loyalty is a fact of international life. To expect wholesale "internationalism" seems to ignore the widespread tendency to identify with smaller "national" groups — viz. the independence movements in Scotland, Wales, and Quebec, as well as the U.N. endorsement of self-determination of peoples.

for in some countries moral offensiveness will refer to matters regarded as obscene or vicious; in others, political opinions contrary to the regime will be so denoted. It is the first example, not the second, to which reference is made.

The prior consent policy discussed earlier does not really satisfy this aim, for it allows a state to prevent all outside broadcasts and thus could completely hamper the international exchange of ideas. It is the *degree* of foreign access that should be the subject of discussion, not the content of each telecast. That degree of control should never be allowed to close borders to the flow of ideas.

D. THE INTERNATIONAL DECISION-MAKING PROCESS

Before discussing the Canadian-American cable television dispute within the context of this policy proposal, it may be beneficial to show why the dispute is important to the broader international arena.

International legal norms do not emerge from a sovereign legislative body, for none exists in the international sphere. Law consists of decisions made by institutions, individuals, and groups regarded as having the authority to make such decisions in compliance with authoritative procedures and as having sufficient control to enforce them. While a prescription may be enunciated by an institution claiming that a practice is 'law,' the norm can only be so regarded if those affected comply with it because they regard it as authoritative. Thus, international law should be regarded as a process rather than as a fixed body of prescriptions, for conduct is as important as enunciated norms in determining the 'law' on a given subject.⁴⁵

Furthermore, one cannot focus only on an isolated group of actors such as courts and legislatures in studying a legal problem. Participants in the decision-making process include states, international organizations, corporations, interest groups, institutions within states such as courts or government agencies, and individuals.⁴⁶ Clearly, the impact of each entity on the decision process will not be equal, for the participants are not equal in the resources which they possess: power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude. Obviously a state has much greater power than an informal citizens' association concerned with a single issue such as national identity. Consequently, it has a larger voice in decision-making. In addition, one must look at other factors affecting the participants' involvement in the decision-making process: the situations in which a given interaction occurs and the strategies adopted.

⁴⁵ The following discussion reflects a policy science approach to international law. More comprehensive discussion can be found in M. McDougall, H. Lasswell, and M. Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence* (1968), 8 Va. J. of Int. L. 188; J. Moore, *Prolegomenon to the Jurisprudence of Myres McDougall & Harold Lasswell* (1968), 54 Va. L. Rev. 662; F.S. Tipson, *The Lasswell-McDougall Enterprise: Toward a World Public Order of Human Dignity* (1974), 14 Va. J. of Int. L. 535.

⁴⁶ In the context of the Canadian-American dispute, these actors include individuals and institutions within the Canadian and American governments (the executives, legislative branches, regulatory agencies, government departments) and interest groups such as nationalist lobbies, broadcasters, actors' unions, and corporate advertisers.

To assess the law, one must approach a problem contextually, looking at the various functions of decision-making: intelligence-gathering, promotion, prescription, invocation, application, termination, and appraisal. Together, these functions, as influenced by the various participants, allow one to decide what is the law. While the traditional legal approach is to focus on the prescription and application processes, the other functions are equally important to the analysis of a legal problem, for a prescribed norm may never be applied to certain groups, or it may be effectively ignored and so terminated.

Thus, in a problem involving international telecommunications law, one cannot focus on the regulation of cable television advertising by Canadian officials as a narrow issue concerning only rules defined by the Canadian and United States governments. The issue must be regarded in a wider context, not only regionally, but also internationally. Any decision taken by a participant in the international decision-making process will affect the development of the larger subject of international telecommunications law and its direction toward policies of free flow of information or controlled access. In turn, positions adopted by these participants will be determined, at least in part, by decisions already made or being made by participants in larger arenas dealing with international telecommunications law, including the United Nations and other international organizations.

Within this framework, one can now turn to the present cable television controversy, looking at the various claimants involved in the decision-making process and the policy directions they advocate, and then proceed to discuss the decisions that they have made which affect the law in this area.

E. CLAIMANTS

1. *The Canadian Government*

Canada is a nation which, like the United States, recognizes the value of a right of freedom of speech. Section 1(d) of the *Bill of Rights*⁴⁷ recognizes and declares a right to freedom of speech. Although this document is of limited effect,⁴⁸ there is a longstanding tradition of free debate in the country. Yet even though freedom of speech is widely advocated, this right coexists with a tradition of government control over broadcasting, a control that is not restricted to technical regulation but which extends to content as well. From the earliest days of broadcasting in Canada⁴⁹ there has been a preoccupation with the need to develop a distinctively Canadian broadcasting system, if necessary by government subsidy or regulation.⁵⁰ This is not surprising if one considers Canada's geographic proximity to the United States and its population of 23.5 million strung out along a 4,000 mile border beside more than

⁴⁷ R.S.C. 1970, App. III.

⁴⁸ This is due partly to its restricted application to the federal sphere and partly to the courts' great reluctance to give the Bill effect. See W. Tarnopolsky, *The Canadian Bill of Rights* (2d ed. Toronto: McClelland & Stewart, Carleton Library Series, 1975).

⁴⁹ See, for example, Canada, *Royal Commission on Radio Broadcasting, Report* (Aird Commission) (1929).

⁵⁰ P. Johanssen, *The Canadian Radio-Television Commission and the Canadianization of Broadcasting* (1973), 26 Fed. Comm. B.J. 183 at 185-86.

200 million Americans. This reality colours all of Canada's political activity, whether in foreign, economic, or cultural policy, and many actions taken by the Canadian government are aimed at establishing counterbalances to U.S. predominance.⁵¹

In broadcasting, the Canadian government has always been concerned with using communications to establish an east-west link in a country that in rational geographic terms would tend to run north-south. As earlier discussion, in more general terms, pointed out, programming from the United States tends to impart certain values or images. Such programming, especially accessible because of the identity of language between Canada and her neighbour, the technical facility for picking up signals off the air or by cable television, and the similar attitudes and life style, risks reinforcing the north-south pull and undermining efforts to strengthen the Canadian cultural identity.⁵²

It has always been the policy of the Canadian government to foster Canadian unity through the broadcasting system. The most concise avowal of this policy is found in the *Broadcasting Act*,⁵³ enacted in 1968 with only one dissenting vote. Its long title expressly describes the statute as "An Act to implement a broadcasting policy for Canada." More significantly, section 3 of the Act contains a unique statement of policy objectives. For purposes of the present discussion, several of these policies are enlightening and warrant quotation:

It is hereby declared that

- (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;
- (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced views on matters of public concern, and the programming provided should be of high standard, using predominantly Canadian creative and other resources. . . .

The Canadian ownership component is not unusual, for several states adopt a similar requirement for strategic reasons, not wishing to leave such an important tool for national expression in foreign hands.⁵⁴ It is the programming provision in subsection (d) which is most significant, for it has been the underpinning of many "Canadian content" regulations and licensing conditions.

⁵¹ This is the rationale underlying the "third option" approach in the Trudeau government's foreign policy: increased European and Japanese contact are sought to balance U.S. influence. See, also, A. Gottlieb and C. Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law* (1973), 67 Am. J. of Int. L. 229 at 230, 258.

⁵² See F. Peers, "Oh, say can you see?" in I. Lumsden, ed. *Close the 49th parallel, etc.: The Americanization of Canada* (Toronto: U. of T. Press, 1970) 135 at 153-54; Canada, *Proposals for a Communications Policy*, *supra*, note 15 at 8.

⁵³ R.S.C. 1970, c. B-11 as amended.

⁵⁴ For example, the United States *Communications Act* contains such a requirement (47 U.S.C. § 301(2) (1); § 310 (a) (1) — no broadcast licence shall be issued to an alien).

Despite the express concern for Canadian content, the government in the early 1970's was not satisfied with the way in which its policy had been implemented. American programming continued to dominate Canadian television and a Canadian programming industry was not developing as anticipated. In its 1973 *Green Paper on Communications Policy*, the federal Department of Communications noted the failure of Canadian programming to keep up with technological developments. After referring to the American omnipresence, the paper stated:

It is therefore essential that a high priority be given to the accelerated development of Canadian creative resources and to greatly increased production and distribution facilities . . . The problem for Canadians is not primarily one of excluding foreign programming and sources of information but rather of ensuring access and exposure to such Canadian material as may be available, and of ensuring that available Canadian material is comprehensive and of excellent quality.⁵⁵

The concern of the Canadian government, then, is one of access for Canadian broadcasters: access to programme time and access to resources that allow broadcasters to produce programmes. That concern has shaped the policies and programmes developed by Parliament and its agents.

The concern, while focused on communications theory, is heavily coloured by economic consideration. Canada's broadcasting system is based on a commercial model, similar to that in the U.S.⁵⁶ In such a broadcasting system, advertising is essential to the production of television programmes. Without revenue from advertising, local stations cannot pay programme producers or networks the necessary royalties for the use of programme products, thus restricting production of programmes. In Canada, it is perceived that advertising revenue which should be available to generate programming in that country is finding its way instead to the United States television stations near the border. Television signals of these stations, sometimes obtainable off the air by individual antennae, are normally carried into Canada by an extensive web of cable television undertakings.⁵⁷ The effect on television advertising from this extended coverage by CATV is twofold. First, many Canadian companies have, in the past, chosen to advertise on American stations rather than on Canadian outlets. This is especially true in the two largest English-speaking areas in Canada: Toronto and Vancouver. In Vancouver, KVOS-TV of Bellingham, Washington, a city of 50,000, reaches about 1,600,000 Canadians and obtains more than 90 percent of its annual \$7 million revenue from Vancouver. In the Toronto area, 4,000,000 Canadians receive the signals of three Buffalo stations, WGR-TV, WIVB-TV (formerly WBEN-TV), and WKBW-

⁵⁵ *Supra*, note 15 at 8. See, also, A. Gotlieb, *The Transnational Flow of Information: A Canadian Perspective* (1974), 68 *Am. Soc. of Int. L. Proceedings* 127 at 133.

⁵⁶ Although the ownership of Canada's broadcasting system is a mix of public and private elements, the publicly-owned Canadian Broadcasting Corporation accepts commercials in its television operations.

⁵⁷ Canada is the most heavily cabled country in the world with 41.9 percent of its households linked to a cable television system in 1975. (Canadian Radio-Television Commission, *Annual Report, 1975-76*, Table 16, at 34). This is an increase from 29.8 percent in 1972. The number of subscribers in the U.S. has also risen dramatically in this period, from 4.5 million in 1970 to 9.8 million in 1975 (*New York Times*, December 15, 1976, at D15, col. 1) but is in no way as extensive as in Canada.

TV, which serves 1,500,000 Americans. The estimated revenue from Toronto advertisers is \$10 million per year.⁵⁸

Aside from this direct drain on Canadian advertising revenues, there is an indirect one which is more difficult to calculate. This drain comes from the spillover effect of advertisements placed by multinational corporations on television stations in the United States which are carried into Canada. Because of the extensive product duplication in Canadian and American markets, there is no need for multinationals to purchase advertising time in Canada as well as in the U.S. It would seem that the multinationals gain a windfall from this spillover, rather than the American stations, since the advertising rates on the U.S. stations are calculated on the basis of U.S. population alone.⁵⁹ The benefit seems extensive, and has been estimated to be as high as \$30-40 million annually.⁶⁰

The Canadian government has felt that advertising revenue needed for the development of Canadian programming in a commercial broadcasting system has been lured away by the U.S. stations. The desire to divert this revenue back to Canada has been the underlying motivation for the commercial deletion and programme substitution policies and for the recent amendments to the *Income Tax Act*.⁶¹

The Canadian broadcasting industry is subject to a variety of regulatory bodies. In implementing its Canadianization policy, the Canadian government has worked largely through the Canadian Radio-Television Commission,⁶² an independent regulatory agency of fifteen members. The CRTC is designated under the *Broadcasting Act* with the regulation and supervision of the Canadian broadcasting system in order to carry out the broadcasting policy enunciated in section 3 of the Act.⁶³ The Commission has the authority to make regulations applicable to all broadcast licensees⁶⁴ and to issue broadcasting licences with such conditions as are necessary to implement the policy.⁶⁵ To date, the Commission has adopted an independent and nationalistic approach

⁵⁸ Miller, "Peace Talks arranged in 'border TV war'" *Toronto Star*, October 5, 1976, at 5, col. 1. It is estimated that 40-50 percent of Toronto viewers watch Buffalo stations (*Toronto Star*, October 20, 1976, at 1).

⁵⁹ U.S. H. of Rep., Committee on Foreign Affairs, Subcommittee on Inter-American Affairs, 93rd Cong. 2nd sess., April 15, 1974, at 26.

⁶⁰ Can. Sen. Standing Committee on Banking, Trade and Commerce, 30th Parl. 1st sess., Issue 87, May 19, 1976, at 87:26. This estimate is by Harry Boyle, then Chairman of the CRTC. It is difficult to measure the precise economic effect of the advertising dollar drain. Boyle's estimate may be high, for the Hon. Jeanne Sauv , Minister of Communications, estimated the total advertising drain, from both multinational corporation ads and Canadian ads in the U.S. as \$15-20 million annually (Issue 84, May 6, 1975, at 84:37).

⁶¹ S.C. 1974-75-76, c. 106 amending S.C. 1970-71-72, c. 63. See text *infra*, note 168.

⁶² Now the Canadian Radio-Television and Telecommunications Commission (S.C. 1974-75-76, c. 49). In addition to this agency, certain aspects of broadcasting are regulated by the Department of Communications and the Cabinet. See A. Gotlieb, *The Individual and the Telecommunications Regulatory Process in Canada* (1973), 25 *Admin. Law Rev.* 175.

⁶³ *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 15.

⁶⁴ *Id.*, s. 16.

⁶⁵ *Id.*, s. 17.

to broadcasting regulation under its previous chairmen, Pierre Juneau, and his successor, Harry Boyle.⁶⁶

Another government body with impact on broadcasting policy is the Department of External Affairs. While the CRTC and, to some degree, the Cabinet are focusing on the immediate communications dispute, External Affairs must look at this issue within the larger context of its global impact and effect on ongoing Canadian-American relations. Thus, there is room for conflict between various spokesmen for the Canadian government as to the best policy to be sought.

2. *The United States Government*

The United States government position with regard to control over broadcasting has traditionally been in favour of freedom of expression and absence of government controls over broadcasting, other than technical regulations to prevent interference.⁶⁷ Clearly, constitutional constraints are a major factor in the adoption of this policy position, for the First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Controls on programme content, such as the prior consent criterion discussed in the DBS Working Group,⁶⁸ or restrictions that limit the amount of foreign programming content, are regarded as unconstitutional.⁶⁹ Just as it is difficult for Americans to understand the suspicion with which their presence is often viewed in foreign countries, it is difficult for non-Americans to realize the depth of attachment to the symbolic value of the free speech guarantee in the U.S. Constitution. Nationals of states more accustomed to government regulation or unused to an active system of judicial review to protect fundamental freedoms may not understand how distasteful government regulation of broadcasting content is in the United States.⁷⁰

⁶⁶ Mr. Boyle was recently succeeded by Dr. Pierre Camu. The CRTC's independence has been criticized, with one commentator expressing apprehension at its tendency to set itself up as "the Parliament of Broadcasting." D. Baum, *Broadcasting Regulation in Canada: The Power of Decision* (1975), 13 Osgoode Hall L.J. 693 at 694.

Boyle, in an article written while he was still Vice Chairman of the CRTC, evinced a deep concern for commercial domination of programming. This article provides insight into the CRTC's perspective on broadcasting regulation (*Responsibility in Broadcasting* (1970), 8 Osgoode Hall L.J. 119, *passim*).

⁶⁷ This is not to say that there is a dearth of regulations in the communications sphere. The *Communications Act of 1934*, as amended (47 U.S.C. § 301. ff.), regulates television through a licensing system administered by the Federal Communications Commission (47 U.S.C. § 151). Hereinafter referred to as FCC.

⁶⁸ *Supra*, note 41.

⁶⁹ Such prior restraints on speech are viewed with hostility by the U.S. Supreme Court. See *New York Times Co. v. United States* (1971), 403 U.S. 713; *Columbia Broadcasting System Inc. v. Democratic National Committee* (1973), 412 U.S. 94. Interestingly, the court has upheld the FCC's fairness doctrine, requiring equal time for responses to personal attacks in controversial public issues and to political editorializing — both questions of "access" somewhat analogous to Canadian broadcasting policy concerns. See *Red Lion Broadcasting Co. v. Federal Communications Commission* (1969), 395 U.S. 367.

⁷⁰ Richard O'Hagan, then Minister-Counsellor (Information) at the Canadian Embassy in Washington, noted this concern for the First Amendment in testimony before the Canadian Senate External Affairs Committee (30th Parl. 1st sess., Issue 14, May 15, 1975, at 14:18).

While the United States government position on communications policy rests partly on constitutional bases, it is submitted that there are further reasons for the favour shown to the free flow of information. As noted earlier, free flow of information at present means that American commercial networks dominate programming in the international market. The profits generated enrich the U.S. as a whole, and the cultural homogenization that follows can only inure to the U.S. government's benefit.

That commercial motives colour the U.S. position is difficult to doubt. The U.S. has nothing to fear from freedom of information, for the commercial structure of its industry ensures that American networks will dominate programming. Foreign programmes must satisfy American tastes in order to attract a mass audience and, thus, obtain a sponsor. This has not generally occurred. Furthermore, the U.S. is a large market which naturally turns to domestic programming.⁷¹ One can only speculate that the U.S. might change its policy of free flow of information if faced with massive importation of foreign programming.⁷²

In carrying out its communications policy, the U.S. relies on the Federal Communications Commission, similar in function to the CRTC.⁷³ The FCC has had to deal with many of the same concerns as the CRTC in its CATV regulation, particularly the effect of imported television signals on a local broadcaster's market, and is aware that such imported signals fragment the local market and drain advertising revenue.⁷⁴ In Canada, the imported signal is often from a foreign country, so that an international aspect is added to the regulatory problem. Thus, the FCC can be expected to understand the CRTC's dilemma. It will also be concerned with preserving harmony between the two regulatory bodies, which have an ongoing relationship.

Finally, the State Department also has a voice in policy development, for the problem under discussion affects Canadian-American relations as a whole, as well as global policy.

⁷¹ Price, *supra*, note 34 at 43.

⁷² That such a change in policy would not be unlikely is shown by the U.S. attitude to broadcast signals from Mexico directed towards American audiences. When signals are broadcast from inside the U.S. across the border for *retransmission* to the U.S., a special permit from the Federal Communications Commission is necessary (*Communications Act*, 47 U.S.C. § 325(b)). There has been significant controversy with respect to stations from Mexico transmitting to Southern California (and draining advertising dollars) by using prerecorded programmes, thus evading § 325(b). See Note, *Mexican-United States Border Broadcasting Dilemma* (1973-74), 4 Calif. W. Int. L.J. 141.

The U.S. President's *Task Force on Communications Policy, Final Report* (Washington: U.S. Government Printing Office, 1968) (Rostow Report) at 7-3-4 noted the importance of television in providing an outlet for local expression and advertising, stating as one of the objectives of communications policy "to preserve the values of localism and to help build a sense of community, both locally and nationally." The concerns are similar to those of the Canadian government.

⁷³ 47 U.S.C. § 151.

⁷⁴ See Note, *Radio and Television-Cable Television Operator Subject to Liability for Copyright Infringement When Distant Signals Are Imported* (1974), 87 Harv. L. Rev. 665; Note, *Regulation of Community Antenna Television* (1970), 70 Colum. L. Rev. 837; Note, *CATV and Copyright Liability: Teleprompter Corp. v. Columbia Broadcasting System, Inc. and The Consensus Agreement* (1973-74), 25 Hastings L.J. 1507.

3. Corporations

In discussing the claimants who wish an input into cable television policy in Canada and the U.S., one cannot ignore the various corporate interests involved. Most immediately affected are the broadcasters, Canadian and American. Canadian television stations are being required to provide more Canadian programming by their government through the CRTC,⁷⁵ when the revenue to finance such programmes is in the United States, as a result of cable distribution of American television stations. In addition, cable television companies import the signals of American television stations that often carry the same programmes for which Canadian stations have paid royalties to American copyright holders in order to obtain Canadian broadcasting rights. The result is dilution of the Canadian audience and American stations, with their larger audiences, attract advertisers sought by the Canadian stations. No longer are the Canadian stations an attractive investment once their audience is fragmented by the imported signals. A further reduction in revenue occurs because advertisers who remain with the Canadian stations pay lower rates, since advertising rates are calculated according to audience size. Thus, the Canadian stations must pay royalties for programmes which are shown to the same audience they seek by foreign stations who have neither been licensed to serve that audience nor paid royalties for the programmes shown to the extended audience. Simultaneously, the revenue of the Canadian stations is reduced at a time when they have obligations to create or purchase original Canadian programmes. Clearly it is in their interest to have controls on the access of foreign broadcasting.⁷⁶

The American border stations, particularly those in Buffalo and Bellingham, also have an interest in the development of communications policy. As the figures quoted earlier demonstrate, these stations obtain a great deal of revenue from Canadian advertisers and from multinational corporations which are saved from advertising in both Canada and the U.S. They are loath to lose that established source of revenue.

American networks are interested in the outcome of this dispute, because it will affect world-wide telecommunications law.⁷⁷ Any derogation from the principle of free flow of information jeopardizes their potentially predominant economic position. Furthermore, Canadian measures are designed to increase the Canadian voice in television programming, reducing the networks' pro-

⁷⁵ The requirements are contained in "Canadian content" regulations discussed, *infra*, at note 90.

⁷⁶ An eloquent statement of the problem was provided by M. Znaimer in "Why let U.S. stations dump programs here?" (*Globe and Mail*, November 5, 1975, at 7).

⁷⁷ Both NBC, CBS, and the Motion Picture Association of America (a major supplier of network programmes) expressed opposition to Canadian cable television policy when a House of Representatives subcommittee studied the subject (*supra*, note 59). The National Association of Broadcasters has been actively lobbying against the Canadian policy. For example, the Executive Committee, in its national convention in March, 1974, passed a resolution to "request the U.S. State Department to use its best offices to prevent an implementation of the above described policy of the CRTC [commercial deletion] to the detriment of any U.S. television station" (quoted in U.S. H. of Rep., *supra*, note 59 at 5).

gramme market and ultimately introducing a competitor. More immediately, there is a possibility of reduced advertising dollars from multinational corporations on American networks if the spillover to Canada is eliminated.⁷⁸

Cable television operators in Canada are concerned about the developing policy. As the cable television system now operates, no payment is made for signals transmitted. The cable television undertaking operates a receiver or antenna that picks up television signals from the air broadcast by television stations, possibly cleans or strengthens them, and re-transmits them by coaxial cable or microwave and cable to the homes of subscribers.⁷⁹ Revenue comes from subscription.⁸⁰ To the extent that any settlement might require CATV to pay for programmes transmitted or to implement costly substitution policies, the existing profit position is imperilled.

Finally, advertisers have an interest in the broadcasting policy developed. Multinational corporations at present receive a windfall from the spillover of their American advertisements into Canada. Limitations on the coverage by American border stations or advertising restrictions would impose new costs on the multinationals not only for the purchase of advertising time but for advertisement production as well, since Canadian broadcasting guidelines set a goal of 70 percent Canadian production for commercials shown in Canada.⁸¹ Canadian subsidiaries would likely feel the brunt of controls first, as they now rely on U.S. parents to provide advertising through spillover. With advertising necessary in Canada, the subsidiaries would face new costs. This would benefit solely Canadian companies who have paid in the past for their advertising, whether in Canada or the U.S.

Canadian advertisers who have been advertising on border stations claim an input into broadcasting policy, for they allege that there is insufficient time available on Canadian stations for advertising. It is for this reason that they have been forced to turn to U.S. stations.⁸² Local Canadian broadcasters refute this allegation, particularly those from smaller local stations such as CITY-TV in Toronto, an independent station broadcasting on UHF.⁸³ However, these smaller stations cannot offer the advertisers a full substitute

⁷⁸ As the U.S. broadcasting system now operates, most television stations are affiliated with one of the three national networks (approximately 600 to 680 stations in 1968 according to the President's *Task Force Report, supra*, note 72 at 7-4). These stations obtain 20-25 percent of their revenue from the networks for carrying network programmes (*id.* at 7-21). Networks often sell a programme to one or a few national advertisers. These national advertisers, if multinational corporations, gain from the spillover to Canada, as do their Canadian subsidiaries.

⁷⁹ Note, *Regulation of Community Antenna Television, supra*, note 74.

⁸⁰ Profits are healthy. A U.S. report calculates the before tax revenue of Canadian cable operators at \$22.5 million in 1973 and an after tax return on equity investment at 17 percent. See U.S. Congressmen, *Report, U.S.-Canadian Relations*, April 29, 1976.

⁸¹ This is to rise to 80 percent in three years. Monitoring occurs through a commercial registration system (S.O.R. 75/554, s. 9.2). The guidelines by the CRTC, set out in January, 1976, are discussed in a report by fifteen U.S. Congressmen on U.S.-Canadian Relations, *id.*

⁸² Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60, Issue 87, May 19, 1976, at 87:15; Issue 91, June 9, 1976, at 91:49.

⁸³ *Id.*, Issue 91, testimony of Moses Znaimer, president of CITY-TV, Toronto.

for border station advertising, for they do not attract the number of viewers reached by CBLT, the CBC outlet, and CFTO, the CTV outlet in Toronto.

4. Interest Groups

Various interest groups in both Canada and the United States are interested in contributing to broadcast policy. While established lobbies are in no way as developed in Canada as in the U.S., certain groups claim a voice in communications policy. Canadian nationalist groups, such as the Committee for an Independent Canada, advocate a highly nationalistic policy. Canadian performers' groups, like the Association of Canadian Television and Radio Artists,⁸⁴ wish to increase Canadian programming in order to increase their employment opportunities.⁸⁵ In contrast, advertising agency groups, such as the Association of Canadian Advertisers and the Advertising Agency Association of British Columbia, oppose controls for they risk loss of commissions on advertisements sold for use on U.S. stations.⁸⁶

The American counterparts of ACTRA, such as AFTRA, the American Federation of TV and Radio Artists, are just as concerned about job security and fear loss of work if Canadianization proposals are instituted.⁸⁷ Network groups, including the Motion Picture Association of America and National Association of Broadcasters, wish to protect the free flow of signals and their advertising revenue.

F. FLOW OF DECISIONS

The claims of the various groups involved tend to fall within one of the two broad policy categories discussed earlier. The Canadian government, especially the CRTC, wants to protect the financial position of the Canadian broadcasting industry so as to achieve the larger goal of using the media as a tool for acculturation and promotion of national unity. Canadian broadcasters want to protect their revenue position and so they, too, favour controls on foreign broadcasts.

The U.S. government and U.S. broadcasters want free access to Canadian audiences. In particular, they want signals from American broadcasts to reach the audiences in an unmodified form. The following discussion will deal with

⁸⁴ Hereinafter referred to as ACTRA. ACTRA is an active lobby, as shown by its persistent efforts to keep foreign "stars" out of CBC production (*Globe and Mail*, July 9, 1977, at 1.).

⁸⁵ Znaimer, in his article (*supra*, note 76, col. 2), calculates the effect of the advertising dollar drain on Canadian employment. Assuming \$250 million has been drained off in the last 25 years, he notes that "[t]ranslated into jobs at an industry average of one job for every \$30,000 or so of gross revenue, that's about 8,000 man years of work for Canadians."

⁸⁶ Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60, Issue 91, at 91: 45ff. See, also, U.S. H. of Rep. *supra*, note 59 at 13. Of the \$7 million in advertising revenue from Canadian advertisers paid to Buffalo stations in 1973, 25% remained in Canada as commission for Canadian advertising agencies and sales representatives.

⁸⁷ AFTRA, for example, fears the effects of the commercial production guidelines. See Congressmen's Report, *supra*, note 80 at 14.

decisions by various participants that respond to these claims. Rather than present these decisions in a strictly chronological order, they are organized in terms of decision-making bodies, for the purpose of this paper is as much to illustrate the decision-making process as it is to describe the evolution of particular facets of telecommunications law.

1. *CRTC Decisions*

The Canadian government has adopted an actively nationalistic policy with regard to television broadcasting for many years—initially by the federal Cabinet and Parliament directly and now under the aegis of the CRTC. This policy has taken several forms. In the 1958 *Broadcasting Act*, the first restrictions on foreign ownership of broadcast media were introduced.⁸⁸ These were not carried over into the 1968 revision of the Act, where the precatory words of section 3(b) replaced the statutory requirement of 1958. Foreign ownership restrictions have been maintained in the CRTC's licensing policy.⁸⁹

In 1972, the CRTC adopted its first "Canadian content" policies. These required that 60 percent of the programming on a television station be Canadian in origin. On private stations, 50 percent of prime time programming must be Canadian, while on public stations the requirement is 60 percent.⁹⁰ In advertising, guidelines suggest a 70 percent Canadian content goal.⁹¹

Most controversial have been the CRTC's policies directed to cable television. Cable television poses a problem for any broadcasting system, despite potential benefits which include almost unlimited ability to transmit television channels and use for other than entertainment purposes, such as information dispersal and education. CATV threatens the existing structure of the television broadcasting system, which is based on licensing local stations to serve a designated community. CATV derogates from the value of the local licence holder's market by importing signals from distant stations. The resulting fragmentation of the audience for the local signal reduces the attractiveness of the local station for advertisers, especially those with a geographically limited market. In addition, CATV may also reduce the royalties available to holders of the copyright to programmes. Normally copyright holders receive royalties from stations licensed to show their programmes based on the audience reached, the station being paid by the advertiser according to the number of viewers. Where the advertiser refuses to pay for an extended audience reached by CATV because those reached are not a valuable market for him, the station will be unwilling and unable to pay increased royalties to the copyright holder. This would not be too serious if the extended CATV coverage did not harm the copyright holder, but this does not appear to be the case. Rather,

⁸⁸ *Broadcasting Act*, S.C. 1958, c. 22, s. 14.

⁸⁹ This is in response to a Cabinet Direction to the CRTC regarding foreign licensees, S.O.R./71-33 as amended by S.O.R./75-102.

⁹⁰ See *Television Broadcasting Regulations*, S.O.R./64-50, as amended by S.O.R./71-558, S.O.R./72-242 and S.O.R./75-554.

The Canadian content regulations discussed here are found at S.O.R./72-242, s. 3 amending s. 6A of the *Television Broadcasting Regulations*.

⁹¹ *Supra*, note 81.

the extended coverage would seem to reduce the secondary market for the copyright holder to sell second runs of programmes.⁹²

While CATV is a problem for any broadcasting system, it is additionally so in Canada. The effect of the CATV system in Canada, as in the U.S., is to undermine the local licence. Because of the predominance of American signals carried, it also risks undermining the whole Canadian broadcasting policy and its goal of Canadianization.

Canadian policy with regard to cable television has undergone substantial revision over the last few years. Until 1968, the regulation of CATV was left to the Department of Transport, which adopted a highly permissive policy in licensing, granting a licence so long as one Canadian channel was carried.⁹³ Then, in 1968, the *Broadcasting Act* accorded the CRTC the power to regulate CATV by defining "broadcasting undertakings," which are subject to licence by the CRTC, to include a "broadcasting receiving undertaking."⁹⁴ Judicial interpretation of this phrase has held that CATV operations fall within the category of "broadcasting receiving undertaking."⁹⁵ The CRTC first exercised its mandate with regard to CATV in a policy statement issued on May 13, 1969.⁹⁶

The first principle set out in the statement dealt with programme distribution, with the CRTC setting out a priority list for channels to be carried, headed by CBC French and English stations, followed by private Canadian networks, independent Canadian networks, local and educational programming, and ending with non-Canadian television stations and duplicate channels. At this time the CRTC forbade any alteration in programming received from broadcasting stations without CRTC approval. No commercial messages were allowed other than those carried in the signals received.

This policy statement was followed by another on December 3, 1969,

⁹² These problems are discussed in greater detail in B. Silverman, *CATV and Copyright Liability: Teleprompter Corp. v. Columbia Broadcasting System, Inc. and the Consensus Agreement, supra*, note 74 at 1527-30. Even if the copyright holder is not directly harmed by the extended coverage by CATV, one might consider the equities of the use of the television signals without compensation therefor by the CATV operation. If copyright law is designed to protect private property, then some compensation seems due. If such law is designed to protect creativity in order to encourage further creativity, then there may be no justification for such compensation if no harm to the copyright holder results from the extended signals. This dilemma is discussed in the Silverman *Note*, as well as the *Note* in the Harvard Law Review cited *supra*, note 74.

⁹³ CRTC, *Annual Report, 1969-70*, Appendix 4, at 347, 348. A change occurred in mid-1964, when it was decided that the Board of Broadcast Governors (the predecessor of the CRTC) should be consulted on all new CATV licence applications so as to determine the impact on broadcasting in Canada.

⁹⁴ *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 2.

⁹⁵ *Terra Communications Ltd. v. Communicomp Data Ltd.* (1974), 1 O.R. (2d) 682 (H.C.); *R. v. Communicomp Data Ltd.* (1975), 20 C.C.C. (2d) 213 (Ont. Co. Ct.); *R. v. Maahs* (1975), 6 O.R. (2d) 774 (Dist. Ct.), *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* (S.C.C. unreported, Nov. 30, 1977), at 26 *per* Laskin C.J.

⁹⁶ CRTC, "Public Announcement — Community Antenna Television," reprinted in CRTC, *Annual Report, 1969-70*, Appendix 5, at 336.

which was directly concerned with the impact of U.S. television coverage in Canada through CATV.⁹⁷ The CRTC decided in this statement that it would not license any CATV system based on microwave,⁹⁸ or any other technical system for the wholesale importation of programmes from U.S. stations. For the first time the CRTC discussed the need to stop the accelerating trend towards expansion of American television coverage in Canada in order to preserve the Canadian broadcasting system. As the Commission concluded,

Broadcasting in Canada can and must express the originality of Canada and Canadians. The commission is determined that the hope and spirit embodied in the *Broadcasting Act* of 1968 will be successfully achieved.⁹⁹

At this time the CRTC took no steps to encourage in an active manner the development of Canadian programmes.

A further policy statement of April 10, 1970, repeated this concern about the broadcasting system. Nevertheless, it declared that in the future a CATV operator could use microwave or other broadband systems to receive one commercial non-Canadian station and one non-commercial non-Canadian station.

By February, 1971, the CRTC had determined that there was a need for extensive review of CATV policy in Canada. Rather than opt for totally unfettered growth in CATV or total restriction thereon, the CRTC chose to pursue a policy of integrating CATV into the broadcasting system as a whole.¹⁰⁰ It issued a policy paper at this time which was the subject of public hearings in Montreal starting on April 26, 1971. Following this, on July 16, 1971, the CRTC issued its most significant policy statement to date, "Canadian Broadcasting—A Single System." The statement noted the problems caused by CATV, both in the derogation of the economic base of the local licensee and in the thwarting of the policy of local licensing. Licences are issued to broadcasting stations partly on the assumption that they will serve a local community's needs. The 'logic' of this local licence is destroyed when CATV imports television signals from outside the community that fail to respond to the locality's interests and needs. The CRTC went on to adopt five basic policies which it felt would be consistent with the objectives of the *Broadcasting Act*, the creation of a single system, and the strengthening of the Canadian cultural, political, social, and economic fabric. First, the CRTC set out a priority list of basic services that a CATV operation would be required to supply, starting with local stations, regional stations, and distant stations, all defined as Canadian. Any other stations are "optional" and may be carried only if basic

⁹⁷ CRTC, "Public Announcement — The Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada by CATV" in CRTC, *Annual Report, 1969-70*, Appendix 5, at 342.

⁹⁸ Microwave is used to carry television signals over a long distance when the use of cable would be much more expensive.

⁹⁹ *Supra*, note 96 at 243.

¹⁰⁰ This is consistent with the broadcasting policy expressed by Parliament in the *Broadcasting Act*, which refers to broadcasting undertakings (including broadcasting receiving undertakings) as a single system (s. 3(a)).

services have been provided.¹⁰¹ Second, the CRTC encouraged the CATV operator to provide access to a channel for community programming. Third, the CRTC concluded that CATV operators who earn a sufficient gross revenue per mile of cable (a sum not calculated in the statement) should pay for the Canadian programmes used on a basis to be worked out by CATV operators and local stations. According to the CRTC, "the basic principle involved is: one should pay for what he uses to operate his business." Fourth, and most importantly, the CRTC adopted two policies designed to restore the logic of the local licence: programme substitution and commercial deletion.¹⁰² In adopting these two policies, the CRTC for the first time authorized CATV operators to alter television signals received.

The programme substitution policy allows the highest priority station to request the deletion of the signals of a programme from another station identical to one which it is broadcasting in the same time period or within one week of its broadcast. In the latter case, the broadcaster must pay for the substitution. The rationale for this policy is that local stations (or perhaps regional) are protected from fragmentation of their audiences. This prevents their advertising clients from protesting about a reduced number of viewers caused by CATV operations. The public is unaffected, for they see the same programmes as before.¹⁰³ All that is affected is the more distant station, which is not licensed to serve the viewing area in the first place. A problem arises, however, in that a distant station, even though not licensed to serve the area, may have structured its operations on the assumption that this extended market would be reached and have come to rely on the revenue built up within that structure. Abstract discussions of licensing do not provide them with much comfort.¹⁰⁴

More controversial is the commercial deletion policy, whereby CATV operators can remove the commercials in the signals of stations not licensed to serve Canada, while continuing to transmit the programmes of those stations. In the space left by the deletion, the CATV operator can substitute commercials sold by Canadian television stations, provided that the CATV operator and broadcaster have entered into an agreement to this effect approved by the CRTC. The underlying rationale, although not expressed, is that Canadian broadcasters will benefit from new sources of revenue as advertisers are attracted to the wider market in Canada or driven away from

¹⁰¹ The definitions of local, regional, and distant stations are designed to ensure that the CATV operator carries local broadcasters, as well as coverage of at least one CBC and one private Canadian station and carriage of an educational channel if a province requests this service.

¹⁰² CRTC, *supra*, note 4 at 21. It is this policy which seems especially illogical to American broadcasters, since American programmes continue to be seen. See, for example, testimony of Leslie Arries of WBEN-TV, Buffalo in U.S. H. of Rep., *supra*, note 59 at 15.

¹⁰³ Although their chance to choose the time at which they wish to view them may be restricted. Rather than pay the cost of programme substitution at various times in the week if the U.S. and Canadian programmes are shown at different times, Canadian stations have chosen to broadcast their version of programmes in the same time slot as the U.S. broadcasters (*Globe and Mail*, December 20, 1976, at 13, col. 3).

¹⁰⁴ This is the feeling of broadcasters in Buffalo and Bellingham.

American stations on which their ads are no longer seen. In turn, the Canadian broadcasters will be expected to use their new revenue in order to produce Canadian programming.

There is no effort under this commercial deletion policy to control the Canadian content of broadcasts or of cable television coverage or to force Canadian production, although indirectly there is an obligation to use the revenue to produce Canadian programmes through the interaction of the present policy with existing Canadian content rules. Nevertheless, American programmes continue to be seen, whether on Canadian or American stations. Rather than try to eliminate American programming, a move that would be politically unfeasible in light of the widespread popularity of such programmes in Canada, the CRTC chose to adopt a policy aimed at increasing Canadian access to programming by increasing the economic resources available therefor. In some ways, an analogy could be made between the commercial deletion policy and a protective tariff. The advertisements accompanying American television programme signals are an economic good, in which trade will be restricted in order to protect a domestic product. The Canadian economy has traditionally been rife with protective tariffs imposed to protect domestic industry from international competition.¹⁰⁵

An interesting addendum was found in the fourth prong of the CATV policy, in the CRTC's request to the Canadian government for an amendment to the *Income Tax Act* to prohibit deduction of advertising expenses incurred by Canadian taxpayers who purchase advertising time on non-Canadian stations.¹⁰⁶ Again the CRTC did not explain its purpose, but one can discern it with little difficulty. The aim is to render advertising on American stations as unattractive as possible for those advertisers wishing to reach Canadian audiences. Thus, elimination of the tax deduction increases the cost of the advertisement while commercial deletion means that there is a substantial risk that a purchased advertisement will never be shown in Canada.

The CRTC's policy statement continued with certain provisions addressed to licensing and to strengthening cable television, finishing with a lengthy discussion of the need for a Canadian programme production industry. The CRTC's perspective on this whole issue is probably best illustrated by the final sentence of the document.

The effect of this [U.S. presence] can tend, at times, to be overwhelming. In the face of such affluence and influence, the creative development and perpetuation of

¹⁰⁵ The danger with the "tariff" on television advertisements, as with any protective tariff, is that it will safeguard inefficiency or second-rate productions. The analogy to tariffs breaks down, to some extent, in the way in which the commercial deletion policy was implemented (*infra*, note 109). By authorizing *random* deletion of commercials, the CRTC could not say that the deletion paralleled a tariff, for tariffs are imposed on a class of goods, not a few items within a class chosen at random. Still, the tariff principle could be salvaged, for the random deletion is similar to a quota. Unfortunately, such a practice is prohibited under the *General Agreement on Tariffs and Trade* (GATT), Article XI (1), which bars import restrictions other than duties. See also H. Steiner and D. Vagts, *Transnational Legal Problems* (Mineola: The Foundation Press, 1968) at 1049-1051.

¹⁰⁶ The request was answered by Bill C-58. See discussion, *infra*, at note 168.

a Canadian programme industry is mandatory if Canada is to survive a culturally autonomous nation.¹⁰⁷

Whether melodramatic or not, the statement illustrates the depth of CRTC commitment to its Canadianization policy. The commercial deletion policy has been by far the most controversial adopted in implementation of this objective. It was not until December, 1972, that it was first implemented. At that time, a Calgary CATV operator's licence was amended on the condition that commercial signals from American stations, specifically in Spokane, Washington, be deleted and advertisements of local broadcasters with whom the licensee had an approved agreement be substituted.¹⁰⁸ Similar conditions were subsequently imposed on CATV operators in Montreal, the Maritimes, and the West.¹⁰⁹

In August, 1973, Rogers Cable Television Company of Toronto began to delete commercials from the Buffalo station WKBW-TV on a random basis. Protests from the Buffalo broadcasters led Rogers, along with two other CATV companies, Coaxial Colourview Ltd. and Bramalea Telecable Ltd., to apply to the CRTC for an amendment to their broadcast licences on October 16, 1973, to allow deletion of commercials on a random basis and substitution of special promotional messages and general public interest messages. A licence amendment would make such deletion a legal obligation on Rogers' part. This would no doubt protect the CATV operator in any subsequent litigation with the Buffalo stations by providing a legal justification for Rogers' action. The three Buffalo stations immediately intervened in a public hearing held by the CRTC on November 27, 1973, claiming that Rogers' action violated the *Copyright Act*,¹¹⁰ the *Trade Marks Act*,¹¹¹ and common law rules against unfair competition, unjust enrichment, conspiracy to injure, and interference with contractual relations. Despite these protestations, the CRTC amended the licences, in part as requested.¹¹² Random deletion of commercial signals would be allowed under the licence, on the ground discussed above, that the CRTC's objective was to restore the logic of the local licence and strengthen Canadian television service. The requested form of substitution was denied, however. No promotional material was to be inserted; rather, public service announcements were to serve as replacements. Finally, the Rogers' licence alone was the subject of a condition barring voluntary settlement of any litigation between the licensee and the Buffalo broadcasters unless prior approval was obtained from the CRTC. This condition was explained as arising out of the fear that the licensee might agree to a settlement which would make it unable to carry out its obligations under the *Broadcasting Act*.

The Rogers' decision was the catalyst that brought the Canadian courts into the development of CATV policy, for the Buffalo stations, WKBW-TV,

¹⁰⁷ CRTC, *supra*, note 4 at 44.

¹⁰⁸ *Supra*, note 3.

¹⁰⁹ CRTC, *Annual Report, 1975-76* at 18.

¹¹⁰ R.S.C. 1970, c. C-30.

¹¹¹ R.S.C. 1970, c. T-10.

¹¹² CRTC Decisions 74-100, 74-101, 74-102.

Taft Broadcasting and Capital Cities Communications, sought judicial review of the licensing decision and also appealed it.¹¹³ Before turning to the judicial response, it may be of interest to note CRTC decisions since Rogers'. New licences continued to be issued with a commercial deletion condition,¹¹⁴ and the CRTC showed its continuing concern about the effect of CATV on Canadian broadcasting with a further policy statement issued in December, 1975.¹¹⁵ It set out objectives for CATV operators: to contribute to the quality and diversity of Canadian broadcasting and programme production industries and to contribute to community programming. Regulations were issued to restrict the carriage of non-Canadian FM radio stations.¹¹⁶

Throughout this period, the CRTC continued to take a position in favour of actions that would foster a Canadian programme production industry. To carry out its objective, it adopted several policies that complement and reinforce each other, including foreign ownership controls, Canadian content regulations, and CATV controls that restore the logic of the local licence and undercut the financial advantage of foreign broadcasters. The effect of these CRTC decisions on the law relating to cable television depended, and continues to depend, on decisions by other participants in the political sphere and in the judiciary.

2. *The Courts*

Frustrated by inactivity in the political and diplomatic arenas, the Buffalo broadcasters resorted to litigation in an effort to shape telecommunications law, challenging the CRTC licence amendments on administrative law and constitutional law bases, and suing Rogers and others for violations of copyright and trademark legislation. Litigation and lobbying are two of the few mechanisms open to the individual to influence the law. At the time that the broadcasters turned to the courts, lobbying seemed to be achieving nothing. It was thought that litigation might expedite negotiations for settlement and might also establish a precedent that would frustrate or deter the implementation of the Canadian policy.¹¹⁷

Shortly after the CRTC amended Rogers' cable television licence in May, 1974, the three Buffalo television stations, Capital Cities Communications Inc., Taft Broadcasting Co., and WBEN-TV Inc., sought relief in the Federal Court of Canada, claiming that the licence was invalid on several grounds: first, Parliament had no constitutional authority to regulate the con-

¹¹³ Judicial review was sought under s. 28 of the *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10. The appeal was pursuant to s. 26 of the *Broadcasting Act*.

¹¹⁴ For example, Decisions 75-151 and 75-152 require QCTV Ltd. and Capital Cable TV Ltd. (Edmonton) to make a commercial deletion and substitution agreement prior to distributing signals from a Spokane station.

¹¹⁵ CRTC, *Policies Respecting Broadcasting Receiving Undertakings (Cable Television)*, December 16, 1975.

¹¹⁶ CRTC, *Annual Report, 1975-76* at 2-4, 17. The cable television regulations are found in SOR/75-665, s. 6 (television service priorities) and s. 15 (radio service priorities).

¹¹⁷ See the testimony of Leslie Arries, Vice-President and General Manager of WBEN-TV of Buffalo before the U.S. H. of Rep. Subcommittee on Inter-American Affairs, *supra*, note 59 at 14.

tent of signals carried by a CATV operation within a province; second, the CRTC exceeded its jurisdiction in issuing the licence; third, the licence was contrary to the *Inter-American Radio-Communications Convention of 1937*.¹¹⁸

A decision in the case was issued by the Federal Court of Appeal on January 17, 1975, dismissing the application for judicial review and the appeal.¹¹⁹ Leave to appeal to the Supreme Court of Canada was granted March 17, 1975, and a decision was finally rendered, dismissing the appeal by *Capital Cities*, on November 30, 1977.¹²⁰

By the time the Supreme Court of Canada delivered its decision, the dispute over commercial deletion on CATV had been temporarily settled by political means.¹²¹ This does not leave the court's decision without significance in the context of the present discussion of international communications law. Substantively, the decision's effect is to preserve the future jurisdiction of the federal government and that of its regulatory arm, the CRTC, should there be a desire to reactivate the commercial deletion policy. If the appellants had succeeded in proving that the federal Parliament had no constitutional authority to regulate cable television, CATV would have become subject to provincial regulation. Such regulation might have been more favourable to American broadcast interests, at least in some provinces.¹²² Even if unfavourable, there would be some delay in implementing provincial regulatory schemes, giving American broadcasters further opportunity to attract Canadian advertising dollars.

Thus, the Supreme Court's adjudication of the *Capital Cities* case involved the court in the international law-making process. Canadian judges do not regard themselves as political actors, and they have often been criticized for their positivistic approach to law.¹²³ Yet in the *Capital Cities* case, they have played an important law-making role, both domestically and internationally.

It is the domestic ramifications of the *Capital Cities* case, rather than the

¹¹⁸ U.S.T.S. 938 (1937).

¹¹⁹ *Re Capital Cities Communications and Canadian Radio-Television Commission* (1975), 52 D.L.R. (3d) 415.

¹²⁰ *Capital Cities Communications, supra*, note 95. See, also, *La Régie des Services Public de la Province de Québec v. Dionne* decided at the same time. In both cases, the court divided 6 to 3, with Laskin C.J.C., writing the majority opinion (with Martland, Judson, Ritchie, Spence and Dickson JJ. concurring) and Pigeon J. writing the dissent (Beetz and de Grandpré JJ. concurring). The *Dionne* case dealt with the constitutionality of provincial licensing of cable distribution systems, holding that such licensing was *ultra vires* the province.

¹²¹ See text, *infra*, at note 178.

¹²² For example, Ontario, where the minority Conservative government made an effort, unsuccessfully this time, to allow Ontario companies to make tax deductions for advertisements purchased in the U.S. directed to a Canadian market. This is contrary to the federal government policy prohibiting such deductions from federal income tax (*infra*, note 168). The measure was withdrawn after opposition parties registered their disagreement with the provision. (*Globe and Mail*, December 1, 1977).

¹²³ See, for example, P. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 Can. B. Rev. 406. The emphasis is on precedent, rather than policy arguments.

international, which appear to have been the concern of the court. The question of constitutional authority over the technology and content of cable television is one that has preoccupied the federal and provincial governments over the last several years.¹²⁴ Neither broadcasting nor cable television is mentioned expressly as a subject of legislative power attributed to either the federal or provincial governments under the Canadian constitution,¹²⁵ for, of course, neither existed in 1867 when that document was drafted. However, the federal government claims authority to regulate the field on two bases: first, the residuary power contained in the opening words of section 91 of the *British North America Act*, "to make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces;" and second, under the combination of subsection 91 (29) and the exception to provincial powers over local works and undertakings found in paragraph 92 (10) (a) of ". . . Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Province, or extending beyond the limits of the Province." It has been the contention of some provinces, in refutation of the federal claim, that cable television is a local matter, detached from broadcasting in general, and falling within subsection 92 (10), "local Works and Undertakings." They regarded the *distribution*, through coaxial cables, of television signals received by the antennae of a CATV operation as separable, for purposes of constitutional jurisdiction, from the *reception* of the signals. Other provinces argued that the subject of cable television has aspects falling within various heads of both sections 91 and 92 of the *British North America Act*. For example, regulation of the importation of foreign television signals would fall to federal jurisdiction under the authority to regulate trade and commerce.¹²⁶

Laskin C.J.C., in his majority judgment, rejected the argument that the jurisdiction over cable television distribution of imported television signals was divided between the federal and provincial governments.¹²⁷ Emphasizing repeatedly that the scope of constitutional jurisdiction over broadcasting should not be determined on the basis of technology, the Chief Justice held that cable television systems receiving television signals constitute an undertaking extending beyond the province. They are integrally related to television

¹²⁴ Evidence of the constitutional importance of the case was shown by the intervention of five provincial governments in the *Capital Cities* case: Ontario, Quebec, Alberta, British Columbia, and Saskatchewan. Interestingly, several important constitutional cases in the Supreme Court of Canada in the last few years have been set in motion by American litigants — *Morgan v. A.G. P.E.I.* (1975), 55 D.L.R. (3d) 527 (alien land controls); *Canadian Industrial Gas and Oil Ltd., v. Saskatchewan* (S.C.C. unreported, November 23, 1977) (resource taxation); *Amax Potash Ltd. v. Saskatchewan* (1977), 71 D.L.R. (3d) 1 (potash industry nationalization). This seems to be a new trend, for in the past the parties to constitutional cases have tended to be federal and provincial governments.

¹²⁵ *British North America Act*, 1867, 30 and 31 Vict., c. 3, ss. 91 and 92.

¹²⁶ Section 91 (2). This was Saskatchewan's argument in the Supreme Court in the *Capital Cities* case (see Laskin C.J.C. in *Capital Cities*, *supra*, note 95 at 21.) Pigeon J. adopted this argument as the basis for federal jurisdiction over imported television signals (*id.* at 3).

¹²⁷ *Id.* at 16-17.

broadcasts and so fall within federal jurisdiction through the operation of s. 92 (10) (a) of the *B.N.A. Act*.¹²⁸ The Chief Justice refused to accept the argument that the reception of television signals by the CATV system's antenna should be regarded as separate from the subsequent distribution of those signals, saying,

The system depends upon a telecast for its operation, and is no more than a conduit for signals from the telecast, interposing itself through a different technology to bring the telecast to paying subscribers.¹²⁹

Since federal jurisdiction over broadcasting extends to regulation of the signals received directly by home receivers, the Chief Justice concluded that the jurisdiction must encompass the same signals picked up by CATV systems and transmitted to home receivers through coaxial cable.¹³⁰

In making his decision, the Chief Justice remained faithful to the decision of the Privy Council in *Re Regulation and Control of Radio Communication in Canada*.¹³¹ In that case, Viscount Dunedin, writing for the Board, held that radio communication was a matter subject to regulation by the federal Parliament both under the opening words of section 91 and under paragraph 92 (10) (a).¹³² His Lordship's decision seems to have been based on structural considerations as to which level of government could best control broadcasting, rather than on the rigid words of the text, for he speaks of the "necessity" for the federal government to regulate broadcasting in order to fulfill its international obligations under the 1927 *International Radiotelegraphic Convention*. Certain words which His Lordship chose have been referred to frequently in subsequent cases, and were quoted by Laskin C.J.C. in the *Capital Cities* case: "[b]roadcasting as a system cannot exist without both a transmitter and receiver." In other words, the two cannot be separated for purposes of regulation.¹³³ This was the approach adopted by

¹²⁸ *Id.* at 16. "The systems are clearly undertakings which reach out beyond the Province in which their physical apparatus is located; and, even more than in the *Winner* case, they each constitute a single undertaking which deals with the very signals which come to each of them from across the border and transmit those signals, albeit through a conversion process, through its cable system to subscribers."

¹²⁹ *Id.* at 17.

¹³⁰ The majority opinion may seem limited to a decision as to federal competence to regulate cable television systems receiving foreign television signals (*id.* at 16.) However, further discussion seems to recognize federal competence over cable television whenever television signals are received, whether from within or without a province (*id.* at 17-18). Possible provincial competence is reserved to CATV systems limiting their operation to locally produced programmes for local subscribers (*id.* at 9). See, also, Laskin C.J.C. in *Dionne*, *supra*, note 120 explaining *Capital Cities* at 3, 4.

¹³¹ [1932] A.C. 304, *aff'g* [1931] S.C.R. 541.

¹³² The *Radio* case, at first appearance, seems to accord jurisdiction to the federal Parliament by interpreting the opening words of s. 91 ("Peace, Order and good Government") to give the Parliament any legislative authority necessary to implement treaties. That interpretation was rejected by the Privy Council in the subsequent *Labour Conventions* case (*A.G. Can. v. A.G. Ont.*, [1937] A.C. 326 at 351.) There the Board explained the *Radio* case, saying that legislative jurisdiction over broadcasting fell to Parliament through the operation of the residuary clause of s. 91, neither s. 91 nor s. 92 having dealt with the matter.

¹³³ *Radio Reference*, *supra*, note 131 at 314-15.

Laskin C.J.C. in *Capital Cities*: CATV is linked to television and radio transmitters in an inextricable manner, carrying television and radio signals to the home receiver.¹³⁴

An argument could be made that radio and television broadcasting differ in nature from cable television, in that the latter is physically confined to a wire or cable and not likely to interfere with transmissions by other broadcasting undertakings in the way that radio and television signals passing through the atmosphere do. Thus, there is not the equivalent need for a single regulating authority which was the concern of the Privy Council in the *Radio Reference*.¹³⁵ Furthermore, from a policy standpoint, the provinces have a significant interest in regulating CATV because of its educational uses (education is a provincial concern under section 93) and community uses (arguably within subsection 92 (16) as a matter of a local nature).¹³⁶ The Supreme Court of Canada, however, rejected such arguments in light of the degree of operational integration between cable television and television broadcasting and the dependence of cable television on television for its existence.

The discussion to this point has focused on federal control of the technology of cable television. The appellants and the provincial Attorneys-General supporting them (Ontario, Quebec, Alberta, British Columbia) directed their attack to federal control over the *content* of cable television.¹³⁷ Pigeon J. in his dissent in the *Dionne* case, released at the same time as *Capital Cities*, would make a distinction between federal control over licensing of the technical aspects of CATV systems and content control, the latter not falling within exclusive federal jurisdiction.¹³⁸ Laskin C.J.C. had no doubts as to federal

¹³⁴ *Supra*, note 95 at 17.

¹³⁵ See, for example, Lerner J. in *Terra Communications*, *supra*, note 95 at 693. See, also, other lower court decisions discussing constitutional jurisdiction over CATV: *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716 (B.C.C.A.); *R. v. Communicomp Data Ltd.*, *supra*, note 95 at 230-31; *R. v. Maahs*, *supra*, note 95 at 780; J. Fine, *Whither Goes the Wire? The Extent of Federal Competence to Regulate CATV* (1972), 18 McGill L.J. 615 at 623.

¹³⁶ Quebec is especially concerned with the use of communications for creating community awareness and has rejected federal claims to control communications. The earlier discussion of the uses of communications (*supra*, section B) should demonstrate the importance of control of the broadcast media to the Parti Québécois government in its efforts to foster Francophone identity and to promote support for Quebec independence.

¹³⁷ The constitutional question of which the provincial Attorneys-General were given notice was phrased as follows:

Whether the Broadcasting Act, RSC 1970, c. B-11, and regulations made thereunder, are ultra vires the Parliament of Canada insofar as they purport to regulate, or to authorize the Canadian Radio-Television Commission to license and regulate the *content* of programs carried by CATV systems situated wholly within Provincial boundaries. (*Per* Laskin C.J.C. in *Capital Cities*, *supra*, note 95 at 7. *Emphasis added*).

¹³⁸ *Dionne*, *supra*, note 120 at 13, 15. Pigeon J. acknowledged exclusive federal control over the *technical* aspects of radio communications, including CATV. He would leave content control and economic aspects to the provinces. Pigeon J. leaves open a door for federal control over content when he assumes that the CRTC could deny a licence to a CATV system meeting all technical requirements under the *Radio Act* (*id.* at 14). Surely, one could challenge the CRTC's jurisdiction to do so, for the decision would be based on irrelevant considerations.

competence to regulate content, at least when foreign television signals are distributed.¹³⁹

Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise.¹⁴⁰

The reasoning underlying this conclusion is not too clear, for it rests, in part, on traditional federal authority to license radio receivers, a basis which does not appear to lead to a conclusion that Parliament can regulate the *content* of material received.¹⁴¹ The conclusion would be more convincing had His Lordship looked to a rationale for content control by the federal Parliament, based on the scarcity of broadcast frequencies. Frequencies available for broadcasting are limited, and the federal Parliament must decide on a way to allocate them between competing users. The method chosen has been through licences issued to those most capable of meeting national policies for broadcasting. Once those licensees commence operations, their ability to function must be preserved, either by ensuring some degree of profitability or through public subsidy. The Canadian government, having chosen a commercial model for broadcasting, must ensure that model is viable. Cable television, by importing television signals from unlicensed stations, threatens the commercial viability of licensed stations. Therefore, one can argue that Parliament must regulate content of the cable television systems at least to the extent that those systems wish to pick up television signals in order to protect the structure of the broadcasting system.¹⁴²

This suggested rationale would not accord the extensive federal jurisdiction over cable television that Laskin C.J.C. recognizes. The Chief Justice would apparently leave open for possible provincial jurisdiction programmes *originated* by CATV systems and seemingly if that was all that those systems transmitted.¹⁴³ Otherwise, federal legislative authority would be exclusive with regard to CATV systems transmitting television signals. The rationale suggested would allow the federal Parliament competence to regulate use and maximum number of signals *if* (but only if) CATV systems chose to receive them. Otherwise, CATV would be subject to provincial jurisdiction.

The appellants fared badly in their constitutional challenge, and their challenge to the validity of the CRTC decision on jurisdictional grounds did not fare any better. The appellants argued that the *Broadcasting Act* gave the CRTC no authority to regulate CATV, an argument that Laskin C.J.C. re-

¹³⁹ *Supra*, note 130.

¹⁴⁰ *Capital Cities, supra*, note 95 at 20.

¹⁴¹ *Id.* at 19. Laskin C.J.C. noted that the federal government had in the past licensed broadcasting receivers. He questioned the constitutional basis for doing so, if Parliament did not have authority to regulate broadcasting content. Surely, one reason for doing so could be to raise revenue. Furthermore, such a statement, that Parliament had licensed receivers, does not prove that Parliament in fact had constitutional authority to do so.

¹⁴² Pigeon J. in his dissent in *Dionne* says that economic repercussions cannot form a basis for legislative jurisdiction (*supra*, note 120 at 14). With all due respect, such repercussions must be relevant, though not conclusive, both in trade and commerce cases and in deciding the scope of jurisdiction over a matter such as broadcasting.

¹⁴³ *Supra*, note 130.

jected. He found that CATV is a "broadcasting receiving undertaking" within section 2 of the Act and so subject to CRTC licensing and regulatory authority.¹⁴⁴ Furthermore, he rejected an argument that the CRTC fettered its discretion in relying on the policy statement of July 16, 1971, to justify the commercial deletion condition to the Rogers' licence.¹⁴⁵

The only issue on which the appellants succeeded was the challenge to the condition in Rogers' licence forbidding settlement without CRTC approval.¹⁴⁶ Laskin C.J.C. found it difficult to accept the CRTC's explanation that the condition was imposed because a settlement could jeopardize Rogers' ability to carry out its obligations under the *Broadcasting Act*. Surely the licensee would be wary of any settlement that might undermine its capacity to fulfil its obligations or that might violate its licence, as it would risk penalties such as licence revocation. Since the court severed this part of the order, the appellants do not seem to have gained a great deal.

The appellants' final submission, based on the *Inter-American Radio Communications Convention of 1937*, forced the court to be aware of its international role. Article 11 of the Convention recognizes the right of states to assign radio frequencies to broadcasting stations, provided that no interference is caused to the service of another country. Article 21 requires contracting governments to take appropriate measures to ensure that broadcasts will not be retransmitted or rebroadcast without previous authorization of the station of origin. Laskin C.J.C. found no obstacle to the commercial deletion order to the CATV licensees in either article. Article 11, he held, was concerned with elimination of technical interference, not programming.¹⁴⁷ This would seem consistent with early approaches to international regulation of telecommunications, which focused on frequency allocation and use.¹⁴⁸

More difficulty arises with Article 21. Laskin C.J.C. would adopt the reasoning of Ryan J.A. in the Federal Court of Appeal, narrowing the Convention's application to rebroadcasts of broadcasting stations, not CATV systems, which are "broadcasting receiving undertakings."¹⁴⁹ This may be somewhat weak reasoning, when the court had just found CATV integrally related to broadcasting stations for licensing purposes. Furthermore, the Chief Justice pointed out that Article 21 contemplates implementation of govern-

¹⁴⁴ *Capital Cities*, *supra*, note 95 at 26, 28.

¹⁴⁵ *Id.* at 32. Pigeon J. rested his decision in *Capital Cities* on the fact that the CRTC exceeded its jurisdiction in ordering commercial deletion (*id.* at 8, 17).

¹⁴⁶ *Id.* at 29.

¹⁴⁷ *Id.* at 36.

¹⁴⁸ Leroy, *supra*, note 8 at 736. See also Whiteman (1968), 9 *Digest of International Law* at 764. The Chief Justice also found that Rogers was not bound by the Convention, since it was a licensee under the *Broadcasting Act*, rather than the *Radio Act*, which implemented the Convention (*Capital Cities*, *supra*, note 95 at 37).

¹⁴⁹ *Id.* at 37. Article 21 reads, in part, "[t]he contracting Governments shall take appropriate measures to ensure that no program transmitted by a broadcasting station may be retransmitted or rebroadcast, in whole or in part, by any other station without the previous authorization of the station of origin."
[Emphasis added.]

ment measures to prevent interference. Here, there is no prohibition on interference with foreign broadcasts;¹⁵⁰ in fact, although Laskin C.J.C. does not point this out, there is government instruction, through the CRTC, to alter broadcasts. Pigeon J., in dissent, did find a violation of Article 21,¹⁵¹ and held that even if the treaty had no domestic force, the CRTC could not authorize licence conditions in violation of Canadian treaty obligations.¹⁵² This position shows much greater awareness of the international law aspects of the case than does that of the Chief Justice.

In sum, the commercial deletion policy emerged intact from the Supreme Court of Canada. This has left the American broadcasters with the decision whether to proceed with a second phase of litigation, pending at the trial level of the Federal Court, which focuses on industrial property issues. One statement of Thurlow J.A. in the Federal Court of Appeal in the *Capital Cities* case will be of concern in this new litigation. In a concurring opinion, Thurlow J.A. questioned the right of *Capital Cities* to standing in the case on the ground that its rights were not affected by Rogers' licence. Since radio frequencies are public property in Canada under section 3 (a) of the *Broadcasting Act* and since *Capital Cities* is unlicensed in Canada, Thurlow J.A. held that *Capital Cities* could not acquire any right either in the frequency or in the signals generated on it.¹⁵³ Thurlow J.A.'s approach may give cause for concern for, if extrapolated, it seems to deny a proprietary interest to anyone operating in a place without authorization. While the appellants have no right to claim the use of the frequency in Canada, it is difficult to see how they lose the ownership of their signals, even when "usurping" Canadian frequencies. Laskin C.J.C. did not deal with the property rights issue, finding that there was standing because Ryan J.A., with Urie J.A. concurring, did not raise the issue and because of *Capital Cities*' interest in protecting the commercials associated with its programmes.¹⁵⁴

The proprietary rights in the programmes broadcast and the commercials contained therein have relevance to all cable television, partly because the decision as to whether CATV transmission infringes copyright or constitutes unfair competition is of interest to all television broadcasters. The television companies argue that CATV transmission of their signals constitutes a violation of the *Copyright Act*.¹⁵⁵ American nationals can claim the protection of the Act by operation of the *Universal Copyright Convention*,¹⁵⁶ of which both Canada and the U.S. are signatories. It would seem that the plaintiffs will face a difficult task in convincing a court that CATV transmission constitutes a "performance" for purposes of copyright infringement. The only

¹⁵⁰ *Id.* at 38.

¹⁵¹ *Id.* at 14. The CATV systems are either interfering with broadcasts (if mere conduits) or retransmitting programmes.

¹⁵² *Id.* at 17.

¹⁵³ *Supra*, note 119 at 417.

¹⁵⁴ *Capital Cities*, *supra*, note 95 at 8.

¹⁵⁵ R.S.C. 1970, c. C-30, s. 3 (1).

¹⁵⁶ 216 U.N.T.S. 132 (No. 2937). Article II provides for national treatment for the nationals of any contracting state.

Canadian authority on CATV is the case of *Canadian Admiral Corp. v. Rediffusion, Inc.*,¹⁵⁷ a decision of the Exchequer Court, which held that cable transmission to subscribers of a live football telecast, as well as films thereof, was not a "performance in public" for purposes of the *Copyright Act*. The transmissions constituted a performance, but not one "in public," when transmissions were to home receivers. While one might argue that the decision is not a weighty precedent in light of the extensive developments in CATV technology since its delivery in 1954 and because it was only a decision at the trial court level, the likelihood of a finding of copyright liability today seems doubtful.

The United States Supreme Court in two relatively recent cases, *Fortnightly Corp. v. United Artists Television Inc.*¹⁵⁸ and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,¹⁵⁹ concluded that CATV operations are not liable to pay copyright royalties. The majority in each case employed a functional approach, concluding that CATV operations fulfill the same function as the viewer's antenna or television set, a conclusion that the Supreme Court of Canada reached in *Capital Cities*, after quoting from *Fortnightly*.¹⁶⁰ The CATV operations do not "perform" as do broadcasters, even when, as part of their service, they mix signals from various stations, provide community programming, or carry advertising.

Even though the *Canadian Admiral* decision found that the CATV transmission was a performance, albeit not in public, Canadian courts might reach the conclusion that the U.S. Supreme Court has reached.¹⁶¹ Whichever approach is adopted, there would appear to be no copyright liability for CATV transmission.

Although the plaintiffs argue that the use of broadcast signals constitutes unfair competition contrary to section 7 (e) of the *Trade Marks Act*,¹⁶² this proposition will be of little benefit. The section was held *ultra vires* by the Supreme Court of Canada in a recent decision.¹⁶³

The chances of a successful termination of the cable deletion policy through the courts are dim. Both time constraints and judicial role perception fail to make the courts an attractive forum for American broadcasters. It is

¹⁵⁷ (1954-55), 20 Can. P.R. 75 (Exch.) at 97, 101. Under s. 3 (1) of the *Copyright Act*, the copyright holder has the sole right "to perform . . . the work or any substantial part thereof in public." Cameron J. found that the transmissions were a performance (*id.* at 404), but not "in public" (*id.* at 408).

¹⁵⁸ (1968), 392 U.S. 390.

¹⁵⁹ (1974), 415 U.S. 394.

¹⁶⁰ *Capital Cities*, *supra*, note 95 at 16.

¹⁶¹ Realizing that a judicial solution to the problem of cable television and copyright was not feasible, the United States Congress recently enacted a new Copyright Law which legislatively solves the problem (17 U.S.C. § 111, enacted October 19, 1976, effective January 1, 1978).

¹⁶² R.S.C. 1970, c. T-10. The Act applies to nationals of those states which have signed the *Paris Convention for the Protection of Industrial Property, 1883*. Both Canada and the U.S. ratified the 1934 revision of the treaty (U.S.T.S. 941).

¹⁶³ *Vapor Canada Ltd. v. MacDonald* (1976), 7 N.R. 477.

on the diplomatic or political level that more effective action must be sought. One cannot say, however, that the Supreme Court has failed to play a role in the decision process with regard to communications law, even though its ultimate decision was delayed and other developments have made its pronouncements almost moot in the international context. By leaving the commercial deletion policy in operation, the court has strengthened the authority of the Canadian government in this area. The decision, as made, has peripheral impact on the question of U.S.-Canadian communications policy in general, since it only leaves the other participants in their present bargaining positions.

3. *Diplomatic Decisions*

The State Department took official action very soon after the CRTC implemented its commercial deletion policy,¹⁶⁴ with its Aide-Mémoire of February 13, 1973. Consistent with the U.S. policy of free flow of information, the Department asked the Canadian government to intervene to rescind or modify the Calgary decision. The Department also instructed U.S. consular posts in border areas in Canada to monitor U.S. television broadcasts received in Canada and report on their treatment. Prior to the public protest, informal discussions had occurred.

The Canadian Department of External Affairs was not quick to reply to the *Aide-Mémoire*, but when it did so in October, 1973, it rejected the State Department's request for intervention. A note from the State Department followed on December 4, 1973, requesting delay while the policy was reviewed. External Affairs replied on January 16, 1974, saying that the "complex" commercial deletion policy was under review in interested government departments and that External Affairs would contact the State Department on completion of the review. It pointed out that the CRTC is an independent regulatory agency with a statutory mandate with respect to broadcasting policy. As the Calgary decision was made in the exercise of this mandate, the Canadian government could not agree to modify or rescind the decision.

The State Department was understandably upset by the note.¹⁶⁵ While the CRTC is independent in implementing a broadcasting policy for Canada, there is still room for discussion of the policy to be pursued. From the response of External Affairs, it would seem that as of early 1974, the Canadian Cabinet and the departments concerned were quite content to rest with the CRTC's action, and so External Affairs formulated its response to leave the action intact.

There seems to have been something of a hiatus on the diplomatic front

¹⁶⁴ At least at the initial stages, it was the Bureau of Economic and Business Affairs which handled the issue, rather than the expected Canadian Desk (Bureau of European Affairs), showing the important economic basis of the dispute (U.S. H. of Rep., *supra*, note 59 at 53.) These two bureaus have worked together subsequently.

¹⁶⁵ B. Pettey and E. Allebas, in *Resurgence of Canadian Nationalism and its Effect on American-Canadian Communications Relations* (1974), 9 J. of Int. L & Econ. 149, quote a State Department official as saying "[n]uts! How would it be if our State Department said it couldn't talk to FCC about a problem?"

in the cable television dispute during 1974. The inactivity of the State Department is born out by the Buffalo television stations' reluctant resort to litigation to protect their interests. Discontent with the State Department's inactivity was also expressed in the House of Representatives Subcommittee on Inter-American Affairs, which held hearings on United States-Canadian Broadcasting Relations on April 25, 1974.¹⁶⁶ The House Subcommittee took no action after hearing witnesses from various border television stations, the Federal Communications Commission, the State Department, and Rogers Cable Television of Toronto.

Further pressure on the State Department came from other political sources. Senator Buckley and other legislators from New York and Senators Magnuson and Jackson from Washington called for Secretary of State Kissinger to take action in letters in June and September of 1975. Later in that year, diplomatic efforts were revived. In October Kissinger met with his Canadian counterpart, the Secretary of State for External Affairs, the Honourable Allen MacEachen, to discuss commercial deletion. The pending appeal in the Supreme Court of Canada was cited as a reason for delaying further decisions.

Then, on January 13, 1976, despite the absence of a Supreme Court decision, a diplomatic meeting was held in Ottawa, attended by Canadian officials from the CRTC, External Affairs, and the Department of Communications, and American officials from the FCC and the State Department. The commercial deletion policy was discussed, and the Canadian officials agreed to receive any U.S. representations on alternative means for attaining the goals of the deletion policy.¹⁶⁷

The result was a further meeting in March between the CRTC and a delegation from the border stations. The proposal put forth can only be understood in conjunction with a contemporaneous Canadian decision, the enactment of Bill C-58.

4. *Bill C-58*

Bill C-58,¹⁶⁸ introduced in April, 1975, is a short piece of legislation with the innocuous title, "An Act to amend the Income Tax Act." It became more infamously known as "The *Time-Reader's Digest* Bill." Its provisions were twofold: the elimination of the income tax deduction for advertisements placed in non-Canadian periodicals, thus ending a special status held by *Time* and *Reader's Digest* since 1966 and a similar treatment of advertising

¹⁶⁶ *Supra*, note 59, at 7, 28. Mitchell Wolfson, president of Wometco Enterprises, stated that, "[w]e have asked to appear before you because other remedies, including representations through our own Department of State have thus far proved unsuccessful."

¹⁶⁷ This information and that following is detailed in a letter from Harry Boyle, CRTC Chairman, to Senator Keith Davey, dated June 9, 1976, and printed in Issue 91 of the Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60 at 91:53-54.

¹⁶⁸ Now S.C. 1974-75-76, c. 106, amending the *Income Tax Act*, S.C. 1970-71-72, c. 63. Royal assent was granted July 16, 1976, and the Act was proclaimed on September 21, 1976, to come into force September 22, 1976.

expenses incurred for "an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking."¹⁶⁹

The rationale for the legislation is clear. The American border stations carried on Canadian CATV undertakings had been siphoning advertising revenue from Canadian stations, at an estimated rate of up to \$20 million per year.¹⁷⁰ By deleting the income tax deduction for such advertisers, the price of an advertisement was effectively doubled. Coupled with the commercial deletion policy, Bill C-58 makes advertising on U.S. stations aimed at the Canadian market an unattractive investment and, theoretically, should direct money back to Canadian broadcasters.¹⁷¹

The State Department objected to Bill C-58, both during its enactment and subsequently. In the January 13, 1976, meeting of officials, the Canadians refused to listen to protests on this, saying that the issue was one for Parliament. The debate over Bill C-58 became enmeshed with the commercial deletion policy, despite the Canadian government's argument that they should be viewed separately. In fact, it is difficult to see how they can be separated, for their purpose is the same—to make advertising on foreign television unattractive and to promote Canadian access to television programming. Functionally, they are somewhat different, since commercial deletion is a direct physical interference with the signals of the foreign station, while Bill C-58 is designed to promote advertising in Canada through taxation measures addressed to *Canadian* taxpayers that make Canadian advertising financially more attractive. It does not coerce such advertising nor does it act extra-territorially.

In the March meeting between the CRTC and the border stations, the broadcasters proposed that they could establish some type of tax presence in Canada, similar to that already established in Vancouver by KVO5 to sell advertising. Income from Canadian advertisers would then be subject to Canadian taxes.¹⁷² This proposal was rejected by the CRTC, however, because it was conditioned on the promise that Bill C-58 would not be implemented.¹⁷³ One might speculate that another reason for rejecting the proposal was its content. It assumes that the Canadian government is only interested in holding revenue in Canada which it can then tax. At most, the establishment of shell corporations in Canada would allow for the creation of a government

¹⁶⁹ Now s. 19.1 of the *Income Tax Act*.

¹⁷⁰ This is the figure used by the Hon. Jeanne Sauvé, Minister of Communications, before the Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60, Issue 84, May 6, 1976, at 84:37. The U.S. stations refute this figure, claiming that some of their revenue from Canadian advertisers remains in Canada through commissions to Canadian advertising agencies or, in the case of KVO5 in Bellingham, through income taxes paid by its Canadian subsidiary, U.S. H. of Rep., *supra*, note 59 at 13; see *contra, id.* at 31.

¹⁷¹ Znaimer, *supra*, note 76, claims that border stations reduced their advertising rates after the enactment of Bill C-58, so as to retain Canadian directed ads. Thus, he argues, commercial deletion must be retained in order to protect Canadian broadcasters from this "dumping" by U.S. stations.

¹⁷² Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60, Issue 93, June 16, 1976, at 93:7-8.

¹⁷³ *Id.*, Issue 91, at 91:53-54.

fund from the new tax revenue generated. While the government could designate that the fund be used for the establishment of a Canadian programme industry, this would involve creating an extensive administrative framework to operate the fund and define standards for grants. The Canadian government wants Canadian programmes, but it seems to have committed itself to a commercial structure for programming, in which advertisements fund programming development and the market sets the standards for content. One might wonder if the resulting product will truly reflect "Canadianism" as desired by a policy based on acculturation and nationalism, for there is a real danger that the product will duplicate the bland, lowest common-denominator approach for which American programming is at present maligned.¹⁷⁴ Yet that is the Canadian government's policy choice and no doubt a major reason for its rejection of this proposal.

With the CRTC unwilling to discuss both commercial deletion and Bill C-58, the State Department resorted to Parliament, where Bill C-58 was still in the process of enactment. The recently appointed American ambassador to Canada, Thomas Enders, took the initiative and informed the Senate Banking Committee studying the bill of the U.S. government's position with regard to the legislation. The U.S. felt that implementation should be delayed while the two governments sought an alternative "more positive" arrangement to meet Canadian objectives.¹⁷⁵ The Ambassador met with a sympathetic audience in this Committee. Instead of the *pro forma* ratification of a bill that usually occurs in the Canadian Senate, there were extensive hearings followed by a report on June 22, 1976, proposing amendments to the bill.¹⁷⁶ This development, while unusual, is not surprising when one considers the business backgrounds of the Senators on the committee. They expressed fears about the uncertain climate that American businessmen have been finding in Canada recently with foreign investment controls, potash nationalization, and broadcasting controls. The reaction to the Senate Committee's action in political circles was heated, for the government was under pressure to adjourn for the summer and end the longest session in the history of the Canadian Parliament. Not surprisingly, the Senate referred the report back to its Committee and a revised report on July 14 removed all obstacles to passage.¹⁷⁷ By the fall of 1976, two policies, commercial deletion and the income tax provision, were in operation to try to direct television advertising dollars to Canadian stations.

G. A DECISION: FINAL OR INTERIM?

Diplomatic discussions continued with regard to commercial deletion after the March meeting and the enactment of Bill C-58, with meetings of

¹⁷⁴ See Peers, *supra*, note 52 at 154, who believes that this danger will become a reality in a commercially structured system.

¹⁷⁵ Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60, Issue 91, at 91:7-8.

¹⁷⁶ *Id.*, Issue 94, June 22, 1976.

¹⁷⁷ *Id.*, Issue 95. The Senators won something of a victory, for the Minister of Communications agreed to postpone proclamation of the broadcasting sections of the Act until she was sure that there was adequate time available on Canadian television stations for Canadian advertisers (*id.* at 95:7). The Act was not proclaimed until September of 1976 (*supra*, note 168).

officials in June and October, 1976, and talks between Secretary of State Kissinger and his new Canadian counterpart, the Honourable Don Jamieson, on October 15, 1976. Out of these meetings came proposals for a solution to the "television war" which resulted in the termination of the commercial deletion policy, by Cabinet decision, in January of 1977.¹⁷⁸ Bill C-58 was left intact, but commercial deletion stopped except in Toronto, Calgary, and Edmonton.¹⁷⁹

What seems to have emerged during these diplomatic discussions is a more active role by the Canadian Cabinet in the formation of cable television policy and, more specifically, commercial deletion. In the past, the CRTC and the Cabinet took similar positions on communications policy. That this has changed is illustrated by several events. For example, at the October 6 meeting of officials, Harry Boyle, Chairman of the CRTC, was ordered to stay in Ottawa.¹⁸⁰ This seemed to signal a government effort to exercise a more dominant role in commercial deletion policy and this was confirmed when Jamieson said that the government, that is, the Cabinet, was considering whether to take a position on the most recent U.S. proposals, *whether or not* in concert with the CRTC.¹⁸¹ Jamieson himself is much more "pro-American" than some of his predecessors involved in the cable television policy, and the present Cabinet seems to be decidedly less nationalistic than that of a few years ago.¹⁸²

Nowhere was the reduced policy role for the CRTC and the expanded role for the Cabinet more clearly evidenced than in Bill C-43, "An Act respecting telecommunications in Canada."¹⁸³ Subsection 9 (1) would au-

¹⁷⁸ The solution seems to have been worked out in a discussion between Canadian-American officials in a meeting on October 6 (*Maclean's*, October 18, 1976, at 17). Their proposals were discussed by Kissinger and MacEachen (Can. H. of C., *Debates*, 30th Parl. 2nd sess., January 24, 1977, at 2273). The termination of the commercial deletion policy seems to be temporary, to last until 1979, according to the *Globe and Mail* (July 9, 1977, at 8). See also CRTC, *Public Announcement on "Commercial Deletion"* (January 21, 1977).

¹⁷⁹ *Globe and Mail*, July 9, 1977, at 8. The CRTC's announcement on the termination of commercial deletion is a fine example of double speak, never clearly stating that the policy has been ended. At 2, one finds:

The Commission has now been informed by the Minister of Communications, the Honourable Jeanne Sauvé, that the Government fully supports the objectives which have led the CRTC to institute the commercial deletion policy, but considers that the feasibility of other methods of achieving the same objectives should be examined by the Commission before commercial deletion is further implemented. In addition, the Government considers that time should be allowed for an assessment of the effects of Section 19.1 of the Income Tax Act and of simultaneous program substitution. The Commission will undertake the requested examination and assessment.

¹⁸⁰ Miller, *supra*, note 58, col. 2 (although a *Communiqué* states that CRTC officials were present).

¹⁸¹ Can. H. of C., *Debates*, *supra*, note 178, October 18, 1976, at 146.

¹⁸² See I. Urqhart, "The Welcome Wagon" in *Maclean's*, November 1, 1976, at 40n. Jamieson is quoted as saying, "[a]ll my life I have had a love affair with the United States" (*id.* at 40). In contrast, though, may be the Hon. John Roberts, Secretary of State, who is responsible for the CBC.

¹⁸³ First reading March 22, 1977. Reintroduced January 26, 1978 as Bill C-24.

thorize the Cabinet to issue directions to the CRTC respecting the implementation of telecommunications policy,¹⁸⁴ thus putting the major voice for telecommunication policy in the political sphere.¹⁸⁵ The result is likely to be more trade-offs in communications policy development in order to respond to varying constituencies and pressures, whether from the U.S. State Department or electorates seeking wider coverage of American programmes.¹⁸⁶ The termination of commercial deletion seems to presage such a development.

One's first response is to ask what triggered the end of the commercial deletion policy. There had been threats of retaliatory action by various claimants in the U.S., although it is unlikely that the Canadian government took them seriously. These included a threat to jam signals crossing the border, and an application for approval of jamming was made to the FCC by the Buffalo stations in October, 1975. Whether or not jamming is illegal under international law,¹⁸⁷ the FCC is unlikely to approve the application. As

¹⁸⁴ That section now reads in part:

9. (1) Subject to subsection (2), the Governor in Council may, by order, issue directions to the Commission from time to time respecting the implementation of the telecommunication policy for Canada enunciated in section 3 [similar to the present section 3 of the *Broadcasting Act*].

(2) Nothing in this Act authorizes the Governor in Council to issue directions to the Commission with respect to

- (a) the issue of a broadcasting licence to a particular applicant or the amendment or renewal of a particular broadcasting licence,
- (b) the content of broadcast programming;
- (c) the application of qualitative standards to broadcast programming,
- (d) the restriction of freedom of expression, or
- (e) the charges to be levied for particular telecommunication services or facilities. . . .

Other sections also seem to diminish CRTC independence — e.g. s. 11 (power of the Governor in Council to refer back decisions) and s. 7 (power of the Minister of Communications to register agreements with provinces regarding the exercise of the powers of the CRTC or the Minister by a *provincial* regulatory body).

The Minister of Communications had already gone ahead and signed an agreement with the province of Manitoba regarding ownership of cable-television distribution equipment on November 10, 1976. The terms of the agreement, allowing the Manitoba Telephone System to own the equipment and lease it to cable television companies, directly opposed CRTC policy. Boyle, Chairman of the CRTC, immediately sought a legal opinion on its validity (*Globe and Mail*, Nov. 23, 1976, at B1, col. 4).

¹⁸⁵ This is a clear policy of the Minister of Communications (*Globe and Mail*, July 9, 1977, at 10). It cannot be faulted in terms of political theory about democracy. See, for example, L. Cutler and D. Johnson, *Regulation and the Political Process* (1975), 84 *Yale L.J.* 1395 at 1405-06.

¹⁸⁶ The CRTC is much more committed to creation of a Canadian culture than the average Canadian. Nationalism often seems to be a pre-occupation of the middle class and the university communities and of far less interest in an election than inflation, unemployment, or bilingualism.

¹⁸⁷ The U.N. General Assembly condemned jamming in Resolution 424 (V) and 425 (V), December 14, 1950. However, an opinion dated February 28, 1973, by J. Willis, Deputy Assistant Legal Advisor for U.N. Affairs in the State Department, concluded that no conventional law either prohibited or sanctioned jamming, [1973] *Digest of United States Practice in International Law*, 327. See *contra*, Abshire, *supra*, note 10 at 50 — jamming is contrary to the *Montreux International Telecommunications Convention* and Art. 19 of the U.N. *Universal Declaration of Human Rights*.

Richard Wiley, Chairman of the FCC, testified before the House of Representatives Subcommittee,

The United States has always supported a policy of free flow of information and ideas between ourselves and other countries, and any retaliatory measures which would result in restricting such free flow would be highly questionable and counterproductive and, of course, could only be considered in close coordination with the Department of State, and in light of our overall relations with Canada.¹⁸⁸

The precedent set by U.S. authorization of jamming would be a weighty one in the larger world telecommunications picture, and it would run counter to the traditional U.S. policy of free flow of information. It would also be an unusually drastic measure to use against Canada, as the ability to engage in dialogue between the two countries has always been extolled.

Other retaliatory activities against Canada have been suggested, such as invocation of the sanctioning provisions of the *Trade Act of 1974*.¹⁸⁹ However, in light of the friction which would be caused by such a measure and the need for an ongoing dialogue between Canada and the U.S., it is unlikely that this Act would be applied.

Rather than these immediate threats of retaliatory action, it is the long-term threat to the diplomatic relationship with the U.S. that probably caused the Cabinet to end commercial deletion. U.S. government and businesses have been upset by many Canadian actions in the last few years,¹⁹⁰ and, by January, 1977, the commercial deletion policy could seemingly be sacrificed with positive results for Canadian-American relations and without serious injury to Canadian interests. Yet it is safe to say that no Canadian government will abandon a broadcasting policy dedicated to promoting Canadian identity.¹⁹¹ Since Canadian programming is necessary to that policy, there must be some means of protecting the revenue sources of those broadcasters expected to produce Canadian programmes. While commercial deletion was once the chosen tool, Bill C-58 now seems to go far towards achieving that goal. Even though it outrages American border stations who bear the brunt of the burden

¹⁸⁸ *Supra*, note 59 at 39.

¹⁸⁹ 19 U.S.C. § 2411(a). Discussed in the Congressmen's Report, *supra*, note 80 at 18. Under § 2411(a), the President can impose duties or other import restrictions on the goods of a foreign country if he finds that it maintains unjust restrictions on U.S. goods or discriminates against U.S. goods. Under § 2191 (c) (C), the Special Representative for Trade Negotiations can investigate and advise the President and Congress about non-tariff barriers to international trade.

¹⁹⁰ See "Interview with Thomas Enders, U.S. Ambassador to Canada," *U.S. News and World Report*, June 21, 1976, at 67.

¹⁹¹ In fact, the Hon. John Roberts, Secretary of State, has evinced the often repeated concern that Canadian broadcasters are not creating enough Canadian programming and has spoken of the possibility of yet another government inquiry, this time a royal commission, on broadcasting (*Globe and Mail*, June 15, 1977, at 10). No decision has been taken at the time of writing (Can. H. of C. *Debates*, Nov. 30, 1977, at 1408 *per Roberts*). See also, B. Kirby, "Opposing Forces gather to do battle on Canada's broadcasting front," (*Globe and Mail*, July 9, 1977, at 10) discussing the report of the Ontario Commission on TV violence (the LaMarsh Commission) and the report of A. Johnson, President of CBC, and its proposals for reform. Both reports express concern about domination from American programming. (*Globe and Mail*, June 15, 1977, at 1).

imposed by the Act, the measure is easily defensible. Unlike the commercial deletion policy, it in no way interferes with the signals broadcast by foreign stations.

Furthermore the CRTC has placed increasing emphasis on its programme substitution policy, which complements Bill C-58. If a local station shows a programme that is telecast by a U.S. station at any time within the same week, it is proposed that the CATV operator substitute the programme signals of the Canadian station in the time slot of the U.S.-originated programme.¹⁹² Already, a great deal of simulcasting has developed in Canada, with Canadian broadcasters scheduling shows that also appear on U.S. stations in the same time slot. The CATV operator must black out the American signal, and substitute the Canadian signal with its ads.¹⁹³ Programme substitution and simulcasting eliminate the unjust enrichment problem caused by using U.S. programme signals without advertisements. These policies also make the local station a more attractive advertising market because of its extended coverage.

Yet the question remains whether the programme substitution policy and the *Income Tax Act* amendments will suffice to combat the drain of advertising revenue to American stations carried on cable television. There are those who deny the efficacy of these policies without the accompaniment of the commercial deletion policy.¹⁹⁴ "Dumping" by U.S. stations, in the form of drastically reduced advertising rates, is feared and commercial deletion may be necessary to prevent Canadian-directed advertisements from clustering around shows that are not simulcast.¹⁹⁵

H. CONCLUSION

While Canadian cable television policy has appeared offensive to Americans in many ways, it has been so largely because of the apparent unjust enrichment that characterizes CATV operations anywhere. The fact that broadcast signals transmitted by the CATV operations have crossed an international border has aggravated the perennial problem of CATV interference with local broadcast licences, by importing international law considerations. Yet the Canadian decision to adopt a policy of active government control over the degree of foreign content of the broadcasting industry is not without precedent. In Europe, measures have been taken on both international and domestic levels to combat pirate broadcasting when it has threatened to undermine

¹⁹² *Toronto Star*, October 20, 1976, at 1.

¹⁹³ *Globe and Mail*, *supra*, note 103. See SOR/75-665, s. 19 (substitution of identical signals on cable television).

¹⁹⁴ See Znaimer, *supra*, note 76.

¹⁹⁵ The CRTC continues to show concern for advertising on American television stations by Canadian advertisers by imposing a condition in the licences of some cable television companies in the following form:

The Commission approves the reception and distribution of the U.S. television stations so long as these stations do not solicit in Canada advertising primarily directed to a Canadian audience.

(CRTC Dec. 77-596, *Canada Gazette*, Pt. I, Oct. 1, 1977; see also CRTC Dec. 77-603, *Canada Gazette*, Pt. I, Oct. 8, 1977).

the integrity of the local broadcasting system.¹⁹⁶ Even the United States has taken action to protect local broadcasting licensees from intrusions from stations outside U.S. territory, through statutory provisions.¹⁹⁷

However, the U.S. through its broadcast policy was careful to restrict its licensing measures to broadcasters within the U.S., in order to prevent transmission across the border to a foreign country. The Canadian commercial deletion policy, while applied to cable television operators within Canada, was directed to broadcasts emanating from outside the country. Thus, the international law issue of free flow of communications arose. The Canadian-American broadcasting relationship is in many ways unique because of the massive use of cable television in Canada and the proximity of Canadians to a broadcast industry using the same language. Yet, while the problems posed are in many ways unique, the broader international law issues involved in their solution are not. Canada's commercial deletion policy, if allowed to stand, sets a precedent for a state to accept some foreign broadcasts and not others and to delete offensive parts of those broadcasts accepted. Such actions run counter to the U.S. policy of free flow of information, and for the U.S. to acquiesce in such action would amount to accepting a change in international law. As earlier discussion pointed out, international law is created by a flow of decisions from various participants. Should the U.S. agree to the alteration of foreign broadcast signals by Canada, it would alter expectations of other states as to what is permissible in telecommunications law in other situations. This the U.S. government did not wish to do.

Of course, not all the U.S. participants in the decision-making process approached the controversy from the viewpoint of averting a harmful precedent in international law. The broadcasters did so out of economic self-interest, and even the U.S. government's policy proposals were not uncoloured by economic motives. Similarly, while the Canadian government's policy was framed in terms of concern for "access" by Canadians to television, there were motives of economic self-interest and political self-interest underlying the domestic policy, as well as the international stance in favour of freedom of information, but with prior consent.

At this point, the U.S. has preserved relatively intact the policy of free flow of information. Yet one might easily speculate as to whether the calm in Canadian-American communications relations will survive. Discontent per-

¹⁹⁶ The efforts to combat pirate broadcasting, that is, broadcasting without authorization from outside the territorial limits of a state into the territory of the state, have included a *European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories* (1965) and legislation such as the *British Marine, etc. Broadcasting (Offences) Act* (1967, c. 41). See D. Smith, *Pirate Broadcasting* (1968), 41 So. Cal. L. Rev. 769. The British efforts are similar to Bill C-58 for, *inter alia*, they prohibit advertisements on the pirate stations, thus eliminating the stations' source of revenue (s. 5 (3) (e)).

¹⁹⁷ *Communications Act*, 47 U.S.C. §325 (b) requires a licence for transmission of signals across the border for purposes of re-broadcast to the U.S. The problems of signals from Mexico to San Diego are discussed in T. Tibbals, *Mexican-United States Border Broadcasting Dilemma* (1973-74), 4 Calif. W. Int. L.J. 141.

sists with Bill C-58's provisions,¹⁹⁸ although the U.S. has little legal right to object to domestic tax legislation that is non-discriminatory.¹⁹⁹ It is unlikely to be that legislative measure which sparks new controversy, however. Rather, a revived commercial deletion policy or further restrictions on American television channels carried on cable is the more likely move, as both the CRTC and the Secretary of State express renewed and continued discontent with the paucity and poor quality of Canadian programming.²⁰⁰

The Canadian government's concern has been one of access to the television media. As international law with regard to telecommunications continues to develop, it is likely that the policy which will persist is one in which the free flow of information is restricted in the national interest in order to allow national access to the media, and Canadian policy regarding U.S. signals can be shaped to accord with this. It is unlikely that the U.S. can successfully oppose all international claims for a degree of state control over broadcasting from foreign sources. While freedom of information is a worthwhile objective, it is unrealistic to expect that it can exist in an unrestricted manner in the world community, for all states wish to protect their cultural identity and promote national unity. Therefore, some state control over broadcasting is and will be a reality in international law.

This recognition is not incompatible with the ideal telecommunications policy mentioned earlier. While world public order is most enhanced when individuals are given the freedom to express opinions and make choices, this does not necessarily mean that some degree of control over individual speech is inconsistent with human dignity. One must look at the reason for controls over speech. Where they are designed to ensure that an individual has access to an outlet by which to express himself, or to shield him from information that is highly offensive to him as an individual, regulation of the free flow of information on broadcast media is consistent with human dignity and world public order. It is difficult to draw a line between controls that are consistent with human dignity and those that detract from it. Where controls forbid discussion of any controversial issues and prohibit opposing viewpoints, they cannot be compatible with individual dignity. In the international context there must be some balance between national control and the flow of ideas from outside the border.

Recognizing the likelihood of such policies evolving internationally, the U.S. and Canada can work together to shape their communications relations in a way that fosters what they regard as the most healthy balance between free flow of information and national control.

Domestically, Canada has made some effort to effect such a balanced policy by developing Canadian content rules designed to protect access and

¹⁹⁸ Questions persist in the House of Commons as to whether Bill C-58 will be eliminated. See, for example, Can. H. of C., *Debates*, 30th Parl. 2d sess., Jan. 27, 1977, at 2440.

¹⁹⁹ Its political clout, as opposed to legal right, is another matter, as the persistent analogy of the elephant and mouse makes clear.

²⁰⁰ CRTC, *supra*, note 115.

leaving remaining broadcast time open to foreign programming. There is room for bilateral discussions to ensure that such content controls or further advertising measures do not interfere substantially with the international flow of information and to ensure that the U.S. is not to be placed in a position of having to sanction unilateral interferences with broadcasts by Canada.

The alternatives for dealing with cross-border broadcasting are several, and the need for some exploration of their viability is clear.²⁰¹ Boyle, while Chairman of the CRTC, suggested that a ban on all Canadian advertisements on U.S. stations and all U.S. advertisements on Canadian stations might be the ideal solution.²⁰² The feasibility of this suggestion is slight, considering the predominantly one-way direction of advertisements from Canada to the U.S. There might also be constitutional problems in the U.S. with such a plan.²⁰³

Another possible solution would be for cable television operators in Canada to pay some compensation to U.S. stations whose advertising is deleted. This could be modelled on the compulsory licensing provisions for cable systems introduced by the revision of U.S. *Copyright Laws*,²⁰⁴ requiring cable operators to pay royalty fees for *non-network* programmes carried beyond the local service area. This would not compensate border stations if cable systems transmitted network shows, for Buffalo stations are not licensed by copyright holders to show them in Canada nor are they harmed by the extended use. It would only be local programmes that would be compensated. No doubt Canadian cable operators would protest, for it is not this type of programme which they seek from Buffalo stations. Canadian broadcasters would also object, unless offered similar remuneration by the cable operators.

That some arrangement is necessary to protect Canadian broadcasters' access to revenue and thus enable them to develop programming is obvious. At the same time, there is a need to consider compensating American border stations when signals are transmitted that are not obtainable in Canada. The solution may be the establishment of some type of intergovernmental mechanism to make recommendations on broadcasting regulation, in the same way that the International Joint Commission regulates boundary waters between the two states. Telecommunications media have important impacts on both sides of the border, and there has been much cooperation in satellite develop-

²⁰¹ There is a danger of further and severe restrictions on foreign programming in Canada. Johnson's report on the CBC states a goal of 80 percent Canadian content (*Globe and Mail*, June 15, 1977, at 1), while Secretary of State John Roberts has announced new working restrictions on foreign performers through provisions in the *Immigration Act* (*Globe and Mail*, July 8, 1977, at 1).

²⁰² Can. Sen. Standing Committee on Banking, Trade and Commerce, *supra*, note 60, Issue 93 (June 16, 1976) at 93:12: "[w]e do not take local advertising on our border stations, and they do not take any advertising on their stations . . . I have been told in Washington by senior people . . . that that is the resolution of it."

²⁰³ The hitherto largely unprotected status of commercial speech is in a rapid state of erosion, with cases such as *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748; *Linmark Assoc., Inc. v. Township of Willingboro* (1977), 97 S. Ct. 1614 and *Bates v. State Bar of Arizona* (1977), 45 U.S.L.W. 4895 recognizing that commercial speech is protected to some degree by the First Amendment.

²⁰⁴ 17 U.S.C. § 101 ff., particularly § 111 (c) (effective January 1, 1978).

ment and frequency allocation in the past. The degree of interaction and the complexity of issues is not yet as great as the manifold concerns of the IJC in regulating boundary waters, and a joint body at present might be only for purposes of consultation. As satellite broadcasting develops and links up with cable TV and television, an international regulatory body for telecommunications will be needed by Canada and the U.S.

Initially, a commission of officials from the CRTC and FCC could try to draft nonbinding guidelines for cable television, drawing on their parallel domestic experience with cable television's threat to local licences. Inevitably, discussion must also focus on foreign programming and protection of both foreign and national access to broadcast outlets. Any solutions can only benefit the Canadian-American relationship, and will also provide both an example for and possible solutions to telecommunications problems elsewhere in the world.²⁰⁵

The U.N.'s Working Group on Direct Broadcast Satellites has concluded that regional and bilateral solutions to telecommunications problems are the way of the immediate future.²⁰⁶ Canada and the U.S. could confirm the viability of such an approach by working out a solution to transnational broadcasting that protects the integrity of the broadcasting system of the recipient state while ensuring that borders are kept open to a certain degree of foreign information.

²⁰⁵ As the IJC has done in relation to international boundary waters issues.

²⁰⁶ U.N. Working Group, *supra*, note 41, Fifth Session (A/AC 105/WG 3/L 8 at 3); U.N. General Assembly, Resolution 2733 A (XXV); Laskin and Chayes, *supra*, note 16 at 33.