The public interest and cable regulation in Canada:

The application of public interest concepts in the regulation of television distribution by the CRTC

by
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Abstract

This thesis seeks to identify the underlying rationales for regulation of television distribution, primarily cable systems, in Canada and examines how these rationales, and the related systems and structures developed around them, correspond to the views of the public interest expressed in the regulatory decisions made by the Canadian broadcasting regulator, the CRTC. Particular emphasis is placed on the public sphere and market model approaches to public interests described by Croteau and Hoynes.

This analysis concludes that the approach to the public interest used by the CRTC has generally shifted from a public sphere to a market model approach. However, in a number of cases, concepts of the public interest have been poorly applied by the CRTC, which has resulted in the equivocation of public interests with certain private interests. This has further lead to the marginalization of public interests and to particular forms of regulatory capture.

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Introduction

Television, as a medium, has undergone constant change in the more than 50 years since its popularization. What was once the province of a handful of over the air stations and huge home antennae has transformed, in North America at least, into a wide array of programming services of all types from throughout the world, which are transported through complex international transmission systems and ultimately delivered to the home via domestic "distributors", such as cable and satellite systems. Newer modes of transmission, distribution and reception also provide supplements or substitutions for more traditional television. Consequently, video services are now also available from a number of different content aggregators, mainly distributing video content via the Internet.

Governments have frequently played an important and extensive role in the dispersement and direction of television services through the licensing or authorization of certain activities and/or organizations and the exclusion of others. But for what purpose and to what end? In principle, the liberal democratic political tradition holds that media regulation should take place in the public interest. But is the public interest motive for regulation merely a convenient rhetorical device or does it possess real value as a barometer of civil society?

This thesis will examine the policy and regulatory framework for broadcasting in Canada with a particular focus on the regulation of the cable industry and other television distributors that receive, aggregate and distribute programming services to Canadians. Although much academic work to date has gone into the study of Canadian television

programming, both from the content of programming itself and its supply and production, the distribution systems on which this programming depends and which, in fact, provide the primary interface between the viewer and this television programming, have much less often been the subject of such scrutiny. My goal, in examining the regulatory treatment of distribution systems, will be to identify the underlying rationales for particular courses of regulatory action and to analyze the way(s) in which these rationales and related systems and structures correspond to both the explicit and implicit views of the public interest expressed through broadcasting policy and regulation. As such, this thesis will involve a largely historical analysis of how concepts of the public interest in Canadian broadcasting have evolved, deteriorated and/or expanded from the mid-20th century to the present day. The primary intention of such an analysis will be to discover and examine the various claims made by policy-makers and regulators as to what lies in the public interest with respect to the regulation of television distribution, how these claims are realized and what consequences stem from them.

Chapter one of this thesis is devoted to a discussion of public interest concepts and their application to broadcasting policy and regulation. This will involve the development of an initial theoretical framework for examining public interest claims and, in particular, describes two distinct public interest models that will be applied throughout this thesis.

The larger part of this thesis, set out in chapters two through four, consists of a partly chronological and partly thematic analysis of broadcasting policy and regulatory decision-making from the 1950's to 2006. The majority of this analysis will be based upon the content of numerous decisions and public notices concerning Broadcasting

Receiving Undertakings[1] (BRUs), Broadcasting Distribution Undertakings[2] (BDUs) and Satellite Relay Distribution Undertakings (SRDUs) (collectively, television distributors) issued by the Canadian Radio-television and Telecommunications Commission (CRTC) between 1968 and 2006, as well as on other government documents and statements by officials and external parties, both preceding and following 1968.

Specifically, chapter two describes the earliest cable distribution systems in Canada and their growing significance in the Canadian television industry. It also provides a pre-history of government intervention in this sector and discusses the motives that lay behind this intervention. Chapter two also examines the development of the 1968 *Broadcasting Act* and early rationales for the inclusion of cable systems within the ambit of the broadcasting system. It later goes on to examine the early stages of the integration of cable systems into the broadcasting system as well as its dis-integration from other forms of telecommunications. Further, it describes some of the fall-out of other aspects of the 1968 *Broadcasting Act* and, in particular, the creation of the CRTC.

Chapter three focuses on issues relating to the 1991 *Broadcasting Act* and the resulting *Structural Public Hearing* of 1993. This chapter also traces the early attempts at competition from non-incumbent cable and wireless services and the licensing of the first competitive satellite distributors between 1995 and 1997.

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[1] This term was used prior to 1997 to denote cable systems and small, single-building undertakings called Master Antennae Television systems (MATVs).

[2] This term has been in use since 1997 and denotes cable systems, direct to home (DTH) satellite systems, telephone company broadcasting distribution systems offering cable-like services via telephone lines, MATVs, fixed wireless systems such as multi-point distribution systems (MDS) and other potential technologies.

More recent issues will be canvassed in chapter four, beginning with the introduction of the *Broadcasting Distribution Regulations* in 1998 and the ensuing emphasis on competition and, particularly, competition with the large incumbent telephone companies. This analysis also turns to an examination of certain "new media" or newer methods of television distribution as forms of largely unregulated services and their impact on more traditional television distributors.

Finally, based on the discussions in earlier chapters, chapter five offers some conclusions as to the evolution of regulatory models in Canadian television distribution and attempts to reassess these models in light of the discussions found in earlier chapters.

Chapter One Regulation and the Public Interest

From its nativity the medium of television, both in Canada and in much of the western world, has operated within a framework of government policy and regulation. Although the particulars of such policy and regulation may differ from place to place, the decisions of governments, particularly in Canada,[3] have shaped and defined the development of television, perhaps more than any other medium before or since. Broadcasting policy and regulation establish the context in which television operates, legitimizing or de-legitimizing some content or activities and occluding or magnifying certain other aspects of television by altering an array of factors, including what is broadcast, from whom, by what means, and to whom.

However, government regulation is not the only system that imposes a contextual frame upon television. Acting as a type of technological "middleman", cable and other distribution systems (such as newer satellite or telephone company distributors) impose their own structure on the television programming seen by Canadians through a myriad of decisions related to the aggregation, packaging and retransmission of that programming. Though themselves the subject of government policy and regulation, these television "distributors" are still able to exert considerable influence (outside or even contrary to government policy and regulation) on the medium of television by acting as the primary technological and financial interface between television programming and its

[3] According to McEwan, "for particular geographic and economic reasons Canada's regulatory policy framework is far more demanding than the other countries under review" (*Selected International Survey*, p. 4). The countries referred to are Australia, Austria, Belgium, France, Germany, the United Kingdom and the United States.

viewers, i.e., they provide the technical system by which programming is received as well as acting as the retailer of programming services.

In this thesis, I will examine the intersection between these two contextual frames: government broadcasting policy and regulation on one hand, and television distribution on the other. I do not propose to attempt an exhaustive study of either broadcasting policy and regulation or of television distribution, neither of which would be possible within the scope of this thesis. Instead, I intend to look at the intersections between the two (i.e., the regulation of television distributions systems and the countervailing pressure applied by these systems towards regulators) through a particular lens: the public interest. In other words, the focus of this thesis will be to ask the question, how has the concept of the public interest been applied in the regulation of broadcasting distribution in Canada? Or, more precisely, what is meant when we say that something is in the public interest with respect to television distribution systems and what effects do such determinations have on Canadians? I will also consider several instances in which significant regulatory decisions have been made without a clear and reasonable concept of public interests. Such cases represent missed opportunities in which government actors, rather than centering decisions on public interests, have, instead, focused on other concerns or inappropriately redefined public interests to equate to these other concerns.

As the federal agency empowered with the legislated authority to regulate and establish "regulatory policy" with respect to broadcasting in Canada, much of the focus of this thesis will be on the Canadian Radio-television and Telecommunications Commission (the CRTC) and on government policy and legislation related to the CRTC. In many

respects, the documents issued by the CRTC are the primary field in which questions of the public interest in this area are raised and resolved. In addition and to our benefit, the public nature of CRTC processes permits a variety of viewpoints – often contradictory – to be aired and considered, thereby providing a much greater level of contextualization and depth of argumentation than is normally found in government documents.

Specifically, analysis of these documents will focus on the use of "public interest" arguments, i.e., determinations as to what is or is not in the public interest. However, unlike in other nations, which have sought to codify the application of the public interest,[4] Canadian legislation contains no public interest "test" nor, in fact, does it contain any reference to the public interest at all.[5] Instead, a series of policy objectives set out a wide ranging and frequently contradictory list of social, cultural and economic goals. Public interest principles and arguments are also rarely explicit in policy and regulatory documents, which only infrequently refer to public interests directly. Moreover, when such references *are* made explicitly, they frequently take the form of simple declarative statements that the particular decision taken or policy made has been found to be in the public interest, but provide little or no rationale to support such statements. For these reasons, standard methods of content analysis are not viable.

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[4] For instance, in the United Kingdom, as quoted in Feintuck (1997), the criteria to be applied as indicative of the public interest set out in the 1996 Broadcasting Act include:

a) the desirability of promoting -
   i) plurality of ownership in the broadcasting and newspaper industries, and
   ii) diversity in the sources of information available to the public and in the opinions expressed on television or radio or in newspapers,
b) any economic benefits . . .
c) the effect of the holding of the licence by that body on the proper operation of the market within the broadcasting and newspaper industries or any section of them.

[5] This does not mean that the drafters of this legislation did not intend for public interests to play a role in determinations related to broadcasting in Canada. On the contrary, as shall be seen in the following chapters, concepts of the public interest were central to the framing of legislation, although only implicitly present in the actual language employed in broadcasting legislation.

Instead, it will be necessary to investigate the implicit views of the public interest that underlie policy and regulatory decision-making. The approach I have adopted for this investigation entails a largely historical analysis of the various trends in Canadian broadcasting policy and regulatory decision-making with respect to television distribution between 1951 and 2006. Through this historical approach, I hope to discover the overarching views of public interests that inform regulation and policy during various historical periods as well as how and why these views change. A historical analysis of this type is also appropriate, in my view, since public interests themselves should be treated as possessing a certain degree of historicity themselves, i.e., public interests are created and evolve over time in relation to numerous factors, such as social change and technological and economic capacity.[6]

Before we undertake a specific analysis of Canadian policy and regulation, however, it is necessary to first establish its criteria through a better understanding of how the term "public interest" will be employed throughout this thesis.

Defining the public interest

Though difficult to define, the notion of public interests is a fundamental theoretical underpinning of democratic governance. Philosophically speaking, it involves the relationship of the individual(s) to the state and the rights and responsibilities of each in relation to the other. Inherent to this relationship is the necessary requirement that

[6] For instance, an interest in universal telephone or Internet service would not have even been conceivable before such technologies were developed.

citizens benefit from participation in society – in both a material and immaterial sense.[7] Further, the benefits of such participation, whether deriving from mutual protection, division of labour, economies of scale, etc., must not, in turn, unnecessarily restrict or limit a citizen's freedom to act, according to his or her own reason. In other words, the political theory underlying democratic governance holds that certain individual rights or components of those rights, i.e., the unlimited individual right to govern oneself however one may see fit, are given up in order to receive the benefits of participation in society. The state's purpose, in this sense, is to provide such benefits, without unnecessarily limiting individual rights. The crux of public policy and regulation in a democratic state lies in that point of balance between the "benefits" provided to the public and the "limitations" imposed on individuals. And it is at this balance point that public interests are located.

Following these general principles, public interests may be defined as arising from the pursuit of significant collective or societal benefits that are achievable without unreasonably limiting individual rights. The determination of what is "in the public interest", therefore involves two separate decisions. First, is the benefit sought of sufficient value to warrant its pursuit by the state? Second, are the limitations on rights entailed by achieving such a benefit reasonable or acceptable? Two general models of the public interest diverge at this point – one which emphasizes the benefits sought, while

[7] Consider, for instance, the particular view of public interests formed as part of Locke's basic contentions regarding individual rights. In the Lockean sense, such rights include both material property rights and immaterial human rights (Winseck, p. 44). Locke's *Second Treatise on Civil Government* describes the maintenance and affirmation of individual rights as a necessary component of the governing of a civil society, in which individuals consent to be governed on the basis of the perceived benefits that might be achieved through such a society. Benefits that are not achievable by an individual alone.

the other emphasizes minimal infringement on individual rights – and serve as focal points for our analysis of broadcasting policy and regulation.

Two models of the Public Interest

Two models in particular tend to dominate all discussions of the public interest. These models are characterized by highly estranged viewpoints as to the role of government and the manner in which the public interest is defined. A thorough but succinct description of these two models as they relate to media has been set out by Croteau and Hoynes, which they refer to as the "market" model and the "public sphere" model.[8]

According to Croteau and Hoynes, the market model conceptualizes media as products sold by private companies with the intent of generating profit. Since the audience is treated as a group of "consumers", the public interest lies in providing the most popular content to the widest possible audience within the context of economic markets, ideally operating under the fewest possible limitations (pp. 38-39). The chief proponents of this model are the larger, generally corporatized media organizations and increasingly, as we shall see later in this thesis, governments themselves. These parties generally argue that the minimal benefits conveyed by government policy and regulation are outweighed by the limitations on individual rights necessary to achieve them. Accordingly, under the market model, government policy and regulation are generally viewed as a potential hindrance to the operation of economic markets and, therefore, reduced regulation of media is favoured, wherever possible. Proponents of this model suggest that greater

[8] Although Croteau and Hoynes describe these two models as "approaches" that frame the public discourse on media (p. 38), I have appropriated them here since they serve equally well as approaches or views of the public interest as well.

reliance on market forces will adequately address public interests without extensive government supervision.

Some argue, Croteau and Hoynes among them, that, since the market model is actually concerned mainly with the maximization of profit, it really has little to do with public interests at all – beyond whatever lip-service may be necessary to appease governments or other potential critics. Nor would even the proponents of this model themselves likely dispute that profit trumps other interests in most cases. In fact, the market model tends to view other concerns (programming diversity for instance) as ancillary issues that will spontaneously be addressed as an incidental consequence of the proper functioning of the market. Other criticisms of this model with respect to broadcasting distribution in Canada will also be discussed over the course of the following chapters, including factors that limit the ability of markets to provide choice and the tendency for attempts at reducing regulation to, instead, result in regulatory transformation.

Although these are significant criticisms, the market model remains a legitimate approach to public interests. In particular, the view that the public interest is defined by the popularity of media products and consumers' desire to purchase these products within an economic market is a view commonly held by the television distribution industry and one which, as we shall see in chapters three and four, has come to dominate recent broadcasting policy and regulation. Further, the maximization of individuals' rights to determine for themselves what lies in the public interest through their participation in such markets (and the minimization of limitations on these rights) provides an important perspective on public interests.

In contrast to the market model, the public sphere model focuses on the maximization of public benefits. The public sphere model views media, not as products, but as public resources. Under this model, the audience is composed of citizens, rather than consumers, and the public interest lies in providing "diverse, substantive and innovative content, even if not always popular" (pp. 38-40). Equally as important, the public sphere model considers citizens as participants not only in the reception of programming but also in its production. The public sphere model emphasis on the "democratization" of media involves a broadened concept of the freedom of expression, which encompasses access to both the means of reception and the means of production of media goods. Public interests are therefore defined and achieved through the greatest possible level of involvement by citizens in media systems themselves.[9] However, despite the name given to it, this model should not be considered solely as an extension of public sphere theories, such as those most famously put forth by Habermas. Rather, the public sphere model derives its name from similarities between this model and certain principles underlying the work of Habermas and others, such as the shared emphasis on the promotion of active participation by citizens.

The chief proponents of the public sphere model of public interests tend to be citizen or consumer advocacy groups, public broadcasters and academics. Rather than pursuing reduced government intervention, these parties emphasize the public benefits that could accrue under the appropriate policy and regulation. Government intervention is therefore

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[9] As Feintuck (1997) has suggested

> to place citizenship at the heart of any meaningful concept of 'the public interest' would seem to be a logical necessity.

viewed as a useful and often necessary tool in achieving public interests that would not be attainable in the absence of such intervention or through economic markets alone.

According to Raboy (1989) and Dahlgren (1995), for instance, the public sphere is the battleground wherein conflicting views of reality compete to represent public opinion and the public interest. From Raboy's perspective, broadcasting decision-making specifically, which greatly impacts an important communications media, needs to be re-centred in the public sphere (p. 52). Absent concentrated efforts to this effect, the discursive field may continue to be occupied by the limited economic models of public interests, which have recently dominated regulatory decision-making. Rather than focussing on the operation of economic markets, proponents of the public sphere model emphasize the importance of the public sphere as the appropriate context for regulatory decision-making. It should be noted that this model does not reject economic markets or the roles that these markets play in defining public interests. In the context of North America, at least, it would be unrealistic to ignore the role and impact of these markets. While recognizing the significance of economic markets, proponents of the public sphere model simply contend that these markets should not be the sole environment in which public interests are sought and defined.

Fundamental to both the market and public sphere models is a fine distinction between the *public interest* in relation to media and what might be called simply the *interests of the public*. In Croteau and Hoyne's view, the latter generally refers to transient or superficial interests or desires, such as the pursuit of entertainment, which, while profitable to the media, provides only limited or short-term value to the public. The

market model tends to focus on these short term *interests of the public*, excluding or presupposing a subordinate position for other interests that resist being transformed into products or are not as popular and, therefore, not as profitable. In contrast, the public sphere model emphasizes the pursuit of longer term underlying goals, e.g., diversity in programming. These *public interests* are potentially more significant in their impact and of greater overall value as public or common "goods".

On this basis, it may seem that the pursuit of long-term substantive goals in television emphasized by the public sphere model should always supercede that of more transient or superficial interests. However, there are also problems with limiting one's view of the public interest to the achievement of such goals and losing sight of the actual interests of the public. According to Michael Powell, former chair of the US Federal Communications Commission (FCC):

> It is said that the public interest is not just what interests the public. I respect and share the sentiment. But, the danger of this aspiration, when invoked in regulatory policy, is that it implies a justification to require that the public accept by law, what it is uninterested in accepting by choice. (*Address to the Media Institute*, 27 March 2003)

In effect, the public sphere model may become paternalistic,[10] potentially dictating to the public what it *should* want, while denying what it *does* want. In fact, the value of public or common goods, however laudable, is diluted or disappears entirely if they are not accepted or used by the public for which they are intended. Simply put, can we truly say

[10] Croteau and Hoynes anticipate arguments of this type and insist that the basis of the public sphere model is not a desire to impose media content deemed worthwhile by an elitist group(s). Rather, they emphasize the need for a greater diversity and inclusiveness of media sources and information (pp. 157-158). However, they do not appear to acknowledge the very real possibility that diversity may also be achievable under the market model. I would emphasize that the large corporate media that often subscribe to the market model are not averse to *diversity*, they are averse to *risk*. Where it can be demonstrated that there may be profit in diversity, corporate media have shown a clear willingness to participate in achieving this goal. An excellent example related to the addition of numerous third-language and other ethnic programming to cable line-ups is discussed in chapter 4.

that there is a public interest in producing a television show that the public is not interested in watching?

At the opposite end of the spectrum, however, the market model's emphasis on equating public interests with the profitability of particular media products is also problematic. For instance, not all audiences are equally desirable to advertisers, who exert influence on media products through their relationship with media producers. Disproportionate amounts of media products intended to appeal to preferred audiences are, therefore, made at the expense of other audiences. Further, as will be discussed in chapter three with respect to the funding of Canadian production, even where media products are popular and appeal to favoured audiences, other factors can distort economic markets, such as the availability of other less expensive products. In such cases, the market model also fails to address what the public actually wants.

Despite the substantial differences in these two models, broadcasting policy and regulatory systems throughout the world virtually all incorporate elements of both, though some may favour one model over the other.[11] As we shall see later in this chapter, the Canadian system is no exception in this regard. Combinations of the two models have been used in various aspects of Canadian broadcasting policy and regulation with respect to television distribution and certain historical trends have become apparent in the manner in which government actors have employed these models. However,

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[11] For instance, Croteau and Hoynes suggest that US broadcasting policy is dominated by the market model, but includes components of the public sphere model, such as National Public Radio (NPR) and the Public Broadcasting Station (PBS). Conversely, the UK has historically been most heavily influenced by the public sphere model, as evidenced by the importance of the public broadcaster, the British Broadcasting Corporation (BBC). Private elements have increasingly been introduced in the UK in recent years, however, demonstrating the influence of the market model. (pp. 65-66)

before examining the specifics of broadcasting policy and regulation in Canada, it is necessary to consider a few issues with respect to television distribution itself.

Cable and television distribution as communication

In Canada and in many other countries, cable and other television distributors operate as part of a communications industry. As in any industry, the services of distributors are commoditized and sold in pursuit of financial profits. Specifically, television distributors receive content from various programming services, aggregate and organize that content into "channels" and "packages" of channels, and sell access to these channels and channel packages to their subscribers.

The products and services sold by communications, however, are unlike those of other industries. As described by Babe, communication (or information) displays at least three characteristics that differentiate it from other commodities. First, information is intangible. It is not easily divisible into equivalent units, nor is there any correspondence between the capacity of a medium and the amount of information stored in it. Secondly, information is not consumed in its use. It may be reproduced, accumulated and retransmitted almost infinitely without any dissipation or reduction in "value". Finally, there is a "public good nature" to information, i.e., it is difficult to exclude individuals who do not pay for information from benefiting from it and use of information by one person does not detract from another's use (*Communications* pp. 15-17).

Grant expands on Babe's concept of the irreducibility of information to a commodity by referring to specific qualities of information that can be seen in the medium of television. In his estimation, "cultural goods" (what Babe referred to as information) such as

television programming, possess the following qualities that differ from other commodities

- higher upfront production costs;
- marginal cost of additional units;
- cultural good is not consumed by use;
- unpredictability of demand;
- non-substitutability of one cultural good for another;
- rapid decay of demand;
- increased latitude for different pricing of various cultural goods in various areas;
- consumers must experience goods before they can evaluate them; and
- specific market-by-market limitations on consumer choices. (pp. 44-58)

Grant and Babe both note that the qualities of information/cultural goods described above are difficult to monetize and are therefore accounted for in neo-conservative economic theory[12] as "externalities". Such externalities occur when an economic transaction results in positive or negative impacts to parties not involved in the transaction. Since externalities are ubiquitous in transactions involving information/cultural goods, both Grant and Babe argue that such transactions should not be treated in the same manner as other economic transactions.

In fact, the analyses of both Babe and Grant suggest that television programming would better be regarded as having a dual nature. First, television programming is bought and sold within economic markets as a *product* by communication industries. However, the qualities identified above indicate that television programming is unlike other products and therefore should also be treated distinctly as *information* or as a *cultural good.* Broadly speaking, we will see in later chapters that the market model approach to public

[12] I am using Babe's term here. Specifically, he describes the neo-conservative view as the dominant approach to economic theory and distinguishes it from other views espoused by political economists, Marxists theorists, etc.

interests tends to focus on television as a product and often attempts to "internalize" the externalities produced by television by assigning values to them, i.e., attempting to commodify these externalities as well. Regulators participate in this internalization process, for instance, by creating and enforcing methods of claiming compensation from third parties that benefit from externalities.[13] In contrast, the public sphere model tends to focus on the significance of the information/cultural goods aspects of television and to treat the economic concerns related to these products as secondary.

With respect to cable and other television distributors specifically, their chief role is to provide a means of transmitting television programming to the public. In this sense, distributors do not sell programming itself but, instead, sell access to a means of receiving programming, i.e., access to a network through which programming may be received. Distributors tend to measure the value of their network in terms of the revenues derived from it, which is calculated as a function of the number of subscribers connected to the network. However, these networks themselves also exhibit many of the same characteristics we have already discussed with respect to information and cultural goods in general. For example, distribution services are not consumed in their use and programming may be retransmitted almost infinitely without any dissipation or reduction in "value". In addition, these networks have a "public good nature", i.e., the use of the network by one person does not detract from its use by another. Moreover, in aggregating, packaging and pricing programming, cable distributors have a significant impact on which programming is received by subscribers and on the context in which it is

[13] The debate related to fee-for-carriage of television stations discussed in chapter 4 is an excellent example of this.

viewed. Accordingly, they transform the manner and context in which television programming is viewed or used by subscribers.

Taking the above factors into consideration, distribution networks should not be treated solely as a technical means of transporting media products. Nor, like the cultural goods they transport (television programming), should they be treated solely as economic commodities. Distribution networks should also be seen as both 1) transmitters of cultural goods and 2) additional participants in the production of these goods.

Locating the public interest in Canadian regulation of cable

Turning our focus to the application of public interest concepts to regulation and policy-making with respect to television distribution in Canada specifically, the discussions above raise several questions. Namely, what views of public interests have been held with respect to cable and television distribution in Canada? What has government policy and regulation sought to achieve in this area? Or perhaps, what has it sought to prevent? Where and in what way has government intervention been necessary or useful and where has it not? Finally, how is this intervention legitimated by or correlated with the interests of the Canadian public?

To begin, we can observe that regulation, in its simplest sense, involves the imposition of a set of limitations/burdens on regulated entities and, indirectly, on other parties. These involve both behavioural requirements (do this, don't do that) and those that derive from the structure of the regulated system (this can/can't be done due to the perceived needs of

the overarching system of relationships defined by regulation).[14] This is, in fact, the most common view of government intervention, in general, i.e., as a limitation on freedoms. Equally important, although less often acknowledged, is the fact that regulation is not merely a limiter; it also enables the attainment of goals that might otherwise be unachievable.[15] In fact, regulation itself is a neutral tool that is capable of both providing public goods (enabling the attainment of goals) and limiting individual rights (restricting behaviour).

By choosing to pursue certain public goods (and restrict particular rights), regulators make "claims" as to what is or is not in the public interest. In this sense, public interest claims form the rationale for regulation. For example, with respect to the United Kingdom, Feintuck (1997) identifies three general types of public interest claims related to television broadcasting. The first of these relates to ensuring the "effectiveness of communications", i.e., avoiding interference between programming services through state management and allocation of wireless spectrum frequencies, which, in Feintuck's view, is of little ongoing relevance due to the "almost infinite expansion of channels available through digital satellite technology".[16] The second set of public interest claims is

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[14] The terms behavioral and structural regulation, among others, are borrowed from Feintuck (1997), who uses these terms to define types of regulatory action similar to those discussed here.

[15] The transition from analog to digital and high definition television described in chapter 4, for example, involves significant costs for and co-ordination between all elements of the broadcasting industry. It's doubtful that such a change could occur in the absence of direct government intervention. In fact, even with such intervention, this transition continues to involve numerous difficulties.

[16] Feintuck's argument in this regard is far too dismissive, in my opinion. There are significant practical limits on both wireless spectrum and digital cable and satellite capacity. With regard to the former, RF spectrum is definitively limited and there are considerable ongoing domestic and international pressures to reallocate valuable spectrum from broadcasting to other purposes, which may indicate an on-going need for government intervention in this area. With regard to the latter, as is discussed in chapters 3 and 4, although digitization has increased the capacity of cable and satellite systems and will continue to improve, there are still only a very finite number of programming services that may be distributed and the total number of services that may be distributed is reduced radically when programming services offer High Definition programming (i.e., a "standard" definition programming service currently may use between 1 and 3 Mb/s

described as essentially pluralist and aims at ensuring the availability of a diversity of cultural and political views. The pursuit of diversity may also lead to concepts of public service broadcasting or the establishment of specific public broadcasters, both of which are intended to provide direct means of providing viewpoints that might otherwise be unrepresented or poorly represented. The final set of claims identified by Feintuck involves the need to prevent monopoly or oligopoly and ensure the functioning of effective markets.

Variations of these public interest claims have also been made in the Canadian context as well. As is sketched out briefly below (and shown in more detail in the following chapters), these claims can be seen to gradually move from those that may be related to the public sphere model during the early years of television regulation to those related to the market model in more recent years. For instance, early claims such as those related to cultural sovereignty and diversity clearly relate to the public sphere model of public interests. While these earlier claims still hold some currency, later claims such as those related to the implementation of competition tend to emphasize an approach to public interests that is more closely aligned with the market model.

Public Interest Claim 1: Cultural sovereignty

Beginning even before the 1928 Royal Commission chaired by Sir John Aird, the Canadian discourse on the public interest in broadcasting (radio, at the time) began to be correlated with the desire to maintain and promote national sovereignty in the face of

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of capacity while a HD service may use between 11 and 19.6 Mb/s of capacity). While it is frequently possible for distributors to add additional capacity when current capacity is filled, such additions come with very high costs, which are inevitably passed on to subscribers in one form or another. To be fair, however, some of these concerns may have been difficult for Feintuck to foresee when writing in 1997.

foreign influence. As expressed concisely by Graham Spry (1932), the choice facing Canadian policy-makers was thought to be that of "The State or the United States".[17] Consequently, and to a large extent due to the efforts of Spry himself, the primary method chosen for protecting Canadian cultural sovereignty, at least in the early stages, was through the creation of a Canadian public broadcaster.[18]

With public radio came more direct state intervention in the field. Although, not unlike in the United States, [19] officials in Canada expressed concerns with the allocation of scarce radio frequencies, national sovereignty was the enduring preoccupation of the 1932 *Canadian Radio Broadcasting Act* and the Canadian Radio Broadcasting Corporation (CRBC) established by it, as well as of a number of other royal commissions and government statements that followed in later years. In this regard, the mandate of the CRBC was to regulate radio broadcasting in Canada with the objective of providing

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[17] As quoted in Raboy, Marc, "The 2005 Graham Spry Memorial Lecture: Making Media: Creating the Conditions for Communications in the Public Good", 2006.

[18] It was generally assumed that private broadcasting, in many cases imported foreign broadcasting, would take care of itself, while the establishment and maintenance of public broadcasting required state intervention. As noted by Audley (1983), this method was initially quite successful. For instance, within its first two years of television operations, Canadian Broadcasting Corporation programming was able to reach 60% of Canadians, albeit in many cases through affiliation arrangements with private stations. In fact, of the 44 licensed television stations broadcasting CBC programming in 1958, only 8 were owned and operated by the CBC.

[19] In 1927, the US Congress passed its *Radio Act* into law, which contained a general obligation that radio broadcasting licences be allocated on the basis of which broadcaster would best serve the "public interest, convenience, or necessity", thereby establishing a long-standing principle that would underlie much of the regulation of US broadcasting, in one form or another, to the present day. Although this phrase was borrowed from the public service obligations contained in public utilities law, the Federal Radio Commission (FRC), which was also established by the 1927 Act, diverged substantially from that legal tradition in the reasonably elaborate interpretation of the "public interest, convenience, or necessity" set out in its *Third Annual Report* of 1929 (United States, FRC, 32-35). In that report, the FRC found, first, that broadcasters are not "common carriers" and served "listeners" rather than "users". It indicated, therefore, that it would favor broadcasters that seemed more inclined to serve the public rather than "private or selfish interests". As pointed out by McChesney (1993), however, there was an absence of guidelines in the 1927 *Radio Act* with respect to determining whether a broadcaster met these criteria. He concludes that "Congress clearly had no particular notion as to how the term should be applied to the thorny problems of broadcasting."(p. 18) Essentially, McChesney argues that the net result of the FRC's interpretation was to favour licensing of private over non-profit broadcasters and general interest services over those wishing to serve more targeted groups.

entertainment and information programs that were primarily Canadian to all regions of the country. Though this mantle passed to a crown corporation, the Canadian Broadcasting Corporation (CBC), in 1936, its mandate remained essentially the same and continues to be much the same to this day.

Public Interest Claim 2: Diversity of programming sources

Following the development of television and a few decades of reckoning with an ever-increasing influx of foreign, largely American, programming, a more nuanced policy view of the public service role of *all* broadcasters – public and private – emerged. While still maintaining the importance of specifically Canadian programming, by the time the 1968 *Broadcasting Act* was signed into law, Harry Boyle (1970), then vice-chair of the newly established Canadian Radio and Television Commission (CRTC), would declare a more pluralistic perspective in asking,

> By what criteria do we judge the quality of a country's broadcasting? To be good, or even adequate, there must first be a multiplicity of individual organizations serving the whole. There must also be the widest range and variety of programs offered to listeners and to viewers, and the safeguards must be taken against the narrow imitative process ... There must be the widest degree of freedom to tell and to show the truth. ... Fundamental to it all, there must be an attempt to reveal society to itself. (p. 203)

However, this goal of providing the "widest range and variety of programs offered ... to viewers" would continue to be heavily tinged with concerns over cultural sovereignty. With the incorporation of Broadcasting Receiving Undertakings (BRUs, the first cable television distributors) into the ambit of broadcasting policy and regulation[20] through the 1968 Act, BRUs were enlisted to ensure, first, the provision of the "widest range" of

[20] Like radio before it, cable systems were regulated to some extent prior to 1968 through the payment of fees relating to usage of radio frequency spectrum. The primary concern of the then-Department of Communications was to ensure that cable systems did not produce "interference" for other parties utilizing spectrum.

Canadian television stations, and then later and space permitting, the "widest range" of non-Canadian stations.

Public Interest Claim 3: Protecting certain entities/industries from adverse effects

Having successfully produced the beginnings of a Canadian television broadcasting industry, concerns over cultural sovereignty became refined and transformed into a desire to maintain and protect this industry and the Canadian programming it produced. As noted by Ian Waddell, New Democratic member for Port Moody-Coquitlam, British Columbia, in discussions related to the framing of the 1991 *Broadcasting Act*:

> The whole thrust of the thing is that you will have to protect the Canadian stations. The Americans will wipe them out because they can produce the program at just a marginal cost ... we do not have a level playing field with Canadian-content regulations. (House of Commons, 14:50, 16 March 1990)

Parliament's particular fear was that unrestricted access to US programming would marginalize or eliminate Canadian programming. Responding to this concern, the CRTC began to employ regulation of cable (and later, other types of television distributors) as the primary vehicle for protecting Canadian programming services and enforcing Canadian program rights. In doing so it imposed a wide array of regulatory obligations on television distributors including, at various times and in various forms, requirements to distribute Canadian services, prohibitions on distribution of non-Canadian services, deletion and/or substitution of programs broadcast by Canadian and non-Canadian programming services, restrictions on grouping or "packaging" of services, channel placement, price controls, obligations to extend service to unserved areas and ownership limitations.

Public Interest Claim 4: Implementing competition

Despite the fact that competition is not mentioned even a single time in the 1991 Broadcasting Act, all branches of Canadian government, the CRTC included, have recently begun to emphasize the importance of its implementation. Schizophrenia between the implementation of competition and the legislated mandate to fulfill the cultural objectives of the Act has resulted in a form of "pseudo-competition" in which television distributors operate within a highly competitive domestic market, though one that is shielded from foreign competition, while the television programming services (including both television stations and more recently introduced "pay" and "specialty" services) they distribute operate within a highly protected market that permits only minimal competition between Canadian services and between Canadian and foreign services.

Public interest Claim 5: Reduced regulation

Most recently, an understandable predisposition against unnecessary regulation has seemingly changed into a penchant towards viewing all government intervention as undesirable. Closely linked with the desire to implement competition, the dominant view has become that government regulation is itself inherently negative, since it inhibits the operation of "free markets". The scope of debate on government policy has largely narrowed to a debate between the merits of detailed government regulation vs. reduced government regulation. In this regard, proponents of the latter often insist that regulation should be reduced or eliminated in correspondence with and in acknowledgement of technical and economic change. For example:

> [A]s plentiful bandwidth emerges, the government should regulate less. Agencies like the FCC are going to have to pull back from attempts to supervise the rollout of fast-moving, highly complicated technologies. It makes little sense for politicians to pick the next-generation television standards or for regulators to decide telephone rates. When technology was fairly stable, regulators could oversee business operations, calculate cost models, and ensure that companies didn't make too much money off the public. Now, only the marketplace can do this effectively. (Hillis 2000)

Ironically, despite its theoretical commitment to reducing regulation, the government has in fact introduced a different form of regulation to address competitive markets, rather than actually reducing or withdrawing from regulation.

Regulatory rationales unrelated to the Public Interest

Although we have tried to account for a wide range of potential public interest claims in using the market/public sphere models, not all of the decisions or rationales of regulators can be reasonably construed as making public interest claims nor do they fit neatly into any public interest model. Two types of regulatory rationales or decisions not clearly linked to public interest claims are particularly relevant to this thesis: technocratic and managerial decisions/rationales. As is discussed in more detail with respect to particular cases described in chapters two through four, these types of regulatory rationales often represent missed opportunities for regulators to address important public interests.

Technocratic rationales and decision-making

With respect to the first of these regulatory rationales not clearly linked to public interests, some parties have argued that recent policy and regulatory decision-making in Canadian broadcasting has been characterized by an ever-increasing prevalence of technical rationales or even technological determinism. In essence, technocracy or technocratic decision making assumes that regulatory options and activities are

constrained or even determined by the specific capabilities and limitations of current television and television distribution technology, as well as by the relative economic costs and benefits associated with changes in technology. It is also frequently marked by the dependency or primacy in regulatory decision-making of "experts" and their expertise[21] as to what information is salient to such decision making. The information such experts rely on tends to be predominately or exclusively technical information – most often garnered from the regulated industries themselves.

In fact, a wide range of authors, including Barney (2005), Brainard (2004), Franklin (1999), Mosco (1988), *et al.*, have levelled damning criticisms with respect to the consequences of technocracy on democratic participation and the media. The most important of these criticisms, for our purposes, is that the reliance on technical information and co-dependent experts excludes other valid considerations and sources of information. As Winseck (1998) argues, in employing technocratic logic and rationales, politics, law and economics become decontextualized and linked to "instrumental action, power and, technical knowledge, rather than any idea of what is right, just and good" (p. 59). Such considerations, including questions or concepts related to the public interest, are relegated to secondary positions, where not excluded entirely.

Nor are these misgivings exclusive to outside observers of political processes. As noted by Audley, as far back as 1980, there were concerns that the CRTC and the then-Department of Communications were preoccupied only with the economic and technological aspects of broadcasting. Studies completed by the C.D. Howe Institute

[21] Mosco usefully defines "expertise" as "drawing on socially sanctioned views of what constitutes correct information, knowledge, and truth." (p. 109)

and the Canadian Council for the Arts in 1980 and 1981, respectively, each concluded that the Department's policy-making centred on the science of broadcasting, to the exclusion of its social nature (1983, pp. 252-3). According to Franklin the situation had only become worse by 1999, when she wrote, "[w]e now have nothing but a bunch of managers who run this country to make it safe for technology" (as quoted in Barney 2005, p. 121).

Inherent in these arguments is the understandable concern that social, cultural or civil goals will be hindered by the unconstrained pursuit of technological progress. If technology and technocrats dominate political decision-making then what room does this leave for the pursuit of public interests or of other democratic involvement related to the concerns of citizens, particularly those that run contrary to the development of technologies and the industries in which they are situated?

Despite these criticisms, it should be noted that technocracy – in the sense of a view that most or all restraints on technological progress should be removed – has many proponents. Not surprisingly, technology industries, and television distributors among them, are the greatest proponents of this viewpoint. Among these, de Sola Pool suggests that electronic communication obliterates social impediments, widens the units in which political, economic and or social action takes place and creates counterweights to established authorities. In contrast, he argues that constraints on technological progress are frequently developed in the name of cultural nationalism and sovereignty but instead, upon closer inspection, serve to protect domestic industries from foreign competition, and/or existing governments or government structures (1987, p. 231).

Managerial rationales and decision-making

Closely related to technocratic rationality in many respects, managerial theory, according to Mosco (1988), involves notions such as the impact of growing complexity on state action, and the manipulation of regulatory apparatuses by regulated entities or industries in order to maintain power structures (i.e., regulatory capture), both of which are of particular relevance in the context of regulation of television distribution (pp. 115-117) as we shall see in the following chapters.

The growing complexity of government action is self-evident. In the area of broadcasting alone, numerous new services have been developed over the period examined in this thesis, each with its own characteristics and corresponding regulatory structures. Even industry consolidation, convergence and the commitment to reduced regulation, which one might intuit to reduce complexity, have, as will be observed in later chapters, entailed new areas of government action. The impact of growing complexity is compounded due to limited availability of time and other resources by all actors, including government and industry actors as well as citizens. The net effect of such complexity is that individuals become less capable of participating in the development of regulatory structures and systems. [22] Regulators themselves, overwhelmed by the complexity of their task, often

[22] The notion of the growing complexity of the state is closely linked to the power of "experts" discussed in relation to technocracy above. For instance, in his influential treatise *Public Opinion*, first published in 1923, Lippman explored the role of media – newspaper journalism, in this case – in democracy. He suggested that "the nature of democracy had fundamentally changed" (Fallows p. 236). Given the large scale and complexity of modern society, it has become impossible for citizens to sufficiently inform themselves so as to participate in direct democracy. In Lippman's view, successful democracies would instead have to rely on trained experts in government and journalism. The former charged with the role of making decisions and the latter charged with disseminating those decisions to the citizenry. Essentially, the "role of the press in the age of a complex mass society was not to engage the citizenry to participate directly in their own democracy, but to evaluate complex information and inform the public." (Champman and Knoedler 2006)

seek administratively *simpler* solutions rather than *better* ones. Further, in order to better allocate their own scarce time and other resources, regulators, by necessity as much as by philosophy, abandon certain areas of regulation, in order to focus on other areas deemed to be more significant or more current. Although an argument may be made that public interests are served by administrative simplicity, these interests are clearly secondary to the maximization of scarce resources.

A second relevant area of managerial theory is regulatory capture. It has frequently been observed that there is a tendency for government agencies vested with the mandate to pursue public interests to become dependent on or "captured" by the industries they supervise instead. This may be due to reliance on the information provided by regulated industries in the formulation of regulation, or, as a type of "group think" through which government agencies and private industry adopt similar views due to their on-going relationship and a lack of oppositional views from third parties. As has been observed with respect to public utilities regulation

> Public utility commissions have traditionally been charged with protecting consumers by ensuring that a particular commodity produced by a natural monopoly provider is available at a reasonable price. In many cases, this charge has meant protecting the industry's economic welfare as well as, or instead of, the consumer's welfare, leading critics to charge that regulators had been "captured" by the very companies they regulate (Aufderheide 2002).

In such cases, regulatory decisions are made on behalf of the interests of the industry, and public interest concerns play only a secondary role. As we shall see in later chapters, a particular form of regulatory capture occurs in the context of Canadian regulation of broadcasting, and television distribution in particular. A defining characteristic of regulation in Canada, as well as in certain other countries, is its holistic or structural

conception of a broadcasting *system.* Due to the emphasis placed on the importance of the broadcasting system, rather than speaking of regulatory capture by the industry, it may be more appropriate, in the Canadian context, to refer to regulatory capture by the broadcasting system itself. Although in many respects the concept of a broadcasting system is merely a benign conceit, this form of capture places regulators in the position of maintaining the system itself, rather than advocating on behalf of the public interest or fulfilling other roles. Accordingly, it presents a significant potential danger for regulators.

Where do we go from here?

In this first chapter, we have discussed the concept of public interests in some detail, including two general models and a variety of regulatory rationales that may be correlated with these models in the context of Canadian broadcasting regulation. We have also discussed other common rationales that underlie regulatory decision-making that do not clearly relate to public interests but instead serve as a substitute for or distraction from such interests.

The following chapters present a largely historical survey of the major milestones and issues in broadcasting policy and regulation related to television distribution in Canada. Over the course of this survey, I will explore the way in which public interest models and various related rationales are employed and made apparent through Canadian policy and regulatory decision-making. I will also describe several instances in which private or other interests are placed ahead of the broader consideration of the public interest.

Chapter Two Pioneers and Politicians, 1949 to 1989

First efforts

Unlike television stations, cable distribution or Community Antennae Television (CATV) systems were not initially regulated by the Canadian government. Although the first "cable" system in Canada – built in Montreal in 1949[23] - actually predated the first Canadian television station by 3 years, policy-makers and regulators did not immediately take notice. As is discussed below, these government actors were instead focused on radio and television stations and the programming they offered and on concerns that we would associate with the public sphere model of public interests, such as maintaining cultural sovereignty through the broadcast of Canadian content. Cable systems were therefore able to develop initially in a policy vacuum, regulated only by the fledgling market for television services.

Although the first Canadian television transmitter wasn't built until 1952, a number of US transmitters were already broadcasting their signals throughout the northern states and across the Canadian border by this time[24] (p. 73). Transmitters were in operation in Detroit, Cleveland and Buffalo, for instance, all of which are within reasonable proximity of one or more major Ontario cities, including Windsor, London and Toronto. All across

[23] This first cable system was built by the UK company, Rediffusion, and was originally intended for the reception and distribution of radio signals, rather than television (Easton p. 31). When it became known that the Canadian Broadcasting Corporation (CBC) intended to build its first television transmitter in Montreal, the decision was made to re-engineer the system entirely for television signals (pp . 44-45). However, as it turned out, this decision was ultimately a poor one and the system was a commercial failure (pp. 46-48).

[24] It should be noted that the US Federal Communications Commission (FCC) placed a freeze on the construction of television transmitters between 1949 and 1952. However, a number of television transmitters, including a significant number along the Canada-US border, were built prior to 1949 and continued operation throughout this period.

Canada, numerous cable systems were built to receive and transmit these signals to eager audiences.[25]

Some of the pioneers of Canadian cable were motivated by the desire to sell lucrative television sets, while others were merely techno-enthusiasts intent on pursuing hobbies or new careers in their field of interest. However, common circumstances can be identified in each of the early systems that were to spur the steady growth of CATV systems throughout Canada for at least the next decade. Specifically, each of the early CATV systems were built where television was not available over the air due to

1) a lack of locally broadcast signals; or
2) unfavourable geography, which prevented reception of distant, or, at times, even local signals.

Essentially, this meant that television signals were distributed in areas in which they were not expected or intended to be available, a fact that would place cable distributors at odds, to varying degrees, with television stations and governments (from both the U.S. and Canada) for the next 50 years.

Though not regulated in any substantive way by governments, it is important to note that these early cable systems succeeded in defining and addressing a new public interest. These systems provided many Canadians with a technical solution to their desire to access something – television – that was otherwise inaccessible to them or only

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[25] Examples include Ed Jarmain and Harry Anderson, who, by 1952, had begun providing access to television stations from Cleveland and Buffalo to Jarmain's neighbours in London through an antenna built in Jarmain's backyard (pp. 74-79). He and a number of his neighbours enjoyed access to two US television stations through this community antenna television (CATV) system a full year before the first local station, CFPL-TV, went on air in 1953. In the same year, George Chandler started his Tru Vu Television system in Vancouver, British Columbia to receive the KRSC-TV Seattle signal. In 1953, Fred Metcalf and Jake Milligan began to build their own system in Guelph, Ontario to receive the Buffalo and CBC Toronto signals (p. 80). The next year, Ed Polanski built a system in Thorhild, Alberta to receive the faint CFRN-TV Edmonton service (pp. 82-86).

accessible under unreasonable conditions, i.e., each viewer building a 200 foot tower in their backyard. For many Canadians, their first experience of television was facilitated by these new cable systems. Accordingly, these early systems could be said to address what could be described as the primary or most important type of public interest related to television distribution: *access* and its corollary, access under *reasonable conditions*. It is arguable that the question of access and the various conditions – reasonable or otherwise – that may be put on it, e.g., geography, wealth, education, ethnicity, religion, form the basis of all public interests or at least are fundamental to achieving any such interests with respect to television. Simply put, in the absence of access, no other public interests may be pursued. It was in the ability of cable to "extend" access to the services of television stations[26] beyond the normal reach of these stations to hitherto unserved or underserved areas in which cable found its initial niche.

It would not be long, however, before other motivations developed for the construction of cable systems as well, even in areas that already had access to television stations. Throughout the 1960s, the design and construction of antennae, amplifiers and other elements of cable systems improved considerably. These improvements permitted increases in the number of programming services that could be offered and the distance from which signals could be received as well as eliminating a number of visual imperfections in the retransmitted television signals. Colour television signals, in particular, were difficult to receive from any distance with a household antenna, resulting

[26] The provision of service to unserved or underserved areas is often formally referred to in Canadian broadcasting and telecommunications policy as "extension of service". Extension of service is often referred to in relation to the policy goal of providing "universal" service to all, or virtually all interested Canadians.

in even greater demand for the signal quality offered by community antennae (cable) systems.

These technical improvements were likely instrumental in the extraordinary growth of cable from a handful of backyard systems in the early 1950's to a significant national industry in the 1960's. By 1967, these systems were deemed significant enough to warrant a specific report by Statistics Canada. This report found that there were 314 operating cable systems in Canada, serving 408,053 individual homes and offering service under a further 6,768 bulk and commercial contracts (Foster p. 235). Even further, the $50 million in fixed assets installed by these cable companies were capable of providing service to a potential total of 1.2 million subscribers. One might say that, while it was providing technical solutions to physical and geographic limitations that birthed cable (extension of service), it was the provision of signals of a higher technical quality than those receivable by standard equipment owned by individual Canadian (quality of service) that brought it to maturity. A second type of fundamental public interest can be identified here, one related to high technical programming quality, which also continues to be evident, in various forms, up to the present.

The number of cable systems and the subscribers they serve would continue to grow over the next several decades. By 1978, 537 cable licensees were in operation serving 3.8 million subscribers, nearly 1,000 systems serving 6.7 million in the 1980s (Easton pp. 194 and 282) to a peak of nearly 2,000 individual cable licensees serving over 9 million subscribers by the year 2000.[27] The extraordinary growth in cable systems and the interest of Canadians in these systems is indicative of the incredible appetite of

[27] Public Notice 2001-59, 29 May 2001.

Canadians for access to more and more television stations and other programming services (i.e., pay, specialty and other US services discussed later in this chapter).

Since cable systems were not regulated in any substantive way during the period from their inception in the 1950s until as late as 1968, it is not possible to draw many conclusions with respect to the treatment of public interests in cable. It can be seen, however, that in focussing exclusively on television and radio stations and the public sphere model concerns related to these stations, government actors missed a significant opportunity to participate in shaping the manner in which access to television developed in many communities throughout Canada.

Instead, in the absence of policy or regulatory action, the factors discussed above (i.e., the ability of cable to extend service, provide improved signal quality and meet the desire for more programming services) contributed to the early positioning of cable as a private mediator of access to television programming. These same factors would later make cable systems an ideal chokepoint for regulatory intervention. In the initial pre-regulatory period from their inception in the 1950s until as late as 1968, however, cable systems operated as a kind of arbitrator of public interests in broadcasting, at least in otherwise unserved areas. However, the success of cable would eventually bring the attention of government to this sector, and with it, considerable changes to the role of cable systems.

Government Intervention

Though the first television stations and cable systems in Canada developed in virtually the same historical timeframe, television stations were licensed and regulated from the

outset, while cable or Community Antennae Television systems (CATVs) operated for some time before they received any significant attention from government. It was only once these latter systems were perceived to have achieved a certain minimum level of critical mass that efforts were made by legislators and policy-makers to define a role for them. Even then, government intervention seems to have not been motivated by the pursuit of public interests related to the extension of service or improved signal quality, or even by anything intrinsic to the services themselves. Instead, the concern of governments was clearly the potential impact cable might have on the Canadian television and radio services with which the government was already preoccupied.

Specifically, since cable systems – termed "broadcasting receiving undertakings" under the government policy of the time – were seen as only the passive retransmitters of programming, they did not fall under the jurisdiction of the CBC, which regulated television and radio stations until 1958, or the Board of Broadcast Governors (BBG), which held this role after 1958. Instead, between 1952 and 1968, CATV systems were regulated by the Department of Transport.[28] Initial regulation was related only to the basic technical characteristics of these systems. Cable licences were granted to any party that met these technical requirements, i.e., their facilities would not create interference for radio or television broadcasters or other spectrum users (once again, the government's concern was not for the systems themselves but to ensure that they would not impact television and radio stations, as well as other users of wireless spectrum).

[28] Cable systems, in this sense, were treated similarly to telecommunications systems, which were also linked with transport. In fact, the legislative provisions governing telecommunications in Canada were, at the time, contained in the *Railway Act* (and would remain there until the 1991 *Telecommunications Act*), which was also administered by the Department of Transport via the Board of Transport Commissioners.

Aside from these minimal technical requirements, licensees were subject to only one direct condition, that they retransmit the programming of the local television station,[29] if any, broadcasting in that area. The requirement that CATV systems offer local stations served two purposes. First, it ensured that, where unfavourable geography limited access to local stations within their normal licensed service area (e.g., due to a hill or valley), these stations could still be received via cable. Secondly, it reduced the capacity of these systems to offer programming originating outside these markets, thereby protecting the advertising market of any local television stations from outside competitors.

The licences issued by the Department were non-exclusive, meaning that they would be issued to as many CATV systems as wished to operate in a given area, provided that they met the requirements above. The dependence of cable operators on telephone company facilities, however, effectively limited any early competitive efforts. In Ontario and Quebec, for instance, Bell Canada refused to contract with more than one party to install facilities in a particular area, and established a maximum number of miles of cabling that it would install for a given cable system (Easton p. 149). As is discussed later in this chapter, it could be argued that the later geographic monopoly service areas of cable operators developed, while set by regulatory fiat, were initially determined by Bell Canada, and other telephone companies and only confirmed by regulators. Again, this situation highlights the fact that, in the absence of government regulation, regulatory-like

[29] At the time, the government was operating under what was referred to as the "Single Station Policy". Under this policy, only one station – usually a CBC station or a station willing to offer CBC programming on an affiliate basis – was licensed to operate within a given market, so as to ensure the financial viability of that station, given the relative novelty of the medium and the small number of Canadians that owned television sets (Foster p. 252).

activities (such as defining service areas and limiting competition) will be undertaken by private interests.

Of perhaps even greater significance, although not a specific component of cable licences, the policy of the Department of Transport was to prohibit the use by cable, or prospective cable systems, of microwave technology to transport distant signals to Canadian markets. By refusing to licence microwave retransmitters for use in cable "networks", the Department sought to enforce the government's so-called single station policy. The Department's concern in this regard was that, by using microwave, cable systems would be able to import a variety of US and Canadian stations, that would compete for viewing and, frequently, advertising revenue with the local station.

The prohibition on cable networks was maintained even in areas in which no local station was licensed or operating. Effectively, this precluded the construction of cable systems outside of southern British Columbia, Ontario and Quebec,[30] the only provinces in which US and Canadian stations were available over the air without microwave retransmission. To circumvent this policy,[31] some Canadian cable operators went so far as to finance the construction of low-power "rebroadcasting" stations for US signals in areas of the northern US states that would make the signal receivable over the air by the cable operator (Foster p. 235).

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[30] According to Department of Transport statistics, as of 31 March 1965, there were 55, 12, 81 and 187 CATV systems in British Columbia, Alberta, Ontario and Quebec, respectively. Only a handful of systems were in operation in the Prairie provinces and there were virtually none in the Atlantic provinces or the North.

[31] Another method of circumventing this policy was the practice known as "bicycling", which started in Canada primarily with cross-border programming but eventually was used to transport Canadian and even community channel programming from one cable system to another. Bicycling involved physically transporting tapes of programs (sometimes by bicycle) from one cable system to another rather than receiving the signal conventionally over-the-air or via microwave.

Neither the indifferent regulation of cable nor the prohibitions on microwave-based cable networks indicate any effort on the part of government to discover or address public interests with respect to these burgeoning systems. As is noted above, government policy and regulation during this period was focused exclusively on limiting access to television stations beyond licensed service areas. Although the purpose of this type of regulation is to ensure the economic viability of these stations, they do not relate to a market model perspective of public interests. Instead, the public interest is clearly understood to lie in ensuring that stations are economically viable and, therefore, capable of supplying Canadian programming – a benefit that government actors considered could not be achieved in the absence of government intervention and therefore a definitively public sphere model concern. However, in doing so, this type of regulation runs counter to public interests related to access and the extension of the services provided by such stations and market model related concerns with respect to minimizing limitations on individual rights. Whether deliberately or not, government actors clearly made a choice that public interests related to cultural sovereignty outweighed those related to access.

Introduction of the Broadcasting Act, 1968

The level of government scrutiny of cable systems increased considerably in 1968, when a new *Broadcasting Act* was introduced and responsibility for broadcasting regulation – and later telecommunication regulation as well – was transferred to a new agency, the Canadian Radio-Television Commission[32] (CRTC).

[32] Later renamed the Canadian Radio-Television and Telecommunications Commission (but still referred to as the CRTC) in 1976, when it assumed responsibilities for telecommunication regulation.

Planning for this new legislation started in 1963 and, according to Secretary of State La Marsh, "there ha[d] been an almost continuous dialogue [in Parliament] on how we should try to solve some of these [broadcasting] problems since that time." (*House of Commons*, October 127, 1967, p. 3188). Many of the problems the Secretary referred to were related to broadcast content, i.e., concerns as to whether programs, primarily CBC programs, were balanced, offensive, etc. However, the most significant problem identified by parliament was the on-going encroachment of US programming and television stations, which had not been arrested by earlier attempts at content regulation by the CBC and BBG (p. 3189).

In 1964, the Secretary of State established the Fowler Committee on broadcasting to examine the continued dominance of foreign programming in the Canadian broadcasting system, despite the existence of Canadian content quotas. The Fowler report (1965) came to several conclusions that stirred the government to action with respect to CATV systems and dramatically altered the prevailing view of cable systems as mere retransmitters of programming. The Fowler committee observed that a significant cause of the continued dominance of foreign programming could be correlated with the growth of CATV systems importing US television stations. In fact, it noted that Canadian CATV systems were so intertwined with US television stations that

> [i]n at least two instances, the receiving antenna or distribution point [of a CATV system] is located in the United States, and the signals are brought to Canadian receivers over landlines. (p. 251)

The report concluded that the "control problem" with respect to CATV systems was "complex, to say the least" and involved at least two conflicting public interest ideals that could, in turn, be addressed in one of two different ways.

First, there was a public demand for CATV services – which I have earlier described in terms of a public interest in access – as was clearly demonstrated by the rapid growth of these systems, which Fowler noted exceeded that in the United States both in terms of the growth rate itself as well as the ratio of subscribers to the total population (pp. 252-253). The report considered that, provided these systems

a) were operated as "common carriers", i.e., offered all available television stations without discrimination; and
b) operated in areas otherwise unserved by local television stations;

there was a strong argument for continuing to permit these systems to operate largely free from government control. In these circumstances, government policy or regulation would be an unnecessary interference (p. 254). For our purposes, we could say that the first model proposed in the Fowler report entailed a market model approach to public interests, i.e., one that entailed minimal government intervention and sought to maximize the individual rights of cable operators and subscribers.

Secondly, however, Fowler noted that there were many instances in which the public interest goal of "nourishing" Canadian television stations was thwarted by CATV systems due to the "sudden intrusion of a number of new signals which dilute the audience and damage commercial support" (p. 254). In these cases, regulation was needed to ensure the continued feasibility of these stations and the existence of a Canadian broadcasting system. As has already been discussed, this proposal is consistent with the public sphere model approach to public interests.

Fowler seems to have placed greater weight on the latter public interest concerns (that related to the public sphere model). Accordingly, the report recommended that the

government undertake monitoring and potentially more detailed regulation of CATV systems so as to ensure that:

- multiple systems were not linked into a partial or complete form of CATV network (i.e., the signals of television services can not be transported outside the local market in which they broadcast); and that
- distinctions were made between passive reception and retransmission of programming (CATV function) and the origination of programming (the television stations' function) so as to keep these functions separated (pp. 254-5).

Following these conclusions, particularly those with respect to US television stations, CATV could no longer remain below the radar of legislators and policy-makers. The white paper produced by the government in response to the Fowler Committee's report formed the basis of the new legislation considered by the House Standing Committee on Broadcasting, films and assistance to the Arts, and later enacted by Parliament. Proclaimed on 1 April 1968, the *Broadcasting Act* of 1968 (the 1968 Act), made a number of significant changes to Canadian broadcasting policy. Most importantly, for our purposes, the 1968 Act incorporated CATVs into broadcasting legislation for the first time, defining them as a type of "broadcasting undertaking" that must be licensed under the Act. Section 2(a) of the Act further declared that

> broadcasting undertakings [including broadcasting receiving 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.

The argument that broadcasting undertakings are reliant on publicly owned radio frequencies is somewhat more tenuous in the case of CATV systems than it is in the case of television stations. However, it provides a common linkage to rationalize the inclusion of these systems as an integral element of the overarching "Canadian broadcasting system". The implication of the declaration above is that there is a role for CATVs

within this system, and, presumably, responsibilities commensurate to the alleged benefit associated with inclusion in it.

In fact, the government's primary rationale for addressing CATV systems at all, as is suggested by the Fowler committee report, was the concern that "activities in the cable field could have an economically detrimental effect in so far as free television is concerned" (December 20, 1967, p. 5677). This focus was made even more clear when a significant distinction was made by the government between CATV operators, who distributed programs broadcast over the air (OTA) and were therefore regulated, and "closed-circuit" television services which did not (February 2, 1968, p. 6313) and therefore were not regulated. It was those systems that distributed OTA programs that concerned the government since these had the greatest potential to impact Canadian programming services, and in particular, the publicly owned CBC stations.

It should be noted that, although the Fowler report identified two approaches to cable regulation: 1) a market model approach based on the demand for cable systems and access to additional programming services and 2) a public sphere model approach related to the protection of Canadian television stations, the former was almost entirely eclipsed by the latter. In fact, what parliament proposed in the 1968 Act was a system in which cable would be regulated *on behalf* of television stations, rather than on behalf of the public. The logic then appears to be that, by protecting television stations from competition by services operating outside of their markets, the result would be financially stronger television stations that would themselves be able to offer more or better programming, which, would, in turn, provide public benefits.

Parliament rejected an alternative form of regulation also considered in the Fowler report, i.e., treatment of cable systems as common carriers. The notion of common carriage has a long history in telecommunications regulation and, had it been applied to cable distribution, may have resulted in both cable and telecommunications being regulated in a similar manner.[33] As a common carrier, cable systems would be expected to carry all television stations, without discrimination. Given its primary concern – protection of television stations – its not surprising that parliament rejected this option. In fact, parliament's intention was to *require* cable systems to discriminate in favour of local Canadian television stations and against distant or foreign ones. Accordingly, the 1968 Act essentially removed cable distribution from the sphere of telecommunications and placed it within the broadcasting system, setting cable distribution on a new and very different path.

Despite including CATVs within the ambit of the broadcasting system, the 1968 Act provided no explanation of its anticipated role or the type of legislative or regulatory responsibilities that should be applied to these systems, aside from the overarching requirement that Canadian television stations should be protected. In order to glean something of the particulars of parliament's intent, it is necessary to delve into debates of the House of Commons in drafting this legislation. In this regard, Secretary of State

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[33] The principle of common carriage is based on the premise that a common carrier should not interfere with the content of a transmission. For instance, section 36 of the *Telecommunications Act*, 1993 states:

> Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

In the case of cable distributors this principle could have been applied, for instance, as a requirement that the common carrier make no distinction between the content carried or the source or destination of the content, provided carriage was technically possible and the carrier received reasonable compensation for its service. One possible outcome of common carrier regulation of cable could have been the lack of regulatory obligations to carry particular programming services, which are fundamental to the current regulation of television distributors.

LaMarsh, whose department was chiefly responsible for the government's whitepaper and the proposed legislation described the anticipated regulatory requirements of CATVs as including:

> First of all, program integrity; you are not to use somebody else's advertising on your own programs. Second, at present one must carry the national program[34] that is available in the area. Aside from those two considerations, I can say nothing more. (Debates of the House of Commons, February 2, 1968, p. 6313)

Unfortunately, as is betrayed by her summation, and as Ms. LaMarsh herself acknowledged (November 28, 1967, p. 166), the government had a rather limited understanding of the relatively new CATV services. In fact, the inclusion of CATV systems as broadcasting undertakings that would require licensing under the proposed Act appears to be a minor component of the government's proposed legislation – although one that would later become a major element of future broadcasting policy and regulation. However, beyond the simple intent of protecting television stations and the Canadian programming they produced, it is not clear that the government was either willing or able to provide direction as to how CATVs should be addressed by broadcasting policy and regulation. Instead, this matter was left almost entirely to the discretion of the new organization established through the 1968 Act to regulate the Canadian broadcasting system: the CRTC.

The CRTC

An important principle in and one of the motivating rationales for the development of the 1968 Act – from the Fowler Report and the government's whitepaper through the various

[34] Ms. LaMarsh's use of the term "national program" is a reference to specific definitions in the 1968 Act. In that context the national program refers to both the programming offered by the CBC as well as the CBC stations themselves.

parliamentary discussions – was the creation of a national[35] regulatory agency that would be independent of both parliament and the CBC.[36] The body created – the aforementioned CRTC (frequently referred to as just 'the Commission') – was to be responsible for the orderly development of the Canadian broadcasting system. In stepping into this mandate, the CRTC was considerably more aggressive than the BBG before it. While the BBG seemed to have been generally content to implement the directions of government, the new CRTC demonstrated an early penchant for developing its own "regulatory policy" (Foster p. 246).

Perhaps because the 1968 Act gave little direction with respect to how cable should be treated by the new regulator, the greatest part of the CRTC's work in its early years was related to cable.[37] The 1968 Act required all CATV systems previously licensed by the Department of Transport to apply to the newly established body for a broadcasting licence within 90 days of the issuance of the Act.[38] This legislation empowered the

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[35] Reinforcing federal jurisdiction in the area of broadcasting was a central tenet of each *Broadcasting Act* (1958, 1968 and 1991) passed by parliament. Although there were several attempts by provincial governments, and even municipal governments, to assert some measure of jurisdiction in the years following the issuance of the 1968 Act, federal jurisdiction over the regulation of cable was clearly confirmed in a December 1977 decision by the Supreme Court (Press Release, Department of Communications, 16 December 1977) Nonetheless, a certain measure of co-regulation with provincial governments remained in place up until the issuance of the 1991 Act.

[36] According to Keith Spicer, chair of the CRTC in the early 1990s, there are three reasons why independence is important for the Commission:

> First of all, the general public needs to believe in democracy. They need to believe that the system is clean and impartial ... Secondly, industry needs to know there is a level playing field, that there is no fear or favours that ... they will get fair treatment. This leads me to the third ... in the most simplest sense we protect the government from itself. (House of Commons, 9:10, 22 February 1990)

[37] In his remarks to the Senate Special Committee on the Mass Media in 1970, CRTC Chairman Keith Davey observed that cable was not only the newest of the media the committee would analyze, but also "the most perplexing". (41:42) This sentiment was later echoed by the CRTC in its first report to parliament in which it stated that cable television was the single most complex area of its activities (Foster p. 246).

[38] Specifically, section 68 of the Act permitted CATV undertakings licensed by the Department of Transport to continue operating under that licence for 90 days following the date the Act came into effect

CRTC to issue licences for up to five years, under whatever conditions it considered necessary to implement or further the objectives of the Act.[39]

Of equal importance, the licensing process established under the Act was to be a public one, requiring an open public hearing for each licence issued or renewed and permitting any interested party to make submissions representing their views in each public process. Again this approach to cable was consistent with what we have described as the public sphere model of public interests. The intent of the Act, as implemented by the CRTC, was to provide opportunities for active citizenship through direct public participation in regulatory processes. As is discussed in chapter four, however, actual participation by the public has often been limited.

In the year following the issuance of the 1968 Act, the CRTC engaged in a kind of extended cross-Canada tour in which it held seven public hearings and issued 232 CATV licences, in addition to licences of other types.[40] Neither the government nor the CRTC should have been surprised that, in response to the call for applications issued in the 1968 Act, it received applications not only from existing licensees but also from a wide range of entrepreneurs and hastily assembled consortiums wishing to establish a claim to particular geographic areas. Similarly, existing licensees commonly claimed much broader areas than those that were identified in their Department of Transport licences, presumably so as to ensure room for later growth. By September of 1968, the glut of

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(i.e., until 29 June 1968). If, prior to this date, CATV undertakings submitted a licence application to the CRTC, they would be authorized to continue to provide services until the application was disposed of.

[39] It is worth noting that none of these objectives pertained specifically to CATV licensees. Objectives related to the CBC and other television stations may be read as being indirectly applicable to cable licensees due to their distribution of these stations.

[40] The Commission dealt with 249 CATV applications compared to only 62 applications of all other types during its 1969-70 fiscal year (CRTC Annual Report, 1969-70)

licensing applications made it apparent to CRTC officials that the government had grossly underestimated the growing economic significance of cable systems and the impact that public licensing of these systems would have on the market for broadcasting services.

The CRTC's response, in its 10 July 1969 Public Announcement,[41] was to adopt the following licensing policies to prioritize this workload:

- No applications for new licences would be heard until Department of Transport licensees had been considered at a public hearing;
- Department of Transport licensees that had been denied a licence by the CRTC would also be heard prior to applications for new licenses;
- Applications for increased service territories were generally denied and some service areas previously licensed by the Department of Transport were reduced so as to leave certain areas for potential new CATV systems;
- Licensing should avoid disruption to services already provided to Canadians;
- Licensees must comply with Canadian ownership requirements[42] by no later than 1 September 1970; and
- All initial licences would be for a period of two years.[43]

In examining the various licensing decisions issued by the CRTC following this policy statement, two motivations become apparent. The first of these is bureaucratic expediency (or administrative simplicity, as discussed in chapter one in relation to managerial rationales). An enormous number of cable systems were already in operation across the country at the time the 1968 Act was issued. By way of comparison, only 93 television stations were in operation in 1969 as compared to 232 licensed cable systems. Further, since the Act required that the application of each potential licensee be treated in a public hearing, considerable additional strain was placed on the new institution, necessitating, in its view, the sacrifice of certain "luxuries". For instance, the decisions

[41] *On the Licensing of Cable Television Systems*, Public Announcement, July 10, 1969.
[42] These requirements were set by cabinet in Governor-in-Council direction to the CRTC SOR/69-140.
[43] The two-year initial licence period was actually set out earlier as a general guideline in the 13 May 1969 Policy Announcement.

issued at that time are perfunctory, rarely stating more than that the Commission had reached a decision to licence or not licence an applicant and that that decision was, therefore, in the public interest.

Secondly, it is apparent from these early licensing decisions that the CRTC had elected to embark on a policy of licensing only one party in each given area, i.e., to enshrine geographically defined monopoly territories for CATV licensees. In doing so, the Commission expressed concern that the current boundaries of CATV systems were more historical than logical and should be rearranged so as to improve "distribution efficiency" (Public Announcement, 26 February 1971). Consequently, the CRTC developed the further policy of establishing new boundaries to these areas ("service areas") that were based, to the greatest degree possible, on natural or community boundaries, i.e., a river or the edge of a particular ethnic community. The extension of the service area of one cable system into the service area of another system was prohibited, unless "as a special case" such an overlap was deemed to be in the public interest (Public Announcement, 13 May 1969), although no criteria were established that would indicate how such a public interest would be found to exist. Once again, this type of licensing was symptomatic of a public sphere model approach. Enshrining regulated geographic monopolies protected these cable systems from competition in exchange for the implementation of a wide variety of protections for programming services, as we shall see throughout the following chapters.

The CRTC also attempted, however, to licence several different parties to provide services within larger urban areas, although each with its own distinct service area. For

instance, three separate parties were licensed to serve various parts of the city of Hamilton, Ontario, while five parties were licensed to serve separate parts of the metro Toronto, Ontario area. This approach was extremely unpopular with incumbent cable systems (licensed previously by the DoT) and entailed numerous instances of "rationalizing", i.e., considerable changes were made to the service areas of existing cable systems and the sale/exchange of assets, between CATV systems so as to ensure that later entrants could be licensed to provide services within their own distinct service areas.

In most cases though, the systems licensed by the CRTC were incumbents. By enshrining specific geographic monopolies for these incumbents, the CRTC appeared to be preoccupied with ensuring that there would be no disruptions to existing service, as per the objective of providing for the orderly development of the broadcasting system objective set out in the 1968 Act. Preference was given, in particular, to systems already in operation and serving subscribers as opposed to those that had merely been licensed by the Department of Transport but which served few or no subscribers.

An additional factor of importance in these first licensing decisions was that all cable systems would be limited to a maximum foreign ownership level of 20%. This requirement, at least, was not set by the CRTC, but stemmed from a Directive from the Governor-in-Council, via the Secretary of State. Cabinet's preoccupation with Canadian ownership appeared to be founded on notions of economic nationalism, which, as would frequently prove to be the case in the future, would come to be viewed as a necessary vehicle of achieving other cultural goals, such as the promotion of Canadian

programming. In this case, although the direction applied to all undertakings licensed by the CRTC, its effects were particularly significant for cable systems,[44] which had frequent and continuous financing problems (Easton pp. 92-93).

The CRTC would later indicate that its reasoning in implementing its 1969 licensing policies related to its concern that, to maintain the licensing policies of the Department of Transport, would have resulted in a *fait accompli* for regulation of CATV, which would not be in the public interest. It specifically noted its fear that

> the most urbanized parts of Canada would be divided into very large service areas allotted to a relatively small number of operating companies" (Policy Announcement, 26 July 1971).

In the long run, industry consolidation would overcome the Commission's attempts at diversifying the industry through such licensing strategies.[45] However, with enormous effort, the CRTC was successful, at least, in instilling some order in the tangled web of cable operations that spanned a number of Canadian urban centres and its policy of licensing cable systems in geographic monopolies would be maintained for the next 22 years until finally altered in 1993.

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[44] By 1969, the U.S. broadcasting network had a 75% ownership interest and had invested some $18 million in several Vancouver area cable networks (Easton p. 93-94). The U.K. company Rediffusion maintained control of cable systems in Montreal, which at various times were also partly owned by the U.S. companies Paramount Pictures and Skiatron Inc. (p. 112). Finally, the U.S. company Famous Players held controlling interests in several cable companies in London and Etobicoke, Ontario (p. 115).

[45] A notable exception took place in the three licensed services areas in Hamilton referred to above. One of the licensees, Mountain Cable Inc., has retained its independence to the present day, despite the consolidation that has taken place around it and throughout much of the industry.

The wired city

While the CRTC took its first steps in cable distribution regulation, policy-makers were considering other, more forward-looking goals, for the newest members of the broadcasting system. Although it would seem that legislators were rather uninformed about the potential impact of cable in the years before the 1968 Act was introduced, their views as to its significance would change radically shortly thereafter. Many policy documents in the years immediately following the issuance of the 1968 Act describe the potential development of "wired cities" in ostentatiously optimistic terms, with cable in the vanguard of this development. Documents allude to the wired city as "providing 'total' telecommunications services to each home", perhaps through the upgrading of existing "copper pairs" in use by telephone companies or to the co-axial cable used by cable systems (DoC, *Multiservice,* 1971, p. 59). It was anticipated that "switched" cable systems,[46] in particular, could deliver a range of possible services including:

1. Advertising
2. Alarm (burglar, power failure, fire, etc.)
3. Banking
4. Facsimile
5. Emergency Communication
6. Communication between subscribers and Computers
7. Meter reading (utilities)
8. Distribution of Radio programmes
9. Shopping from the Home
10. TV (origination and distribution)
11. TV (stored movies, available on demand)
12. Educational Television

[46] Switched cable represents a hybrid of technologies in place in both the telecommunications and cable industries. Telephone companies used copper pairs that were able to transmit only very limited amounts of data but, through the use of "switches", were able to identify each subscriber and offer them a unique stream of information over their own dedicated line. Meanwhile, co-axial cable used in cable systems had a much greater capacity for transmitting information but, without employing switching equipment, cable subscribers could not receive individualized streams of information, meaning that each cable subscriber effectively shared the available capacity with every other subscriber. It was thought that the employment of telephone-like switches through co-axial cable infrastructure would provide an improved hybrid of the two technologies.

13. Telephone
14. Computer Aided Instruction
15. Picturephone [also referred to as Videophone]
16. Voting (DoC, *Seminar*, 1971, p. 9).

All of which would be offered via:

- 4 voice/data channels for telephone or data services;
- 12 TV channels, one-way, common to an area;
- 12 TV channels, one-way, selected by each subscriber; and
- 4 TV channels, two-way, common to an area. (*Multiservice,* p.61)

The Department of Communications, and others, were not insensible to the price of such a venture, acknowledging that it would cost some $70 billion to implement the necessary infrastructure, which was an order of magnitude beyond even the total costs of all telecommunications infrastructure in place in Canada at the time (p. 61). On a similarly negative note, other parties cautioned that wired cities may carry with them their own social and political problems, noting that "total communications" may be "totally inhuman" (*Seminar*, p. 14). Interestingly, in the view of some parties, the chief limitation on the development of such systems would not be the cost or social implications of the endeavour but the limited human ability to receive such a vast array of information as would be available without overloading our physical and intellectual capacity (*Multiservice,* pp. 63-64).

This particular technotopia may not have seemed so far away in 1971 as it would later prove to be. During a Department of Communications seminar held at the University of Ottawa in that year, participants heard how "tele-shopping" was already a reality in San Diego, California, how "videophones" would be available for purchase on the Canadian market within a few years, and how the Bank of Montreal had engaged in a project to link

central processing facilities and remote data storage for all of its 1,000 branches within five years (*Seminar*, p. 3).

In retrospect, it would seem that these policy-makers aimed too low and fired too soon. Rather than 30 odd channels of video/audio/data, modern cable systems can transmit hundreds and, via high-speed Internet service, provide access to a growing multitude of other information. However, these changes were more than 30 years away, not less than five, and much of what was anticipated by policy-makers, such as switched cable, has yet to be realized in any significant fashion. Nonetheless, it may be that this vision of the future is, in part, what motivated policy-makers and regulators to later engage cable systems as national champions in achieving other public policy goals. As such, it can be seen as facilitating the further implementation of a public sphere model approach to public interests. However, as is discussed in the following sections, the practical matters of actually integrating cable into a Canadian broadcasting system would contribute to a change in this approach.

Integrating cable into the broadcasting system

More than simply licensing cable systems, the CRTC's task was to integrate this once distinct type of service into the broadcasting system conceived of in the Act. In the view of existing players, the purpose of such integration was to "control cable in such a way as to use its growing popularity as an aid to the development of the entire Canadian system." (CAB p. 18)

Likely taking its cue from parliament's concerns with respect to cultural sovereignty and the protection of Canadian television stations, the Commission described the challenges related to defining a role for cable with considerable drama:

> The danger to the Canadian broadcasting system is real and immediate. The Commission reiterates that the Canadian broadcasting system must improve if it is to survive as a system. Improvement may be fruitless however unless difficulties in the system are resolved realistically.
> ...
> The purpose and mandate of the Commission is to uphold the public interest and to safeguard the system which, in the considered opinion of the Commission provides the best service for the largest number of Canadians.
>
> The Commission has indicated in previous announcements how the unlimited penetration by United States stations on a wholesale south to north basis would completely destroy the licensing logic of the Canadian broadcasting system as established by the Broadcasting Act. If a solution is not found to integrate cable into the overall system, the impact, by fracturing the economic basis of the private broadcasters, would also disrupt the Canadian cultural, educational and information imperatives of the Canadian broadcasting system. (Notice of Public Hearing, 26 February 1971)

Paramount to these concerns was the maintenance of a Canadian broadcasting system. Central to the logic of such a system was the view that induction into the system carried with it the responsibility to contribute to its maintenance and improvement. Consistent with the public sphere model of public interests, regulation would employed to ensure that cable systems undertook certain responsibilities that they may not have undertaken if regulated by the market alone. Initially, the CRTC determined that such responsibilities should take the form of requirements to:

- Provide "priority" carriage for Canadian television stations;[47]
- Limit the importation of distant US television station signals;[48] and to

[47] Regulations to this effect were not implemented until 1976.

[48] Regulatory limitations on the importation of US signals were complemented by changes to the Income Tax Act proposed in the 1970 report by the Special Senate Committee on the Mass Media (Davey Commission). Although the Commission's determinations in its 1971 policy review took into consideration the proposed changes to the *Income Tax Act*, changes to that Act were not actually made until Bill C-58 was passed in 1977. This Bill amended section 19 of the Income Tax Act to allow Canadian

- Perform signal deletion and/or substitution on programs broadcast by US television stations, where the same programs were also broadcast by Canadian television stations.[49]

When the 1968 Act was published, the average CATV system was generally capable of distributing between four and seven television stations (House of Commons, January 26, 1968, p. 6044). By the time of the 1971 policy review, a considerable number of systems were capable of utilizing the full VHF band, which includes 12 channels, numbered from 2 to 13.[50] CATV systems located in border regions were often able to receive a number of US television stations as well as local Canadian stations – not to mention those that could be received via microwave technology. Since the number of stations available could often exceed the capacity of a system, the CRTC developed rules related to the *prioritization* of television stations.[51]

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advertisers to claim expenses for advertising placed in periodicals which are at least 75 per cent Canadian-owned, or on television stations which are at least 80 per cent Canadian-owned., i.e., any licensed station. This amendment provided a significant incentive to advertise on Canadian television stations that effectively eliminated the practice of advertising on US television stations received in Canadian markets.

[49] Although signal substitution was discussed in principle and permitted, on an optional basis, it was not made a requirement for CATV systems until 1975, and is discussed in greater detail below.

[50] This total number of channels on which a CATV could distribute television stations represented what would be referred to as the "capacity" of the system.

[51] Beyond carriage of these stations, the possibility of direct payment by cable companies for the distribution of priority Canadian television stations was a subject of much debate in the Commission's 1971 cable review. In that review, the Commission generally found that,

> [s]tated simply the fundamental relationship is: television stations are the suppliers, and cable television systems are the users. Thus, the basic principle involved is: one should pay for what he uses to operate his business.

Nonetheless, payments were not mandated, since the CRTC considered that it lacked the statutory authority under the 1968 Act to compel cable systems to pay television stations for the use of their signals. Although several other proposals have since been advanced by television stations seeking direct payment for their services, none have ever received regulatory approval. However, a method of payment by cable systems to television stations was eventually arrived at through copyright reform, instead. Distributors currently pay a per subscriber "compulsory retransmission tariff" set by the Copyright Board. Television stations continue to frequently argue, however, that additional compensation is warranted. For example, in its 2006 Television Policy Review, a number of television networks proposed a "fee-for-carriage" regime for Canadian television stations.

Stations were prioritized primarily by giving preference to stations (setting regulatory requirements to carry stations) based on their relative distance from cable service areas, i.e., stations were defined as either local, regional or extra-regional, as well as by giving particular preference to CBC stations and provincial educational stations. As was also the case with FCC regulatory policy in the US, cable carriage requirements set by the CRTC vis-à-vis carriage of television stations were informed by an emphasis on what has come to be termed "localism". "Localization" in the design of media and other "political" institutions is considered to promote political participation as well as encouraging civic education. In the case of broadcasting, localism policies are generally intended to enshrine the local markets of television stations with the intent of encouraging these stations to produce additional local programming (see pp. 10-19, Napoli, 2006).

Other lesser or non- priority stations, most notably US stations but also more distant Canadian stations, might be distributed, if authorized, provided that capacity was available after distributing priority stations. From both the CATV and subscriber perspective, the prioritization of local Canadian stations was a particularly problematic element of regulation since it required the distribution of many stations that were often already available to subscribers over-the-air, albeit sometimes with greatly improved reception, while effectively excluding stations that were not readily available over-the-air. Unfortunately for both cable companies and their subscribers, it was access to these latter "distant" stations that were, in fact, the greatest benefit of subscribing to cable. The prioritization of local stations, combined with limits on available capacity, in fact brought into conflict two important interests: the desire of cable subscribers (and cable systems)

to receive additional programming; and the desire of television stations to limit access to other services so as to protect the local advertising markets of television stations. The train of logic apparently employed by the Commission in prioritization of local stations was that, despite the public's desire to obtain other services through cable that were not already readily available over the air, the more important policy priority was the protection of the markets of Canadian television stations. This protection would strengthen these stations and the system as a whole resulting in greater overall benefits for Canadians. Once again, this was contextualized as a choice between "the State and the United States". Regulation, in this sense, is intended to dam the inexorable flood of U.S. programming into Canada.

The logic of this policy also held that, in addition to protecting local Canadian stations, prioritization supported technological innovation by forcing CATV operators to improve their networks so as to increase their capacity in order to permit the distribution of optional services, in addition to those they were required to offer. However, the downside of such a policy was that increased CATV capacity would inevitably result in further calls to authorize the distribution of more and more US services, which could potentially result in Canadian cable systems that offer mainly US programming, despite the prioritization of local Canadian television stations. To offset this potential problem, the authorization to distribute US services was later hemmed in further by a "predominance" rule,[52] which required that the overall number of Canadian services distributed by a cable system be greater than the number of foreign services distributed.

[52] This rule was first set out in Public Notice 83-245, 26 October 1983.

Program deletion and substitution

In addition to carriage rules related to television stations, one of the first types of regulation enacted by the Commission was signal substitution. Once again, signal substitution was a further component of its public sphere model-based approach to public interests, in that public interests were equated with the protection of the private interests of television stations. Ironically, the case of signal substitution highlights the fact that the greatest commonality between Canadian television stations and cable companies, which frequently argue diametrically opposed positions, lies in their mutual reliance on US programming: the purchase of programming in the case of television stations, and the retransmission of US television stations in the case of cable. Signal substitution and deletion sits astride this fault line in the Canadian broadcasting system and persists to this day as one of the most significant areas of conflict between broadcasters and distributors.

The first iteration of this type of protection for Canadian television stations,[53] took the form of a prohibition on program duplication, i.e., a cable system was not permitted to air any part of a signal containing a program broadcast by a television station within its service area within a week of its broadcast by that television station. Practically, this meant that any non-local Canadian or US signal that broadcast any program that was also broadcast by a local station could not be distributed by a CATV/Cable system.

Realizing, in its first cable policy review in 1971[54] that prohibiting signals that contained duplicate programming was far too burdensome, the CRTC provided an alternative solution. It authorized CATV systems to delete the advertisements in US television

[53] Found in Public Announcement, 10 April 1970
[54] Public Announcement, 16 July 1971.

stations (referred to as "commercial deletion"). CATV licensees were not permitted to add in commercials of their own but were encouraged to make contractual arrangements with Canadian television stations to provide alternative advertisements. US stations were, perhaps unsurprisingly, incensed by commercial deletion, pushing US and Canadian government officials at various levels into sporadic but protracted negotiations aimed at ending the practice. Commercial deletion was largely phased out following a request by the then-Canadian Minister of Communications, Jean Sauvé, that the CRTC "examine the feasibility of other methods of achieving the objectives which have lead the CRTC to institute a commercial deletion policy" (Public Announcement, 21 January 1977). However, the practice did continue in a number of markets until specifically prohibited in the 1987 *Canada-U.S.A. Free Trade Agreement* (the FTA)[55] and, later, under section 9(2) of the *Broadcasting Act, 1991.*

Signal substitution, later known as simultaneous substitution or "simsub",[56] proved to be a somewhat more palatable alternative and, consequently, was to have a much longer regulatory life. In 1971, the CRTC authorized the optional substitution of the signal of US and distant Canadian stations with local stations as an alternative to commercial deletion or full deletion of duplicate programs.[57] In its submission to the Commission as part of the second cable policy review in 1979 on the topic of simultaneous substitution, the Canadian Association of Broadcasters (CAB) concluded that "it is a known fact that

[55] Article 2006, subparagraph 3(a)(vi).
[56] Simultaneous substitution or simsub involves the substitution of one signal for another. Where the signal of a local station and a US or distant Canadian signal are both received by a broadcasting distributor, and both contain "comparable" programs, the signal of the local station can be distributed to subscribers on both its normal channel and the channel normally occupied by the US or distant Canadian station. In this manner, the local station is said to be substituted for the US or distant Canadian station.
[57] *Public Announcement*, 26 February 1971.

the singular most effective device implemented by cable to assist broadcasters is program substitution" (CAB, pp. 16-30).

The Commission was initially hesitant to require simultaneous substitution since, even more so than deletion, it required cable licensees to purchase and maintain expensive specialized equipment. The protection of local advertising markets afforded to television stations through substitution and the opportunity to provide a more palatable compromise to US broadcasters won out over these concerns. It is important to note, however, just as was the case with carriage requirements, the focus of simultaneous substitution regulation lies on the relationship between broadcasters and distributors. In fact, signal substitution has only an ancillary impact on viewers/subscribers in that the increased costs for cable companies to provide services are inevitably passed on to subscribers. Perhaps more importantly, this type of regulation, which is intended to support public sphere model-based concerns related to protection of televisions stations and cultural sovereignty, actually supports, or arguably even rewards, systemic reliance on US programming through the co-opting of the signals of US stations – once again at the expense of cable companies and ultimately subscribers. Regulators tend to ignore this fact, however, apparently judging the underlying prerogative of maintaining local television markets to be a sufficient justification for this type of regulation.

Community Channels

Cable companies have long argued that they should be permitted to be involved directly in the broadcast of programming, as well as in its distribution. After all, they reasoned, if cable is to be part of the Canadian broadcasting system and assume the related

responsibilities discussed already, why should it not also be permitted to reap the potential rewards of such, including advertising revenues? Although the CRTC authorized and even encouraged cable systems to offer "locally programmed channels" or "community channels", very early in their mandate, these systems were not permitted to sell advertising on these channels.[58] While community channels provided CATV with a form of involvement in programming, which they avidly sought, the prohibition on advertising also ensured that they would pose only limited competitive concerns for television stations.[59] Once again, this regulatory approach has its roots in the public sphere model of public interests. The prohibition on advertising served to protect local advertising markets on behalf of television stations, while the authorization for cable companies to provide self-funded community programming provided an opportunity to introduce diverse new programming into the broadcasting system.

Community programming was, in fact, to become a significant vehicle for the Commission's policies. Unlike the programming provided by television stations, community channel programming was exclusively local, thereby justifying this small incursion into programming by CATV systems. The CRTC encouraged cable licensees to offer community channels in local municipal buildings, legions and other places and to cover local council, school board and community meetings, as well as local sports and other community events. The Commission estimated that 10% of gross subscriber

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[58] This prohibition is still maintained to the present day. In fact, in addition to being prohibited from selling advertising themselves, distributors were also not permitted to own controlling interests in programming services until 2001 (Broadcasting Public Notice CRTC 2001-66-1, 24 August 2001).

[59] Though not specifically mandated to do so, the restrictions related to advertising can be viewed as the Commission nonetheless fulfilling one of the recommendations of the 1965 Fowler committee report by firmly circumscribing distinct roles for distributors and programmers within the Canadian broadcasting system.

revenues would be an appropriate amount for cable systems to spend on community channels. More importantly, other policies encouraged cable licensees to provide access to time on community channels to local groups. Specifically, cable systems were required to ensure that 33% of all programming on community channels consisted of public "access" programming, i.e., programming produced by members of the local community. Consistent with its overall public sphere model approach, these policies placed, at least to some small extent, the means of involvement in the production of television into the hands of the public.[60]

By 1975, community channels had become significant enough to the Commission and to subscribers to warrant their inclusion in the first set of *Cable Television Regulations,* which required all cable licensees to provide a community channel as part of their basic service and to distribute that channel on a priority basis. The perceived value of community channels in the provision of local programming would only increase throughout the 1980s and 90s as television networks, including the CBC, closed local television stations and reduced local programming in favour of "regional" programming that could be produced and broadcast by a number of stations.[61]

In what would appear to be a form of *quid pro quo* for the increased expectations placed on community channels, later policy decisions would loosen restrictions on the content that could be offered on community channels. For instance, the CRTC allowed the use of

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[60] Various Public Announcements, 1971- 1975.

[61] Aggregated data from a number of CRTC decisions indicates that, currently, the average amount of local programming Canadian television stations are required to offer during the evening primetime hours is 30 minutes per week or 6 minutes per weekday. This programming usually takes the form of a local insert into regional news programs. Between 1970 and 1990, the amount of local programming television stations were required to broadcast gradually declined from approximately two to four hours per week to the current level. This programming usually takes the form of a local insert into regional news programs.

the community channel to promote cable licensees' own services.[62] By 1985, the CRTC would permit smaller (Class B systems serving fewer than 3,000 subscribers) to offer "complementary programming" on community channels, including community programs produced by other cable companies, National Film Board productions, children's programs, educational programs, alphanumeric services[63] and portions of the proceedings of the provincial or federal legislatures. This permission was later extended to all systems serving fewer than 6,000 subscribers.[64]

Community channels are, in many respects, a win-win situation for all parties concerned. The prohibition on advertising on these channels protects local advertising markets to the benefit of local television stations. These channels also, at least potentially, provide a significant alternative source of programming for viewers as well as a mechanism by which community groups can gain inexpensive access to broadcasting time. Despite prohibitions on advertising, cable companies also generally consider community channels a worthwhile service, particularly since they differentiate cable services from those provided by Direct To Home (DTH) satellite distributors. Community channel programming expenses may also be deducted from amounts that cable companies are required to contribute to Canadian programming.

Criticisms of community channels usually point to the difficulties that certain community groups have had in making arrangements with individual cable companies for mutually

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[62] Public Notice 83-7, 19 January 1983.
[63] So-called alphanumeric services, i.e., services that consist only or predominately of words and numbers rather than audio or video, have a long and spotty history in broadcasting regulation. Eventually these services were excluded entirely from the definition of broadcasting in the 1991 *Broadcasting Act*, but have remained indirectly regulated by the Commission in a number of ways due to their use by a variety of distributors and programming services.
[64] 1986 *Cable Television Regulations.*

acceptable periods of air-time. Others argue that, whereas at the outset a wide array of community members and groups could access these channels, most access programming in recent years has been produced by only a small number of semi-professional groups. Cable companies too continue to argue that prohibitions on advertising should be removed, particularly as local television stations reduce local programming in favour of regional or national programming. Taking into consideration all of the above, however, community channel regulations would seem to be a good example of a successful implementation of the public sphere mode of public interests, i.e., one that strikes a reasonable balance between the private interests of cable and television station licensees and potential public interests related to diversity in programming and access to the apparatus of broadcasting production.

Rate regulation

A clear rationale for rate regulation was articulated by opposition parties during the framing of the 1968 Act. Anticipating the geographic monopolies that would be enshrined by the Commission, Mr. Gregoire, Conservative member for Lapointe, Quebec, noted that what frequently happens in government regulation of industries is that

> the government establishes, in a certain field, ...an agency to restrict the number of licences and also to eliminate competition, in an effort to achieve a greater efficiency ... In view of the fact that you are spared competition, you will also be prevented from exploiting the users ... by forcing you to have all your tariffs and rates approved by the commission. (House of Commons, February 2, 1968, p. 6308)

As noted by Mr. Peters, New Democratic member for Timiskasing, Ontario, there was some evidence of exploitation by CATV operators even at that time (February 2, 1968, p. 6317-18). The example cited frequently in this context was of a northern Ontario CATV

operator that charged, what was at the time, an exorbitant $200 connection fee, although a somewhat less pricey $5 per month fee for service.

Despite certain parliamentarians' concerns with the potential impact of geographic monopolies on the rates paid by subscribers, the 1968 Act did not give the CRTC any specific mandate or powers to regulate any of the fees charged by cable/CATV licensees. In fact, according to the record of the debates surrounding this legislation, the government refused to consider an amendment to the 1968 Act that would have specifically permitted the CRTC to set the service rates and connection fees of CATVs, as proposed by the Conservative opposition (February 2, 1968, p. 6317). Nonetheless, on its own initiative, the Commission began to engage in rate regulation shortly after its inception.

In its 1971 cable policy review, referred to above, the Commission directed that any changes to monthly subscription or connection fees would require an amendment to the undertaking's licence and would therefore entail approval of an application through a public process. Detailed subscription and connection fee regulation provisions were later set out in the 1975 regulations and would form one of the larger and perhaps the most publicly contentious part of the Commission's work in the next 20 years.[65]

Perhaps the busiest period of rate regulation followed the parliamentary budget speech of 28 June 1982, in which, as part of its efforts to control inflation, the Liberal government under Pierre Trudeau announced that federally regulated industries, including cable licensees, would be limited to regulated fee increases of no more than 6% in 1982-83 and

[65] Following the issuance of the 1998 *Broadcasting Distribution Regulations*, virtually all cable systems were rate deregulated.

5% in 1983-84, other than in exceptional circumstances. It also indicated that it would monitor the price decisions of federal regulatory agencies and take action where exceptional increases could not be justified. In the budget speech on 15 February 1984, the Government extended this policy for another year and reduced the level of such increases from 5% to 4% for this period.

The ostensible purpose of the government's policy was to limit rate increases for federally regulated services. In fact, the result of its announcement – at least for cable licensees – was a glut of rate applications throughout the period this policy was in effect.[66] The Commission received such a large number of rate increase applications that it chose to implement a "simplified" process for applications by larger cable systems (i.e., more than 6,000 subscribers) that fell below the guidelines set by the Government[67]. Shortly thereafter a further "streamlining" effort took place with respect to the smallest cable systems (i.e., those with fewer than 3,000 subscribers) in which regulation of installation fees was eliminated and a system of "passive approval" was established for monthly subscriber fees. Under this system, cable licensees were required to provide the Commission and their subscribers with notice of a rate increase at least 40 days prior to its implementation. The rate increase would then take effect without direct approval, unless objected to by the Commission, either due to subscriber complaints or its own

[66] Cable companies engaged in a number of strategies to negate or "game" the effects of the government's policy. Rogers Cable in Mississauga and Brampton, Ontario, for instance, withdrew its 1981 application for a rate increase and resubmitted a single request for a "three-stage" rate increase. In fact, what was proposed was an increase of 6% in 1982, 5% in 1983 and 4% in 1984, which, while meeting the government guidelines, actually resulted in a year over year cumulative increase of 19% for subscribers (Decision CRTC 84-378).

[67] Public Notice CRTC 1984-95.

concerns. A similar system of passive approval was put in place for all cable systems in 1986, and regulation of installation fees was eliminated entirely.[68]

Throughout this period, the chief concern stated by the CRTC was the desire to minimize the rate paid for cable licensees' basic service, i.e., the group of services distributed to all subscribers, and to ensure that basic service rates were not used to subsidize the fees paid for other "discretionary" services and packages of services.[69] However, rather than minimizing rate increases, the combination of the government's policy and the CRTC's efforts at streamlining its process to deal with large numbers of applications, resulted in *de facto* rate increases in many systems, at least some of which might never have applied for rate increases in the absence of these circumstances. In essence though, the problem was that there were just too many individual systems for the CRTC to regulate rates effectively,[70] the net result of which was a widespread increase in cable rates. As was the case with the licensing of cable systems, the perceived need for administrative efficiency resulted in changes to the Commission's regulatory approach. In this case, these changes resulted in rate increases for subscribers.

More or less final rules related for rate regulation were implemented as part of the 1986 *Cable Television Regulations*[71] (the 1986 regulations), which made three types of rate increases subject to passive approval. The first type permitted cable licensees to increase

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[68] Public Notice 84-143, 12 June 1984.
[69] Public Notice 83-245, 26 October 1983. In the same notice, the Commission specifically declined to regulate the rates charged for "discretionary" service packages and restricted itself to the regulation of the "basic" package of defined priority services. Rates and terms of the distribution of discretionary services were to be left to commercial negotiation, although the Commission expressed its willingness to involve itself in arbitration or even direct regulation, should negotiations ultimately fail.
[70] As of 31 March 1985, there were 951 licensed cable undertakings operating in Canada (CRC Annual Report, 1984-85)
[71] The 1986 regulations were originally issued in Public Notice 1986-182, 1 August 1986.

rates based on 80% of the Consumer Price Index, with the intention thereby of accounting for the impact of normal inflation levels on subscription fees. The second type of rate increase was linked directly to the distribution of pay and specialty services. Cable licensees were permitted to increase their rates by the "pass-through portion", i.e. the amount the cable licensee paid a pay or specialty service to distribute their services, for each specialty service added to their basic service.[72] The third type of permissible rate increase was based on "calculations concerning capital expenditures or under special circumstances". In other words, where a cable licensee could demonstrate it had made significant upgrades to its facilities (cable "plant") or had undergone extenuating circumstances related to its facilities (a natural disaster, for instance), it would be permitted to increase subscriber fees to recover its costs. Due to concerns with respect to potential abuse of these provisions, and capital expenditures (CAPEX) in particular, the Commission cautioned that it would be willing to disallow certain increases,[73] although in fact it rarely did so.

Combined with the CRTC's streamlined method of passive approval, it is easy – at least in retrospect – to anticipate that significant rate increases would result from the policies described above. In fact, the latter form of capital expenditures (CAPEX) rate increases, in particular, would soon result in one of the most heavily contested and far-reaching decisions the Commission would make with respect to cable regulation. All in all, however, well-intentioned attempts to maintain affordability of service appear to have

[72] This situation was only exacerbated in 1987, following the licensing of additional specialty services and the Commission's decision to permit increases based not only on the pass-through portion but also on a $0.01 mark-up for each specialty service added and a "bonus" $0.04 mark-up where a cable licensee distributed all licensed specialty services.
[73] Public Notice 1986-182, 1 August 1986.

been hampered by the sheer magnitude of resources required to enact detailed rate regulation of such a large number of licensees. Accordingly, the Commission deemed it necessary to bow to the demands of bureaucratic expediency, minimizing regulatory oversight of rates. And, once again, rates went up. Therefore, while such a policy had clear benefits for the CRTC in terms of administrative simplicity and for cable licensees in the form of increased revenues, it had no offsetting benefits for subscribers who simply experienced rate increases.

Pay and specialty television services

One additional element of the public sphere model-based approach to public interests, which I have argued dominated CRTC regulation in the period discussed in this chapter, also bears mentioning: pay and specialty television services. The Commission licensed the first five Canadian "pay" programming services[74] in 1982 and the first two "specialty" services[75] in 1984. In each case, the Commission determined that these services should consist of "narrowcast television programming and be complementary to existing services" and that they should be offered "on a discretionary basis at the option of the subscriber".

These services, similar to what would be called simply "cable services" in the US, differed from OTA television stations in that they were permitted to receive subscription revenue that is collected by distributors and "passed on" to the services. In addition,

[74] In Decision 1982-240, 18 March 1982, the Commission licensed one English-language and one French-language national services and three regional English-language services. By 1984, these would be reduced to two English-language regional and one French-language service (Decision 84-654, 16 August 1984).
[75] Public Notice 1984-81, 2 April 1984. Both of these services are still offered under the names The Sports Network (TSN) and MuchMusic.

specialty services would receive advertising revenue in a manner similar to that of television stations. According to the Commission:

> [T]he increasingly competitive nature of the communications environment[76] brought about by the rapid expansion of a variety of technologies, and the consequent need for prompt action with regard to the introduction of new programming services to provide diversity and expand the range of discretionary services offered on cable systems. (Public Notice 1984-81)

Consistent with its general public sphere model-based approach, the desire to provide diversity in the broadcasting system is consistently cited as the Commission's rationale for licensing these services. In this regard, its objectives relate to both 1) diversity in the types of programming made available to Canadians, i.e., the ability to select specific genres of narrowcast programming, and 2) diversity in the sources of programs, i.e., through the licensing of parties not otherwise already part of the system. The selectivity of the process also suggests, however, that the diversity sought was of a prescriptive and decidedly nationalistic type. This fact is reinforced in the same notice by the CRTC's first articulation of its policy of licensing only one pay or specialty service to provide programming of a particular genre, such as sports, movies, etc., and excluding all other parties, foreign or domestic, from providing a service to Canadians focused on the same type of programming. This would later be referred to as the "genre protection" policy for pay and specialty services, which remains in effect to the present day.

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[76] The "increasingly competitive nature of the communications environment" referred to by the Commission does not relate to competition between programming services as might be concluded by the context. It was an allusion to complaints by cable licensees about the potential negative effects of Satellite (or Single) Master Antenna Television Systems or SMATVs. SMATV's are essentially single-building or single-property cable systems, often embedded within the near-monopoly service areas of cable systems, and were largely unregulated. Cable companies argued that SMATVs offered primarily US services and that they would undermine the new pay and specialty television market as well as cable's financial viability.

Under this policy, the Commission will not licence a Canadian service or authorize the distribution of a non-Canadian service, where such a service offers programming predominately from the same loosely-defined genre as a protected Canadian service that has already been licensed. Accordingly, a number of non-Canadian services were made inaccessible to Canadians. One could say that, in this case at least, nationalism trumps diversity. Since the genre protection policy would also prevent the launch of new Canadian services in occupied genres, however, it might be even more precise to say that vested domestic interests trump diversity.

The factor underlying this policy, but left largely unmentioned in the Commission's initial licensing decisions for pay and specialty services, is that a number of highly popular cable services had begun operations in the US previous to the licensing of Canadian pay and specialty services, some of which had substantial Canadian connections,[77] and that the Commission was under considerable pressure from Canadians and cable companies to authorize the distribution of these services in Canada. To this purpose, cable companies that intervened in the pay and specialty licensing processes argued that they should be permitted to offer US services at the same time as Canadian pay and specialty services were made available so as to "enhance the value of [cable] services to subscribers and thus increase penetration and help them retain their current subscribers".[78]

[77] For instance, the first "demonstration" broadcasts of the Home Box Office service in 1975 were transported through the Canadian Anik satellite, since there were no US satellites at the time that were capable of transporting television services (Easton p. 132).
[78] Public Notice 1984-81.

Citing fears that new Canadian services would not be able to compete with the established US services, the Commission set out its genre protection policy, thereby effectively excluding some of the most popular US services that cable licensees sought to offer. However, in a normative effort to balance new obligations with new freedoms, the Commission permitted cable licensees to offer a maximum of five channels of non-Canadian "specialty services" from a particular list of authorized services[79] that were deemed to not be competitive with Canadian services, provided that these non-Canadian services were sold to subscribers in a package(s) containing Canadian pay or specialty service.[80] As requested by cable licensees, however, those five channels could be composed of programming from as many authorized non-Canadian services as the licensee wished.[81]

Although the Commission chose not to impose carriage requirements with respect to new pay and specialty services,[82] it did establish "packaging" requirements that resulted in *de facto* distribution for a number of pay and specialty services. In keeping with its predominance rules, cable licensees were required to distribute at least one Canadian pay or specialty service in a particular package or tier of discretionary services for each non-Canadian service carried in that package.[83] The Commission's expectation was that the

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[79] This list would become the Eligible List of Satellite Services, which is described in more detail in the following section.

[80] For every Canadian Pay service included in a package, cable licensees were permitted to distribute five non-Canadian services, or two non-Canadian services for every Canadian specialty service.

[81] The ability to mix non-Canadian services on each channel essentially permitted cable companies to create their own channels out of programming provided to them, without regard to the rights involved. The ability to mix and match programming from a variety of non-Canadian services was to be a relatively short-lived benefit to cable, however, since these measures were effectively ended through provisions of the FTA.

[82] I.e., the Commission did not specify that cable licensees must offer ("must carry") these services. Must carry rules would, however, come later in 1996.

[83] Public Notice 83-245, 26 October 1983.

desire to distribute US services and the popularity of these services with Canadian subscribers would drive penetration of discretionary packages (i.e., and package except the basic package) and ensure that at least some Canadian pay and specialty services would be distributed.

A useful contrast can be made here with what occurred in the United States with respect to "cable services". Shortly after Home Box Office (HBO), the first of these services, began operation in 1976, rivals attempted to force it into the regulatory ambit of the FCC. The FCC argued that HBO was not a broadcaster, primarily since it did not utilize over-the-air transmission facilities, and the courts agreed (Grant p. 281). Following this decision, cable services were able to begin operation without the difficulties – and benefits – associated with regulation. A number of "pay" and "specialty"-like cable services quickly began operation. The trade-off for this regulatory freedom was dependency on cable companies. Recognizing this dependency, cable companies first often sought equity ownership in certain services as condition of carriage. Later cable companies frequently sought exclusive carriage rights (which were later outlawed when US DTH services began operation) and the right to sell local advertising on these services. Other requests included free service for multi-year introductory periods and sometimes even payment from cable services for the privilege of carriage. Once cable companies became part owners of cable services, they often refused to carry other cable services offering program in the same genre so as to minimize direct competition (Grant p. 282). The balance of power did not lie entirely in the hands of cable companies, however, and, particularly with the advent of US DTH distributors, a number of cable

services, HBO among them, were sufficiently in demand by subscribers to enable negotiation of their widespread distribution under much more favourable terms.

The Canadian system of pay and specialty services developed in almost the opposite way to that of the US. Only particular services were licensed and authorized for distribution based on so-called "beauty contests". Widespread distribution and minimum subscriber revenue levels were virtually guaranteed through the regulatory carriage and packaging requirements outlined above. As a consequence, while pay and specialty services were much slower in entering the market, they also successfully avoided many of the other problems that plagued US cable systems. This is arguably an example of highly successful regulatory intervention in which the denial of a short term benefit, i.e., to receive more US programming, may be said to satisfy a longer term notion of public interests, i.e., the orderly development of the successful and highly profitable pay and specialty services sector[84] and the equitable distribution of a wide range of diverse new programming. At the same time, the genre protection policy, which prevents the distribution of competing non-Canadian services, is also one of the most frequent subjects of customer complaints,[85] suggesting that there continues to be considerable disagreement as to the success of this policy.

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[84] Revenues of pay and specialty services have continually increased year over year since the Commission introduced carriage requirements (called "access rules") for these services. Revenues were at an all-time high in 2006 at $1.4 billion and profit before interest and taxes margin of 25.5% (*CRTC Broadcasting Policy Monitoring Report*, 2007)

[85] According to the "What's Hot and What's Not" report, which provides monthly compilations of CRTC complaints, requests for additional non-Canadian programming services/complaints about the lack of access to a particular non-Canadian programming service was the third most frequent cable-related complaint made by Canadians to the CRTC between 2000 and 2007 (the first and second were related to simultaneous substitution and retail rates, respectively.

The case of pay and specialty services is also clearly an example of public sphere model-based regulation, as mentioned at the outset of this section, and the protections afforded to these services are, in many respects, similar to those that were earlier accorded to television stations. The history of these services is of particular interest though, since it suggests a hierarchy of public interests even within the public sphere model itself. As is mentioned above, where conflicts occurred between the ideals of "diversity" and "cultural sovereignty", the Commission opted in favour of the latter. In this case, it can be seen that the CRTC defined public interests as equating with the maintenance of the Canadian broadcasting system, at the expense of other interests such as diversity of programming.

Chapter Three Restructuring the system, 1991 to 1998

The period of time discussed in this chapter was, in many respects, a time of transition in Canadian broadcasting regulation. Our examination of this period begins just prior to 1991 in a discussion of the issues and concerns with respect to cable that, in part, resulted in the introduction of new Broadcasting Act. Although the text of this legislation did not change dramatically, the way in which the legislation was interpreted and employed by policy-makers and regulators did. The most significant change in this regard was in the view that competition could be used as a tool to implement other policy goals, i.e., that economic markets could assume some of the regulatory responsibilities previously addressed by government. This change in perspective on the part of policy-makers and regulators, in turn, resulted in the gradual introduction of competition between incumbent cable systems and new services and technologies.

This change was also symptomatic of the beginning of a shift in views towards a more market model-based approach to public interests. As was discussed in the preceding chapter, the regulatory approach to cable distribution employed by government actors up until this period was based almost exclusively on a public sphere model of public interests focused primarily on achieving particular cultural benefits, such as sustaining cultural sovereignty, localism diversity in programming and sources of programming, through detailed regulation. Although the public sphere model still continued to dominate regulatory decision-making over the period examined in this chapter, a movement away from this model and towards a market model approach to public interests clearly began to gather momentum.

The 1991 Broadcasting Act

In many ways, the *Broadcasting Act* of 1991 (the 1991 Act) was more of a refinement than a wholesale restructuring of the 1968 Act. The essential goals, including the primacy of over-the-air stations, and CBC stations in particular, were maintained. Existing cultural goals related to the bilingual nature of the system were strengthened and supplemented by multi-cultural and other social goals related to diversity of program sources and representation of Canadians.

This increased inclusiveness encompassed not only social and cultural goals, but economic and technological goals as well. Most notably, the pivotal definition of the term 'broadcasting', previously defined narrowly as "radiocommunication ...intended for direct reception by the general public", was expanded to include

> any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.

These changes reflected the recommendations of the parliamentary Standing Committee on Communications and Culture[86] to broaden the scope of the Act as it applies to technologies used to offer broadcasting services by including all methods of transmitting "programs", including encrypted programs.[87]

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[86] The *Sixth Report of the Standing Committee on Communications and Culture*, 6 May 1987, endorsed recommendations 8, 9 and 10 of the *Report of the Task Force on Broadcasting Policy*, 23 June 1988 (pp. 150-151), which related to these changes to the definition of 'broadcasting' in the new proposed legislation.

[87] By specifically including encrypted programming, the government's intention was to ensure that subscription services, whether using satellite, wireline or wireless transmission would continue to be regulated, despite arguments that encrypted transmissions were, simply by virtue of being encrypted, not "for reception by the public" and therefore not broadcasting.

The 1991 Act continued in a similar vein to define a Broadcasting Distribution Undertaking (BDU), i.e., a cable system or other future type of distributor, as

> an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more that one permanent or temporary residence or dwelling unit or to another such undertaking.

The decision to reclassify these systems as broadcasting distributors, rather than "broadcasting receiving undertakings" as defined in the 1968 Act, illustrated an acknowledgement by the government of a change in its view of the role of cable systems, and other potential distributors. In particular, this new terminology reinforced the fact that cable systems were now more than simply passive receivers and redistributors of content. In addition to providing access to distant Canadian and U.S. television stations, cable systems had also become the exclusive providers of pay and specialty services, which could not be received over the air, as well as programmers themselves with respect to the community channels they offered.

However, the government's larger intent in employing the definition of BDUs set out above was articulated in the *Government response to the Report of the Task Force on Broadcasting Policy,* which discussed it in the following terms:

> The intention was to create a technology neutral definition that would capture all "distribution undertakings" including conventional cable systems, some satellite direct-to-home services, "mini cable systems" serving a restricted geographic area such as SMATV systems in apartment buildings or condominium complexes, and 'wireless cable systems' such as MMDS and rebroadcasters operating in remote areas. To this end, the definition focuses on the activity undertaken (i.e., the reception and retransmission of programming services of others) rather than the technology used to carry on the activity. (p. 71, 23 June 1988)

This "technologically neutral" approach appears not only in the definitions of 'broadcasting' and 'distribution undertaking' but throughout the 1991 Act, and likely

constitutes the single most significant departure from the 1968 Act. The purpose of this approach was to ensure that the objectives and principles of the Act would operate independently of the technology employed in the Canadian broadcasting system. The remedy arrived at by legislators was to utilize broad language in the definitions and objectives set out in the Act that would focus on the activity pursued by various broadcasting undertakings rather than the technology employed in that activity. This approach was intended to "future-proof" the legislation, but would also provide a substantial counter-argument to those claims of distributors that involved elements of technological determinism.

The principle of technological neutrality has generally had two net effects, each of which has been subject to both criticism and praise by various parties, depending on their role within the larger broadcasting system. First, and most obviously, this principle has permitted the CRTC to treat a variety of new distribution-type services on relatively the same regulatory footing, without regard to the technology employed. As a result, types of BDUs not even contemplated by parliament in its response to the task force above, such as Internet Service Providers, telephone companies and hydro companies, each offering video services, have been licensed to operate under a regulatory structure almost identical to that of cable BDUs.[88] This was clearly the intent of Parliament as represented in the quote from the *Government response to the Report of the Task Force on Broadcasting Policy* cited above. It also indicates the beginnings of a move to a more

[88] From the perspective of cable companies, a significant exception to this "same service, same rules" approach to BDUs is found in DTH licensees, which are discussed in more depth later in this and the following chapter. The Commission has acknowledged that, due to the particular technical constraints of DTH services as well as due to their "national", as opposed to "local" service area, somewhat different regulations have been applied to DTH licensees (Public Notice 2004-19, 31 March 2004) but has argued that it considers its treatment of DTH equitable, if different, to that of cable.

market model based approach to public interests in that it acknowledges the possibility of a future role for competition and an expanded role for economic markets.

Secondly, however, the wide net cast by the technologically neutral definitions of broadcasting and broadcasting distribution undertaking have been interpreted by the CRTC as compelling it to examine and pronounce upon the extent to which a wide variety of activities constitute broadcasting or are broadcasting-like, and thus, should or should not be regulated. The most notable of these was the Commission's examination of "New Media" – primarily services delivered through the Internet – which is discussed in more detail in the following chapter. This approach is more closely aligned with a public sphere model of how public interests are defined and addressed. It assumes that new areas of activity, the Internet for example, must be assessed on an *a priori* basis by government actors in order to define public interests and determine whether they are being met.

The regulatory choke-point

A further difference between the 1968 Act and its 1991 counterpart is that the latter speaks directly to the role of Broadcasting Distribution Undertakings (BDUs), including both cable and the new type of BDUs already anticipated by this time. According to Jim Edwards, Progressive Conservative member for Edmonton, Alberta:

> Cable was in its infancy when the 1968 bill was passed ... cable operators were of course regarded by broadcasters in the 1960's as pirates, thieves, bandits and so on, not in a business sense but in the sense that they were using signals for their own advantage. But the truth is that the cable industry has provided an excellent service to the extent that the country has been wired to a penetration in excess of 70% ...

> In the whole process cable has become the regulatory choke point rather than the territorial licence that conventional broadcasters had. It was the logic of the local licence that was the choke point of the control of the system. Therefore it is not unusual that cable would be recognized – not rewarded, but recognized [in the 1991 Act.] (House of Commons, 14:57, 16 March 1990)

The latter point made by Mr. Edwards, that cable had become a regulatory choke point, is particularly salient. Already by 1990, an increasing majority of 62% of Canadian households received television broadcasting services through cable (CRTC Annual Report, 1989-90) rather than over the air. An array of services, including distant Canadian television stations, Canadian pay and specialty services and US television stations and other services, could only be received by cable. Consequently, distribution by cable could no longer be considered by government to be an *alternative* means to receive television services, it had become the *preferred* means.

The distributor was – and is – the single point through which all broadcasting services passed as well as the interface between programming services and television viewers, perhaps more appropriately referred to now as cable subscribers. Where the regulator wished to provide an advantage or support to a programming service, it could do so through carriage or packaging requirements placed on the distributor. Similarly, where concerns were raised as to the affordability of television services for subscribers or a desire to extend service to unserved Canadians or improve access to services by other Canadians, these goals could be accomplished through regulation of the distributor. This is not to suggest that the importance of other broadcasting undertakings or their licences dwindled into insignificance, but rather that the primary field on which broadcasting

battles were fought came to be the distributor's licence and the sets of regulations that applied to distributors.[89]

It also bears mentioning that traditional television distribution services (i.e., cable and satellite, as opposed to newer types of distribution, such as via the Internet) are particularly difficult services for new entrants to offer, making the markets for these services especially prone to centralization and consolidation. As in the telecommunications industry, this is due mainly to the highly capital-intensive nature of providing such services. In the case of a cable system, this means building the various network facilities (i.e., both the transport facilities, such as the co-axial wires that lead to individual homes, but also the array of equipment that is used to receive and aggregate various programming services that is located in cable "head ends"). This factor has historically presented a significant barrier to entry and relatively few new parties are able to make the investments necessary to compete in the distribution market, ensuring that the industry continues to be dominated by incumbents. When incumbents consolidate with other incumbents, the number of parties involved in the cable industry is further reduced. In comparison, the investments necessary to operate a programming service are generally considerably less, resulting in a greater number of potential new entrants. As a matter of simple practicality, it is easier to regulate a small group of parties than a larger group. This fact also makes television distributors an attractive locus for government intervention.

[89] I.e., the 1986 regulations discussed earlier and the *Broadcasting Distribution Regulations* of 1998, discussed in chapter four.

The status of cable as the preferred means of receiving television services, its significance as the single point through which all broadcasting services passed and as the interface between programming services and television viewers, as well as the relatively small number of parties involved in the cable industry made it an ideal "regulatory chokepoint" for the implementation of broadcasting policy and regulation. With this newfound importance in the broadcasting system came a desire, on the part of government, to better delineate the role of distributors within that system. Central to this new role for cable, were the dual intentions of "recognizing" the role of distributors, as suggested by Mr. Edwards, and addressing concerns that the same factors that made cable an ideal regulatory chokepoint might also cause it to assume the role of "gatekeeper" in the broadcasting system. This role was formally defined under the 1991 Act in the following way:

> 3(1)(t) [D]istribution undertakings
> (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
> (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
> (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and
> (iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

Given the Act's admonishment in section 5(1) that

> the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1).

the objectives listed above can be read as Parliament's attempt to define the particular public interests that the CRTC should take into account with respect to television distribution. It is these objectives that are intended to form the foundation of every CRTC decision with respect to cable or other types of distributors.

Due to the important role played by these objectives, it's necessary to examine in a some detail how they have been applied and how they illustrate a change in the views of legislators towards television distribution. In this regard, of the objectives set out in section 3(1)(t), items i) and iii) both speak specifically to the regulated relationship between programming services and distributors and are intended primarily to reinforce the pre-existing protections for Canadian programming services, and particularly Canadian television stations, previously established by the Commission under the 1968 Act. Item ii) though is a departure from the earlier legislation and is significant in that it alone speaks to the relationship between distributors and subscribers, at least in so far as rates are concerned. However, as can be seen in the following section related to the funding of Canadian production and in chapter four with respect to rate regulation, this objective has frequently been superseded by others that the Commission has deemed to be of greater concern.

Finally, although item iv) would seem to suggest that distributors might originate additional programming of their own, the proviso "where the Commission considers it appropriate" has generally been used by the Commission to continue to limit distributors to originating only particular programming broadcast on community channels in much

the same way as was previously permitted under the 1968 Act.[90] It should be mentioned though that a number of parliamentarians felt that the role defined for cable was too generous in its acquiescence to cable licensees' request to originate programming. Ian Waddell, the New Democratic Party member for Vancouver-Kingsway, B.C., and member of the Standing Committee on Communications and Culture, claimed, for instance, that

> [t]he big winners of this bill appear to be cable. They do not get nailed with a rate of return like telephone companies, as could have been the case, and they get the right to originate programming, which could be an enormous benefit ... What is it they have done that has pleased you so much that there is this broad power? (House of Commons, 14:56, 16 March 1990)

Practically speaking though, whatever parliament's intention might have been and despite this new legislated regulatory objective, the CRTC continued to maintain essentially the same restrictions on programming originated by cable licensees after the 1991 Act – up to and including the present day – as they had under the 1968 Act. It was unsurprising then, that, instead of continuing to seek to originate programming themselves, distributors instead utilized the CRTC's weaker restrictions on transfers of ownership[91] to simply purchase programming services in order to get into the programming business, albeit generally operating these programming services indirectly through holding companies.

Looking more generally at the definition of public interests found in the distribution objectives of the 1991 Act, it can be seen that these objectives essentially reinforce the same public sphere model approach to regulation described in the preceding chapter. For example, the same protections for programming services are maintained, as are the same

[90] These limits are still maintained to the present day. The Commission's current policy with respect to community channels may be found in Public Notice CRTC 2001-19, 5 February 2001.
[91] The ownership transfer process is discussed in more detail in "The cable response" section of this chapter below.

prohibitions on content originated by cable systems. Almost in spite of these objectives though, the importance of cable systems as the focal point of regulatory action and as the tool for implementing these objectives would contribute to the shift away from the public sphere model and towards the market model approach to public interests. Specifically, as the CRTC increasingly added new regulatory requirements to cable licensees, these licensees, in turn, requested other regulatory concessions as *quid pro quo* compensation for their increased regulatory burden. For instance, over the period described in this chapter, the CRTC added carriage and packaging requirements for pay and specialty channels, as well as requiring cable systems to contribute financially to the production of Canadian programming.[92] Cable licensees in turn sought and received greater latitude in other areas, such as in permitting cable licensees to purchase programming services, authorizing the insertion of advertising promoting their own services into certain commercial breaks in foreign programming,[93] and in the later elimination of rate regulation. By stepping back from government supervision of certain activities, gaps began to open in the public sphere model oriented regulatory structure that had been built over the last 20 or more years. The CRTC began to rely on regulation by economic markets to fill these gaps, leading to the uneven application of public sphere model approaches to public interests in some instances and market model approaches in others.

One further policy objective new to the 1991 Act also bears mentioning due to its significance for distributors. The new objective that regulation be "readily adaptable to scientific and technological change" (s. 3(1)(d)(iv)) has often been employed by

[92] Carriage and packaging requirements for pay and specialty were already discussed in chapter 2. Funding for Canadian production will be addressed in more detail later in this chapter.
[93] These commercial breaks are referred to as local availabilities. See Public Notice 2006-69 for a full discussion of how these availabilities are utilized.

distributors as a rationale for many requests for changes to regulatory requirements that might not have been supportable under the 1968 Act. In general, these requests also tend to entail removing regulatory oversight of certain activities, in favour of a market model approach in which these activities are regulated by market forces. For instance, cable distributors have frequently argued that new technological developments, such as digital and High Definition television and internet technologies,[94] necessitate rapid market responses that are delayed by regulatory processes and other forms of scrutiny. They have also argued for the removal of regulatory carriage and packaging requirements, which they consider to have been made obsolete by technological change. As such, the "adaptability" objective frequently comes into conflict with the various public sphere model oriented cultural objectives of the Act more frequently cited by programming services, or those related to affordability and extension of service that are intended to directly benefit individual Canadians.

The adaptability objective also tempers and may conflict with the broadly-conceived "technological neutrality" of the Act. Considering the adaptability objective and the intended technological neutrality of the Act in conjunction suggests – somewhat paradoxically – that it was Parliament's intention that regulation should be both neutral to the technology used in broadcasting, but still sensitive to changes in technology. As is likely true whenever legislative objectives conflict, it is left to other parties, the CRTC in this case, to determine where the public interest lies in assigning precedence to one objective over another in particular circumstances. Even with the best of intentions,

[94] All of which are discussed in chapter 4.

however, such conflicting public policy objectives, may result in quixotic decision making, such as in the case that follows.

Funding for Canadian production

The production of Canadian content (often referred to as CanCon), particularly television programming, has been a central concern for regulators and policy-makers throughout the history of media in this country. With respect to television broadcasting, the conundrum could be described as follows: In a country with a relatively small domestic market such as Canada, by what means can or should the government stimulate the production of expensive domestic programming that is both popular and of high quality, taking into consideration that cheap and plentiful programming is already available from the United States?

As was discussed in chapter one, media and communications products have different properties than other products. One of these properties that is particularly evident in the case of Canadian programming is that, as noted by Grant, "... profit does not necessarily follow popularity in lockstep. In the peculiar market of popular culture, the most popular offering is often not the most profitable one" (p. 17). The availability of relatively inexpensive US programming presents difficulties for even the very best Canadian productions. Using the example of such popular and critical successes as *Degrassi Junior High*, Grant argues that even though Canadian productions may be of very high technical quality, extremely popular and may even appeal to a lucrative demographic, there is still not a business case for producing such programming. Essentially, Grant argues that the Canadian broadcasting market is not capable of sustaining Canadian production, in the

absence of government intervention. To employ the terminology I have used throughout this thesis, one might say that, under a market model approach, it is impossible for a Canadian television program to be commercially viable even where it has all qualities (popularity, attractive demographics and high technical quality) that should theoretically make the program a success under that model.

For our purposes in this thesis, however, the most relevant issue is the role of cable and other television distributors with respect to the production of Canadian programming. Regulators have assigned two responsibilities to distributors in this regard. The first of these relates to the carriage of the Canadian programming services that broadcast Canadian programming, which we have already discussed in some detail. The second relates to the direct funding of Canadian programming by cable and other television distributors, which would eventually come about as the product of a kind of regulatory bargain struck with these distributors.

Additional funding for Canadian programming production was frequently demanded by broadcasters, producers, actors et al. beginning shortly after the 1968 Act was introduced[95] and throughout the 1970s and 80s. The CRTC had even contemplated specific measures, such as the payment of a fixed percentage of revenues to Canadian broadcasters,[96] and had at one point formed a "consultative committee" to determine whether contribution requirements could be linked to the right to distribute foreign programming.[97] Later, in 1986, the Department of Communications, through its Task

[95] For example, the CRTC considered, but did not act upon, this possibility in its *Public Announcement*, 26 February 1971.
[96] *Public Announcement*, 16 December 1975.
[97] Public Notice 83-245.

Force on Broadcasting Policy, released the Caplan-Sauvageau Report, which, while its focus was an endorsement of public broadcasting, also proposed a series of taxes and funding strategies to strengthen Canadian content production, including regulatory requirements related to financial contributions by the cable industry. Despite these consistent demands, the Commission considered cable's role to be exclusively that of carriage of Canadian programming and continued to deny or ignore requests that cable companies be required to make financial contributions due to concerns with respect to the significant financial burden this might place on cable companies.

The Commission's views in this regard began to change in 1987 when, at the behest of cable licensees, changes were proposed to the 1986 regulations that would substantially expand the scope of these licensees' ability to increase the rates they charged to subscribers. Specifically, licensees were permitted to recover, through basic monthly fee increases, up to 50% of all capital expenditures (CAPEX). The Commission indicated that these rate increases would encourage licensees to upgrade and extend their networks so as to provide new and improved services to subscribers. Although capital expenditures of this type were to be amortized over five years, it was unclear in the Commission's policy whether the rate increases related to CAPEX were to be reduced once the expenditures were related were fully amortized. Consequently, cable licensees began to compound rate increases year over year in relation to capital expenditures, resulting in a rapid succession of increases in the fees paid by subscribers. These increases were contentious enough to become a common topic of debate in Parliament

with respect to the 1991 Act, both in Committee and in the House (House of Commons, 9:19-20, 22 February 1990).[98]

In response to these concerns, the Commission decided to clarify that a rate increase related to capital expenditures would be removed ("sunset") after five years, i.e., once the asset to which the expenditure related had been fully amortized.[99] For cable licensees, this sunset provision would have meant a huge reduction in revenue. Fortunately for them, they were to have another chance to retain these revenues when the Commission agreed to revisit its decision to implement a sunset provision in a later proceeding.[100]

Perhaps the best way of describing the Commission decision that followed from that later proceeding is to say that a new regulatory bargain was struck. As an alternative to reducing subscriber fees, the Canadian Cable Television Association (CCTA) proposed that its members make short-term contributions to a fund to support the production of Canadian programming. The Commission apparently saw this as an opportunity to address the long-standing concerns related to program funding and cable's contribution to Canadian program production and indicated that:

> ... the Commission, by majority vote, intends to make certain changes to its cable rate regulation mechanisms, the purpose of which is to provide significant financial support for Canadian programming. Specifically, the Commission intends to link contributions by cable licensees to a production fund to the capital expenditure (CAPEX) component of the cable fee structure.
> (Public Notice 1993-74)

Noting that cable licensees were permitted to increase subscriber fees to cover the costs of 50% of CAPEX, at a rate of 10% per year, the arrangement arrived at by the CRTC

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[98] According to Michael Hind-Smith of the CCTA, the source of concerns over rates was merely a "vocal minority ... particularly those on fixed income or pensions" (House of Commons, 8:6, 21 February 1990).
[99] Public Notice 1991-12, 24 January 1991.
[100] Referred to as the 1993 Structural Hearing (Public Notice 1993-74).

was to suspend the sunset provision on rate increases provided that 50% of subscription fee revenues related to capital expenditures (i.e., half of the 10% amortized each year) were contributed to a fund intended to support the production of Canadian programming. This complicated formula was eventually short-handed as a requirement that 5% of a distributor's gross annual revenues be contributed to Canadian production. The net result, therefore, was that the revenue derived from CAPEX rate increases would be split, with roughly half (5%) going to Canadian production and half (5%) retained by cable licensees.

There was some satisfaction in this arrangement for distributors, programmers, producers and the government; notably missing, however, was any benefit for subscribers in the form of anticipated reductions in fees. In fact, the Commission found that, given the benefits that would flow to Canadians from the various technological improvements discussed in the structural hearing, it was reasonable for subscribers to bear a portion of the costs associated with these improvements by maintaining rates at current levels, rather than reducing them. The net effect then was that, instead of the anticipated reduction in cable rates, subscribers were required to continue to pay inflated rates in perpetuity. Again illustrating the hierarchy of public interests in the public sphere model approach the CRTC has taken with respect to cable, it is clear that public interests related to access to Canadian programming supersede those related to affordability of service.

However, regulatory requirements related to the funding of Canadian production by cable companies have been extremely successful in terms of the amount of new funding made available through the Commission's decisions. Contributions to production funds by

distributors have steadily increased year over year and were at their highest peak level yet in 2005 at $153 million (p. 107).[101] In this regard, this policy could be seen as contributing to the achievement of public sphere model public interest goals related to both cultural sovereignty and diversity of programming. This increased funding is, of course, only part of the solution to the problem of sustainably producing Canadian programming that is still a central focus of regulators and policy-makers.

Competition by degrees

As noted above, the Commission had, up until the 1990s, deliberately established and maintained a system of geographical cable monopolies across Canada. It explained, somewhat disingenuously, that

> [t]raditionally, there has been little direct competition in the field of cable television for economic reasons. In general, it has been assumed to be a natural monopoly. (Public Announcement, 26 February 1971).

In fact, as we have discussed, these geographic monopolies were as much an intentional result of CRTC (and telephone company) decisions as they were natural monopolies.

The Commission's first significant departure from this natural monopoly doctrine occurred in the 1993 Structural Hearing, in which the Commission mused that competition in the distribution market could be used as a means of achieving other policy goals. However, making such a change in direction was complicated for the Commission in that none of the policy objectives in the 1991 Act, which were intended to define public interests with respect to broadcasting, related to competition or the creation of competitive markets. In fact, the words "competition", "market forces" or other synonymous concepts do not appear even a single time in the Act.

[101] CRTC Broadcasting Monitoring Report, 2006.

How then did the pursuit of competitive markets become a significant – if not the dominant – objective of broadcasting regulation in later years? A clue may be found in the fact that, while the Structural Hearing was taking place, Parliament and the Conservative government of the day was working on what would become the 1993 *Telecommunications Act.* Unlike the 1991 *Broadcasting Act* and the 1906 *Railway Act,*[102] the 1993 *Telecommunications Act* established competition as a fundamental goal of the Commission's telecommunications regulation, stating that:

> 7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives ...
>
> (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications... [103]

Given this context, it's probably not surprising that, while the CRTC was labouring over the rules related to the introduction of competition that fell out of this new objective in the *Telecommunications Act*, the Commission also took the small logical step to consider how competition might also be developed in the cable services market.

The rationale supplied by the CRTC for introducing competition in the broadcasting distribution market was first articulated in the 1993 Structural Hearing and was based on the anticipated development of what it described as a new "emerging communications market" that would be characterized, among other things, by the following:

- Regulatory requirements and obligations will be reduced for both programmers and distributors;
- Canadian programming undertakings and consumers will have increasing access to multiple distribution technologies;

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[102] Regulation of telecommunications in Canada was conducted chiefly under particular provisions set out in the Railway Act of 1906, until the 1993 Telecommunications Act was introduced.

[103] Section 7 of the *Telecommunications Act* sets out the overarching objectives of telecommunications regulation in Canada, much like section 3 of the 1991 Act does in the case of broadcasting.

- Canadian programming services and distribution systems will face increasing competition from non-Canadian services and systems;
- In an environment characterized by expanded choice, particularly in an à la carte or transactional environment, Canadian programming undertakings will increasingly rely on the strength and distinctiveness of their programming and their marketing strategies to attract audiences and thereby ensure their viability; and
- Canadian programmers and distributors will have to cooperate in arriving at mutually advantageous terms for the distribution of services, without undue reliance on regulation. (Public Notice 1993-74)

This understanding of a new emerging communications market conveyed by the Commission carried with it a sense of inevitability. The Commission seems to have argued that, since it was impossible to stop these changes to technology and markets, it fell to the Commission to adapt its regulatory approach to them. This kind of economic and technological determinism also seems contradictory to the various aspects of the 1991 Act already discussed, e.g., technological neutrality, or potentially even cultural sovereignty. The change in regulatory perspective signified by this assumption of a new emerging communication market is extremely important since it sets the stage for the introduction of competition in the broadcasting distribution market for the next decade. Perhaps more importantly, it would also be the basis on which the shift in regulatory approaches to public interests from a public sphere oriented approach towards a more market model perspective would be legitimated.

Of further concern, this perception of a reified communications market is also entirely consistent with Babe's depiction of neo-conservative economic theory in public policy. In his formulation, such economic theories assume that abstract and omnipotent mechanisms referred, to as Market, Machine and March of Time, i.e., the "invisible hand" of the market, technical and scientific knowledge and technological evolution, are

in operation and ultimately in charge of human affairs. Babe notes that regarding such mechanisms as abstract forces "annihilates the pursuit of justice" in that it provides a rationale to justify inequities as the inevitable result of such forces in operation (*Communication* pp. 75-81). The remedy proposed by Babe is to recognize that these mechanisms are human constructs that are contingent, rather than absolute, and can therefore be altered by human action.

From our specific perspective in this thesis, it would seem that the Commission viewed its concept of the new emerging communication market in much the same way. Since this new market was regarded as an inevitable development, the Commission could not alter it but could only adapt its regulatory practices to it. As Babe anticipated, this would eventually lead to certain systemic inequities. As is detailed in the following chapter, certain areas of regulatory concern – affordability of television distribution services, for example – would be largely abandoned to regulation solely by the emerging communication market, while attempts would be made to carve out other issues to isolate them from the pressures of this market.

Following the significant changes in policy direction announced in the Structural Hearing, the first substantial steps towards competition would shortly thereafter proceed from the CRTC's report entitled *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition*, 19 May 1995. The government direction[104] that initiated this report provided the Commission with an opportunity to go

[104] The government's stated intention was that such a report would complement the ongoing work of the task force it had created, the Information Highway Advisory Council, to assist the Government in determining its policy framework for telecommunications and broadcasting. This report resulted from a direction by the Governor General in Council to the CRTC, to

beyond simply the employment of the language of competition policy in broadcasting regulation, as it did in the Structural Hearing, to proposing concrete elements of its implementation. In essence, the direction was viewed as licence from Parliament to commence implementation of a competition-based regulatory regime for broadcasting distributors, despite potential inconsistencies between such an approach and certain provisions of the 1991 Act. The CRTC bluntly argued that

> [g]overnment policy supports fair, effective and sustainable competition among facilities and services. To achieve these policy goals, it is essential that barriers to competition arising as a result of the monopoly power or dominant position of telephone and cable companies be removed.

The Report went on to indicate the Commission's view that fair and sustainable competition would require that Canadians have increased choice between distributors and that all distributors should be subject to similar regulatory rules and obligations. In pursuit of these objectives and due to advances in technology, the Commission determined that there was no need to limit competition by other entrants in the broadcasting distribution market.

By 1996, the Commission would announce that cable monopolies had served their purpose and would no longer be maintained by regulation.[105] The exclusive issuance of licences to only one cable operator in any given territory had been successful, in the Commission's view, since it had prevented the unnecessary duplication of high-cost cable facilities, resulting in savings that had enabled cable systems to extend cable service to many locations (approximately 94% of all Canadian households had access to cable

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gather information, seek input, provide critical analysis and report to the Government on a number of matters, as they relate to the Commission's area of responsibility, respecting the development of content and competition policies for new communications technologies and services that will comprise the 'information highway'. (Order in Council P.C. 1994-1689, 11 October 1994)

[105] Public Notice 1996-69, 17 May 1996.

facilities at this time) that would not have otherwise been economically viable for cable systems to serve. These observations led the Commission to conclude that it was time to begin to licence new competitors to incumbent cable companies.

DTH satellite services

The first competitors to cable licensed by the Commission were terrestrial wireless distributors (referred to as Multipoint Distribution Systems or MDS). At the time, projections indicated that MDS undertakings would be formidable competitors for cable. These projections were proven drastically inaccurate,[106] however, and, though a few MDS licensees continue to operate today, they have never succeeded in providing significant competition for cable.

The next group of competitors licensed, satellite distributors (referred to as Direct To Home or DTH undertakings), would become far more successful than MDS. Competition between cable and DTH licensees would, in fact, prove to be the most significant dynamic considered by the CRTC in its regulatory approach to television distribution from their licensing to the present day. The path that led to the eventual licensing of these services, however, was long and difficult for prospective licensees as well as for the CRTC.

The possibility of satellite television distribution was first placed on the public agenda in Canada in 1983, when the government secured six satellite orbital positions at the

[106] For instance, successful applications for MDS licences in Manitoba in 1996 and British Columbia in 2000 anticipated that MDS licensees would serve 156,000 customers by September 2001 and as many as 312,000 subscribers by September 2005. In fact, the Commission's annual returns data indicates that MDS licensees peaked at a total of 86,000 subscribers in 2001 and have since declined to under 60,000 subscribers in 2005.

Regional Administrative Radio Conference (RARC) of the International Telecommunications Union (ITU). The next year, the Commission licensed the company Canadian Satellite Communications Inc. to utilize some of the newly available satellite capacity to transport broadcasting services to remote and Northern communities. Aside from this decision though, satellite broadcasting, and particularly satellite distribution to individual Canadian households, would be hampered by a series of confusing and ultimately unproductive determinations by the Commission over the next several years.[107]

However, in the wake of the inception of the US direct broadcast satellite (DBS) service, DirectTV, in 1991, the CRTC found itself under increased pressure to provide for access to satellite distribution services in Canada – or at least to stand aside as such services were provided by US DBS services. Under such pressure, the Commission found that satellite-based distribution services would provide an important "vehicle for providing programming services to Canadians" and "a degree of price competition to ... other distribution technologies" and adopted two controversial policy positions with respect to DTH.[108] First, the Commission argued that it would be able to exert some jurisdiction over US DBS services that entered the Canadian market, thereby obliquely permitting the entrance of these services into the Canadian market. Secondly, it encouraged

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[107] Some explanation may be required for the reader to understand this criticism. Initially, the CRTC chose to permit programming services to distribute their own services to cable licensees and individual Canadians by satellite, noting that the licences of programming services did not prohibit transportation of program by satellite directly to the public (Public Notice 1984-195). While this authorization was useful in transporting programming services to cable licensees, none of the programming services were willing to provide their services directly to Canadians in this manner. The Commission later issued a revised policy with respect to the potential licensing of DTH services in 1987. Noting the growth in demand for such services, the CRTC expressed a willingness to licence two types, one which "serves as a conduit to deliver existing programming signals ... [but] would not produce, or assemble any programming, nor alter the programming content of any signals which it distributes." The second type would be able to perform all the functions of the first but could also originate at least some of its own programming (Public Notice 1987-254, 26 November 1987). Not one licence was ever issued in relation to this policy.

[108] Public Notice 1993-74

programmers and distributors to explore co-operative means of offering Canadian DTH satellite services.[109] Based on these policy positions and at the behest of Electronics Inc. and Telesat Canada,[110] the Commission chose to exempt DTH services from the need to hold a licence in order to provide service in Canada.[111] The possible net result of these two policies could have been that any US or Canadian party that wished to offer a DTH satellite service could have done so immediately and without any licensing or other regulatory obligations set out by the CRTC.

Acting with a certain amount of frustration with the Commission's policies, on 6 July 1995, the government reigned in this extraordinary departure towards a market model-based approach to television distribution competition and reasserted some of the more public sphere model concerns present in the traditional approach to regulation contained in the 1991 Act. Specifically, Cabinet issued an Order-in-Council[112] overriding the two policies adopted by the CRTC and directing it to immediately implement licensing and regulation of DTH satellite services. Following receipt of this Order, the Commission revoked the Exemption Order Respecting Direct-to-home Satellite Distribution Undertakings[113] and initiated a licensing proceeding for DTH services, wherein it approved two licence applications to carry on DTH undertakings.[114] A new regulatory

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[109] Public Notice 1993-74.
[110] Both are Canadian companies involved in the provision of satellite equipment and services.
[111] Public Notice 1994-111, 30 August 1994. Under an exemption order, a party that meets the criteria and conditions set out in the order may operate a broadcasting undertaking in Canada without any other form of licensing or regulation. Exemption orders are discussed in more detail in Chapter 4.
[112] P.C. 1995-1105 (DTH Order)
[113] Public Notice CRTC 1995-219.
[114] Decisions 95-901 and 902, 20 December 1995.

framework for DTH licensees was also set out in an introductory public notice to those licensing decisions.[115]

The Commission demonstrated in its new regulatory regime for DTH that it had not entirely given up its intention of utilizing a more market model approach to the regulation of DTH services. The regulatory regime it established for DTH was considerably lighter than that applied to cable with the Commission choosing not to regulate a number of areas of the operation of the DTH licensees, explicitly leaving these areas to regulation by market forces alone. Specifically, the Commission decided that DTH BDUs would only be required to carry a very small number of Canadian television stations[116] and that they would not be rate regulated. In taking this tack, the CRTC acknowledged the need to provide flexibility to new distribution competitors and to establish a competitive balance among new and existing distribution undertakings. The Commission considered that its key challenge would be to implement a policy framework that maximized contributions to the Canadian broadcasting system, yet provided sufficient flexibility to support the competitive entry of satellite distribution technology.

DTH was to become an extremely successful competitor for cable. By the time DTH licensees reached their first licence renewal in 2004, they would be able to boast of going from zero to over two million subscribers (seizing 25% of the total Canadian distribution market away from cable) in just seven years. One million of these were new subscribers

[115] Public Notice 1995-217, 20 December 1995.
[116] I.e., one Canadian Broadcasting Corporation's (CBC) French- and English-language television station, and at least one affiliate of each television network licensed on a national basis (e.g., one CTV television station). This meant that DTH licensees were only required to carry 3 television stations in comparison to the 12 to 17 television stations cable licensees were often required to carry in larger urban centres.

who had not been served by cable.[117] This latter fact demonstrating that this move towards a somewhat more market model oriented approach had indeed yielded ancillary benefits, at least in terms of the extension of service.

Industry consolidation: the cable response to competition

The cable industry did not sit idle while all this talk of competition proceeded. In fact, this period witnessed a previously unprecedented level of cable industry consolidation and repositioning. In addition to the purchase of Canadian Satellite Communications Inc. (the aforementioned wholesale satellite transport service) and what would become Star Choice (one of the two surviving DTH licensees) by Shaw, the Commission approved two of the largest changes in ownership ever made with respect to Canadian cable systems over the same period. On the same day, 19 December 1994, the CRTC approved the purchase of Maclean Hunter Ltd. by Rogers[118] and the swap of a number of systems between Shaw and Rogers.[119] The cumulative effect of the 19 December 1994 approvals was to grant Rogers control over virtually all significant markets in Ontario[120] and give Shaw control of all significant markets in Manitoba, Saskatchewan, Alberta and British Columbia. The process undertaken by the Commission in approving these changes in ownership is, itself, informative as to how it approached public interests at the time.

The CRTC's approach to changes in ownership has traditionally been to apply a "benefits" test. As it explained in relation to the Rogers-Shaw "system swap":

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[117] Public Notice 2004-19, 31 March 2004.
[118] Decision 94-923.
[119] Decision 94-924.
[120] Shaw continues to operate two systems in northern Ontario, one in Thunder Bay and one in Sault St. Marie. With respect to Rogers, later approvals would permit Rogers' purchase of cable companies throughout Nova Scotia and Newfoundland as well.

> Because the Commission does not solicit competing applications for authority to transfer effective control of broadcasting undertakings, the onus is on the applicants to demonstrate to the Commission that the applications filed are the best possible proposals under the circumstances, taking into account the Commission's general concerns with respect to transactions of this nature. As a first test, the applicant must demonstrate that the proposed transfers will yield significant and unequivocal benefits to the communities served by the broadcasting undertakings and to the Canadian broadcasting system as a whole, and that they are in the public interest.
>
> In particular, the Commission must be satisfied that the benefits, both those that can be quantified in monetary terms and others that may not easily be measured in terms of dollar value, are commensurate with the size of the transaction and take into account the responsibilities to be assumed, the characteristics and viability of the broadcasting undertakings in question, and the scale of the management, financial and technical resources available to the purchasers. (Decision 94-924)

In essence, in return for approval, the Commission extracts a "benefit" from the party applying to assume ownership of a broadcasting undertaking(s) "commensurate with the size of the transaction", that is intended to counterbalance the potential negative impact of concentration of ownership or any ancillary effects on subscribers that may result from the transaction. The benefit proposed by applicants and approved by the CRTC usually amounts to 10% of the value of the transaction and may be paid out in a variety of ways, such as through the creation of production funds, donations to causes or groups with an interest in broadcasting or the financing of new equipment or facilities.[121] In the case of the system swap, the systems over which Shaw assumed control were valued at $182 million more than those of which Rogers assumed control. As a result, Shaw proposed to provide "tangible benefits" amounting to $19.8 million on its net gain. In comparison, Rogers' proposal in relation to the Maclean Hunter transaction involved $101.9 million in benefits.

[121] Decision 94-923 itself provides a range of such examples including $7.5 million to create an Alberta Television Production Fund, $54.5 million to improve local cable facilities, and $3.9 million on enhanced community programming and on grants to local groups.

The transactions described above are only the two largest of a significant number of instances of consolidation that occurred in the cable industry in the years following the Structural Hearing. In setting out its policy on such transactions, the CRTC considered that

> [i]n the cable sector, a key factor is that the cost of any benefit must not be passed on to subscribers through rate increases. Approximately two-thirds of all benefits accepted in cable transactions involved capital expenditures to upgrade or consolidate the systems, and generally resulted in the provision of improved quality of service to subscribers, including increased channel choice. In the majority of cases in which cable transfer applications have been denied, the denial was based on the Commission's disqualification of claimed benefits and its finding that the level of remaining acceptable benefits was not commensurate with the size and nature of the transactions. (Public Notice 1992-42, 15 June 1992)

In reviewing the various transactions over this period, it becomes apparent that there is a certain fatalism involved in the CRTC's approach to industry consolidation. Its decisions tend to take for granted that applications will be approved – and, except in very rare circumstances, they have been. Therefore, rather than critically assessing the merits of the transaction and the public interests related to the transaction, the Commission instead focuses on seeking to produce some alternative benefit to offset its impact. While the extensive debates surrounding the pros and cons of media consolidation in general are outside the scope of this thesis, it is worthwhile to note that perhaps the chief flaw in the Commission's focus on tangible benefits is that these benefits are, by their very nature, only short-term contributions that are greatly outlived by the long-term changes in the structure of the "broadcasting system" that they are intended to offset. In other words, the effects of industry consolidation continue to be felt long after the benefits prescribed by regulation have run out.

On the other hand, the extent of industry consolidation in the broadcasting industry over this period and to the present has resulted in huge amounts of additional financing for Canadian production. Since 80-90% of tangible benefits typically go to some form of production, it is widely acknowledged that, if mergers and other changes to ownership that yield tangible benefits were to cease or were to be consistently denied by the Commission, the total amount of funding available for Canadian production would drop precipitously.[122] This perhaps explains, in part, why the Commission has rarely ever denied an application of this type – Canadian production has become dependent on the tangible benefits realized through consolidation.

[122] The best example of this occurs between 2000 and 2005. During this period the Commission approved changes in ownership providing a total of over $4.24 billion in tangible benefits alone. Virtually all of these funds went, by various means, to over the air television stations with the expectation and most of this money was allotted to specific projects or funds. In each case, however, the Commission considered that the funds would ultimately be used to support the production of Canadian production in one form or another (Decisions 2000-87, 2000-128, 2000-221, 2000-774, 2000,747, 2000-765, 2001-384, 2001-460, 2001-604, 2001-647, 2001-746, 2002-91, 2004-502, 2004-503, 2004-557 and 2005-207).

Chapter Four Details of competition, 1998 to 2006

The first few years following the inception of the 1991 Act – as detailed in the preceding chapter – were a period of tremendous change in the television distribution industry. New competitors were licensed, incumbents consolidated and, more importantly, the philosophy and implementation of competition produced a significant shift in the regulatory approach to public interests. When the dust finally settled, the regulatory landscape had changed radically. A wide valley had been created between Canadian programming services, still concerned with protection of their traditional markets and business plans on the one hand, and television distributors on the other, whose focus lay on two related concerns: competitive markets and regulatory transformation.

Competition, sort of

After the flurry of official directions from Cabinet and responses by the CRTC that took place between 1994 and 1996, the following period from 1997 to 2006 was almost devoid of official contact on broadcasting issues between the CRTC and the policy-making and legislative branches of government.[123] But since policy, not unlike nature, abhors a vacuum, in the absence of significant involvement from the Department of Canadian Heritage or Cabinet, the CRTC itself assumed several aspects of the policy-making function as well. In particular, the CRTC continued to adopt regulatory structures and rationales that favoured reliance on competition and market forces over more traditional

[123] The only significant exception related to a cabinet direction that distributors be required to provide the Canadian Public Affairs Channel (CPAC) to all subscribers (in some cases, one in English and French). It is worth noting, in this regard, that the CPAC service carries broadcasts of the House of Commons and its committees, while in session.

regulation.[124] Winseck argues that this regulatory desire to create competitive markets is a significant and relatively recent change in regulatory perspective. He notes that, while throughout the 1970s and early 80s, the CRTC viewed itself as a mediator between the telecommunications industry, new technology and the public, it has more recently sought only to "construct markets" and sell policy outcomes to the public as being in the "consumers' interest" (1997, p. 62).

With the new emphasis on competition between distributors came a change in regulatory logic and terminology. Previously, the Commission's preoccupations with respect to distributors had generally been related to addressing a number of specific issues, such as affordability, through direct regulation. Now, its emphasis was on the demand for *choice* and the factors affecting subscribers' ability to make choices about the television programming they received. This demand for choice was considered to exist on a number of levels: for example, choice in distributors; choice in programming services; and choice in programming available on programming services. In effect, the Commission redefined its approach to public interests. Public interests were no longer said to lie in access to programming (i.e., via cable networks), in affordability, or in the diversity of programming sources, all of which had been central to the earlier public sphere model-oriented regulatory regime. The public interest lay instead in providing Canadians with choice.[125] The tool by which this public interest would be achieved

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[124] Although it is popular to juxtapose competitive forces and regulation as mutually exclusive poles on an axis of potential policies, as is pointed out several times in this thesis, this is certainly not the case with respect to Canadian broadcasting, at least.

[125] The clearest articulation of the principle of choice as the basis of regulatory thinking with respect to television distribution at the time is found in the Commission's preamble to the 1997 *Broadcasting Distribution Regulations*, which reads:

> The Commission considers that the goals of competition and customer choice can best be met through the establishment of a regulatory framework that allows market forces to ensure customer

would be competition between television distributors. Other concerns – again, such as affordability, diversity and access – were not abandoned, however. These concerns were assumed to be ancillary benefits that would necessarily fall out of competition between television distributors.

This new emphasis on consumer choice was in no way a difficult policy message to "sell" to Canadians. In fact, it coincided with the popular perception that a number of choices that might otherwise have historically been available (at all levels) to subscribers were restricted through regulation. For example, regulated monopolies had previously limited choice between distributors; regulatory carriage and packaging rules had limited choice in programming services; and Canadian content requirements had limited choice in the types of programming that broadcasters could make available to viewers.

Obviously, there was another side to this argument: regulated monopolies had allowed the extension of service to areas that would not otherwise have been served and could, at least theoretically, maintain affordable rates; carriage and packaging rules ensured the sustainability of Canadian broadcasters, providing a space for Canadian programs and ancillary economic benefits; and, without Canadian content regulations, even Canadian broadcasters were unlikely to provide expensive Canadian programming, when cheaper US and other foreign fare could be resold. Nonetheless, a shift had apparently occurred in regulatory thinking and the earlier bastions of broadcasting policy no longer carried the same weight as they once did. The new objective of "choice" was equated with a need for more competitive industries operating under transformed or less interventionist

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choice wherever possible, and under terms and conditions that best reflect individual circumstances. (Public Notice 1997-25, 11 March 1997)

regulatory regime, which clearly held sway over the earlier arguments for traditional regulation.

Although the *language* utilized by the Commission suggested a wholesale shift from detailed regulation towards competition and reliance on market forces, it's important to note that the only segment of the broadcasting industry that was actually opened to competition to any significant degree was the distribution market. With respect to programming services, the situation was somewhat different. At the same time as the Commission encouraged competition between television distributors, a number of regulations and policies were maintained and even strengthened[126] by the Commission to protect all types of programming services and discourage any potential competition between Canadian services as well as between Canadian and foreign (normally U.S.) services.

This inconsistent approach to programming services and distributors can be seen in the manner in which the Commission licensed new specialty services. For example, shortly after licensing DTH services to compete with cable, the Commission licensed the last group of "analog" pay and specialty programming services[127] in 1996. Then, in 2000, it licensed an additional group of specialty services to be distributed exclusively on a digital basis and referred to as "Category 1" digital specialty programming services.[128] In both cases, the successful applicants were chosen in so-called "beauty contests" in which the Commission licensed only what it considered to be best applicant in each area or "genre"

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[126] These rules are currently found in section 18 of the *Broadcasting Distribution Regulations*.
[127] Although many of these services were and are distributed digitally, they are referred to as "analogue" services to distinguish them from the exclusively digital services that would be licensed later.
[128] Public Notice 2000-6, 13 January 2000. All large cable distributors and both DTH distributors must offer these services as part of their digital services.

of programming. As was the case with all previously licensed pay and specialty services, the genre of programming offered by the winning contestant was protected from both domestic and foreign competition, i.e., the Commission would not licence or authorize the distribution in Canada of a service offering programming that would be fully or partly competitive with that service. Any potential competition between pay and specialty programming services and between these services and foreign services was further minimized through the introduction of new "access" rules in 1996, which essentially required large distributors to carry all pay and specialty services, both those licensed in 1996 and before. Distributors were also required to carry the Category 1 services licensed in 2000 for similar reasons.

Superficially, the wide array of Canadian programming services, including over the air television stations, pay, specialty, Category 1 and 2 services, as well as authorized foreign services might seem to create a competitive market for programming services. However, genre protections shield these services from direct competition and keep the prices these services pay for programming artificially low, while at the same time, carriage and packaging rules ensure that less popular services are distributed and offered in packages with more popular services, thereby guaranteeing these services substantial revenues. It would therefore be difficult to describe the resulting programming services market as competitive in any real sense of the word.

This inconsistent treatment of the programming services and distribution segments of the broadcasting market suggests that the logic of competitive markets did not wholly dominate regulatory thinking during this period. It can also be read as an

acknowledgement by the CRTC that, despite its ostensible commitment to free market ideology and a market model approach to public interests, a mix of public sphere and market model approaches may be more appropriate to the regulation of broadcasting.

Deregulation, sort of

Following in lock-step with the regulatory shift towards competition policy came demands for "deregulation". The term deregulation implies a reduction in regulation or a complete withdrawal by government from the regulation of a particular area of activity. As we shall see though, what is often entailed by the introduction of competition is not a reduction or withdrawal but a change in regulation. For this reason, we will use the terms reduced regulation and regulatory transformation, rather than the less accurate term deregulation.

As noted in chapter one, detailed regulation is the method generally used in support of the public sphere model of public interests, while market model supporters generally pursue reduced regulation in order to permit a greater reliance on regulation by the market. In this vein, as early as the 1993 Structural Hearing, cable systems began to argue that "monopoly-era" regulations, such as carriage and packaging requirements, hindered their ability to compete and should be eliminated or altered to reflect the new realities of the marketplace. These demands for reduced regulation were further heightened by the licensing of DTH and telephone company competitors, and even more so as new, Internet-based services began offering their own broadcasting-like services.[129] Throughout this period, however, programming services have generally sought and

[129] Both telephone company and Internet-based competitors are described later in this chapter.

received additional regulatory protections, most often in the form of additional regulatory requirements on distributors (as described above).

As noted by Mosco, modern debate over the role of government with respect to communication media has largely devolved into a debate over the merits of regulation versus those of reduced regulation (1988, p. 108). Using the terminology employed in this thesis, this is can be understood as essentially being a debate over the appropriateness of public sphere model approaches to public interests and those of the market model. For example, speaking of the 1996 *Telecommunications Act,* then FCC Chair Michael Powell (2003) stated:

> For decades the Commission had in essence required *proponents* of deregulation to prove why the rule was no longer necessary. Now, the FCC has the obligation to prove a rule is in fact necessary—indeed one of my colleagues interprets the law to mean we must prove a rule is indispensable to the public interest. The congressional bias is for deregulation and the standard for maintaining a rule is an enormous hill to climb.

This is also an apt description of the changes to the public interest approaches of the CRTC with regard to television distribution that have been the subject of the last two chapters.

As Rideout (2003) points out, again in the context of telecommunications, it is common for regulators operating under conflicting social and economic objectives, as is the CRTC, to generally drift towards liberalization and reduced regulation (p. 141). Regulators find that the easiest method of reconciling these conflicting objectives is by attempting to achieve competition via regulation, with the expectation that other social objectives, such as affordability and universality, will also be incidentally realized through competitive markets rather than regulation.

In practice, however, a change to competition does not necessarily reduce regulation. In fact, it is more accurate to say that the prioritization of the role of the "market" or "competitive forces" simply entails a different form of regulation, i.e., a transformation in regulation, rather than a supposed decrease in regulation overall.[130]

A clear example of this type of regulatory transformation appears in the CRTC's employment of exemption orders. Under new provisions included in the 1991 Act, the Commission was required to exempt groups of undertakings from licensing and regulation where the Commission found that they would not contribute materially to achieving the objectives of the Act.[131] In theory, exempt undertakings are considered completely free of any regulatory obligations and outside of the Commission's regulatory oversight. For the most part, the exemptions granted in the years immediately following the issuance of the 1991 Act were for services that were temporary or of small impact on the broadcasting system, such as telethon fundraisers or community events. In 2001, however, the CRTC took the superficially bold step of exempting virtually all Class 3 distributors, i.e., those cable systems that individually served less than 2,000 subscribers each, some 1,700 cable systems in total.[132] In 2004, the CRTC also exempted many Class 2 cable systems, i.e., those serving between 2,000 and 6,000 subscribers each,

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[130] Other analyses of related industries, such as Winseck's examination of Canadian telecommunications and Brainard's discussion of US broadcasting regulation, have come to similar conclusions with respect to calls for reduced regulation in those industries.

[131] The basis for the Commission's power to exempt broadcasting undertakings from licensing and regulation is found in subsection 9(4) of the 1991 Act, which states:

> (4) The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

[132] Although individually small, these former licensees collectively served nearly a million Canadian subscribers, or slightly less than 10% of all Canadian subscribers to distribution services. See CRTC Broadcasting Monitoring Report 2002.

withdrawing from direct regulatory oversight of more than 100 additional systems.[133] In each case, the CRTC's determination was premised on the view that these systems operated in smaller or more isolated areas in which they individually served small groups of subscribers and, therefore, their regulation was immaterial in achieving national policy objectives.

Although the exemption of small cable systems is construed as a withdrawal from regulation of these undertakings, it should be noted that the conditions placed on exempted systems through the exemption orders were constructed to mimic the full extent of the regulatory requirements of licensed cable systems of the same size.[134] In other words, exempt systems have virtually the same regulatory requirements as licensed systems, although the requirements of licensed systems are contained in the *Broadcasting Distribution Regulations* (the 1997 regulations), while those of exempted systems are contained in exemption orders. In fact, the only significant differences between the regulatory requirements of licensed and exempt systems are that exempt systems do not pay licence fees, nor do they need to provide annual financial and operational information to the CRTC. In this sense, it is certainly more accurate to describe exempt cable systems as subject to a different form of regulation rather than reduced regulation.[135]

A similar argument could be made in comparing the provisions of the 1986 *Cable Television* regulations, created in a regulated monopoly environment, to those contained in the new 1997 regulations, intended to address the new competitive environment for

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[133] Collectively these systems serve more than half a million subscribers.
[134] Broadcasting Public Notice CRTC 2004-39, 14 June 2004.
[135] The New Media exemption issued in 1999 was a clear exception to the practice of re-regulation through exemption orders, for reasons discussed below, since new media undertakings were exempted entirely from regulation without any conditions.

distributors. While eliminating some of the rules contained in the former, the latter regulations added a number of new types of rules to address competitive relationships between distributors, such as dispute resolution measures and a prohibition against conveying an undue preference or disadvantage on any party, including the distributor itself. Attention was also given to providing competing distributors with access to certain facilities owned by incumbent distributors.[136] At the same time, the 1997 regulations also maintained and strengthened non-competitive protections for programming services. Existing protections with respect to over-the-air television stations from the 1986 regulations were retained in the new regulations.[137] In the case of pay and specialty services, new protections[138] that did not exist in earlier regulations were also imposed on distributors through the 1997 regulations. It is difficult to construe this array of new and retained rules as a reduction in regulation.

Further, there are also practical indicators that support the view that implementation of competition between distributors entailed regulatory transformation, rather than reduced regulation. For example, the CRTC's spending on its complement of broadcasting staff has actually increased by 40% between 1997 and 2006.[139] Moreover, rather than

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[136] In particular, the co-axial cable installed inside buildings, referred to as "inside wire", came to be regarded as a "bottleneck" facility. To address this concern, the Commission chose to mandate rules by which competitors could gain access to the inside wire and specified a monthly lease rate for access.
[137] These protections focused on limiting entry to particular geographic markets, i.e., each ownership group is generally allowed only one station in each market, access to distant and foreign stations is limited and/or the programming of local stations is substituted over that of other stations (simultaneous substitution, which was discussed in chapter 3).
[138] These protections are based primarily on the "genre" of a service. For instance, the CRTC will not licence a Canadian service to offer programming focused on the same type of programming, e.g. gardening, if there is an incumbent Canadian service already operating in that genre, similarly, a foreign service offering competing programming would not be authorized for distribution in Canada either. Additional rules related to distribution of services in the official language of the minority, e.g., French-language services in anglophone communities, and for third-language services, i.e., Canadian services in any language other than English or French.
[139] CRTC *Report on Plans and Priorities*, 1998-99 and 2007-08.

slowing, the overall annual output of broadcasting public notices and decisions by the Commission has increased by 5% over the same period.

At least on a *prima facie* basis, these facts point towards an increase rather than a decrease in regulation and regulatory activity entailed by measures intended to reduce regulation and increase reliance on market forces. In fact, there appears to be a strong argument that the transition from monopoly/oligopoly regulation to competition regulation has proven to entail a more stylistic change to the methodology of regulation, rather than a substantive reduction in government intervention in favour of reliance on market forces. Whether intentionally or not, it appears that the market model approach to public interests is more accurately portrayed as entailing regulatory transformation rather than reduced regulation.

Elimination of rate regulation

The CRTC's rather complex treatment of cable rate regulation has already been discussed in some detail in chapters two and three. However, this area bears some further examination here for two reasons. First, the rates paid for service are inevitably one of the greatest areas of concern for Canadian cable subscribers and the elimination of rate regulation during the period considered is another significant example of the trend towards the employment of market model approaches to public interests. Secondly, the regulation of cable rates is perhaps the only area in which the CRTC has unequivocally withdrawn fully from regulation.

In the 1997 Regulations, the Commission included a method by which distributors could apply to be exempted entirely from rate regulation. To make such an application, a

distributor needed to demonstrate that there was a competitor operating within its licensed service area and that it had lost at least 5% of subscribers to competition. With respect to the former element of this test, the CRTC considered that it had already been satisfied for all cable distributors, since licensed DTH satellite undertakings served all of Canada. As it turned out, the latter component of the test was not much more difficult to meet since the regulations did not specify any period over which the subscriber loss needed to occur. As a result, distributors simply needed to indicate that the number of subscribers they served was 5% lower at any point in time than at some other previous point, even if subscriber losses were temporary or if these subscribers were later recovered. Virtually all distributors were able to satisfy this test in short order.[140]

It is worth mentioning that, at the same time as the Commission established the extraordinarily easy test for rate deregulation of cable systems described above, it was quixotically maintaining (and has continued to maintain) rigid controls on certain of the rates charged by telephone companies. This raises the question, why deregulate cable rates in this manner on one hand, while defending rate regulation for telephone companies on the other? Certainly, the differences between these industries and between the legislation governing their regulation account for some of this inconsistency. The balance of the answer to this question, however, most likely involved both philosophical and practical concerns. Obviously, rate deregulation was philosophically consistent with the logic of competition set out by the Commission.[141] The Commission's practical

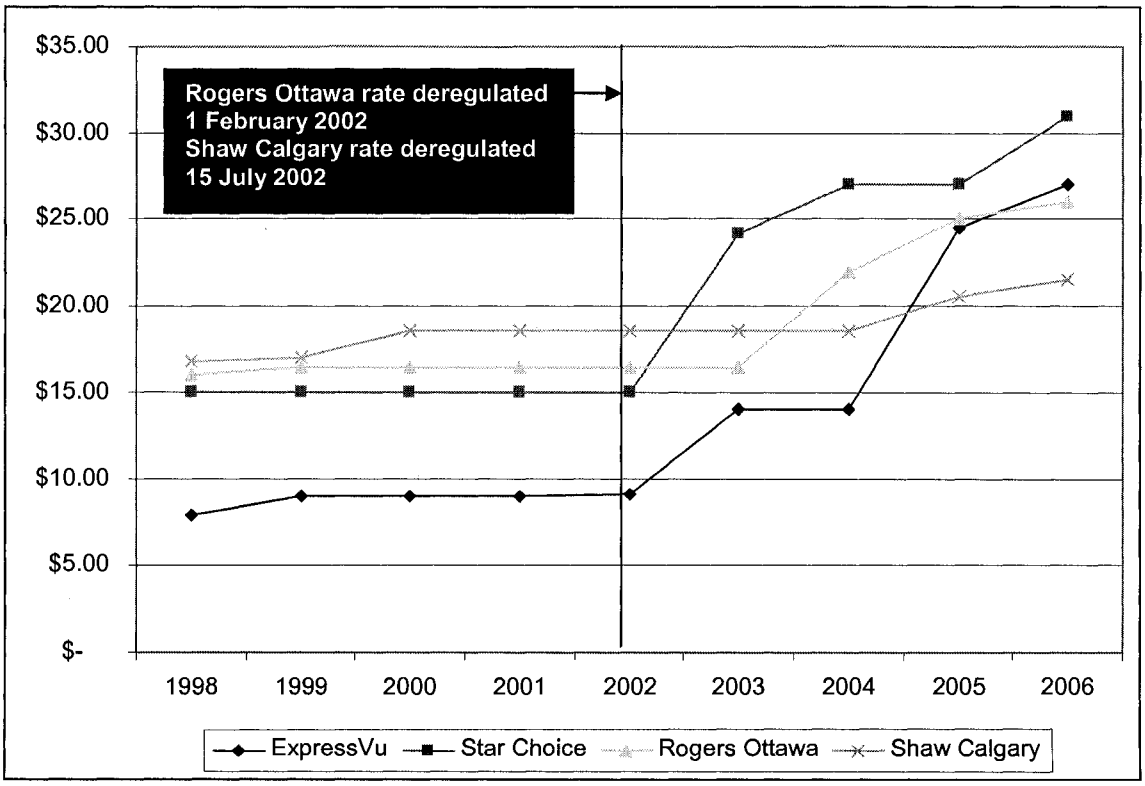
[140] As of 1 January 2007, only 7 out of the 147 cable distributors that were rate regulated before the 1997 regulations remain rate regulated.

[141] Although, as noted in chapter three, the more pro-competition framing of the *Telecommunications Act*, 1993, should have, on a *prima facie* basis, made it more likely for rate deregulation to occur in telecommunications than in broadcasting under the 1991 Act.

reasons for cable rate deregulation are perhaps more compelling, however. As noted in chapters two and three, an extremely large amount of the Commission's time and resources were expended on rate regulation. Various strategies had already been employed to "streamline" rate regulation to address this concern, and, in this sense, full rate deregulation was only the final step in this process.

Unfortunately for subscribers, following rate deregulation, CRTC documents indicate that basic service rates have not decreased or stabilized as economic models of competition commonly might have predicted, but have increased by an average of at least

Chart 1: Comparison of basic service rates of sample BDUs, 1998-2006



Source: MediaSTATS

20% over and above the rate of inflation between 1998 and 2004.[142] The Commission's assumption was that economic markets could effectively regulate the rates of television distributors, ensuring their affordability. Rates have clearly increased much more rapidly, however, since rate regulation was removed. Consequently, it can be seen that the employment of the market model has not necessarily been successful in addressing public interests with respect to affordability.

New Media

Advances in the development and ubiquity of Internet services have caused concern in many of the traditional media. By 1998, these concerns had come to a head in the television broadcasting industries. The result was the initiation of a "New Media"[143] hearing, one of the CRTC's most extensive public proceedings. Proceeding on the heels of the Commission's Convergence report, it makes some sense that this hearing was conducted under both the *Broadcasting Act* and the *Telecommunications Act*. However, the spotlight clearly lay on broadcasting issues and, in particular, on how the traditional media of broadcasting would be affected by so-called new media.

The New Media proceeding engendered more than 1000 comments from individual Canadians alone, as well as many more from parties representing numerous industries and disciplines. In this respect, it was probably the most significant litmus tests of public opinion on any issue ever conducted in the Canadian broadcasting and telecommunications industries. The near universal consensus of public comment seemed

[142] See CRTC Broadcasting Policy Monitoring Reports for the years 2002-2005. Interestingly, the 2006 and 2007 reports no longer include any information, past or present, on cable rates.
[143] Although the CRTC has used the term 'New Media' to refer to a wide range of services, content and technologies, its focus has more specifically been on Internet-delivered services that could potentially compete with or supplant regulated broadcasting and telecommunications services.

to be that, by initiating this process, the CRTC had already staked a claim on new media, with the intention of regulating at least some aspect of Internet content and services. Most participants demanded, in often angry or vulgar terms, that the Commission not undertake any form of regulation for Internet-based services, leaving the field completely open to market forces.[144] These parties often employed the specific language of the market model of public interests, insisting that their own interests were best determined through the provision of choice and regulation exclusively by economic markets uninhibited by government supervision.

Despite expectations to the contrary, the CRTC agreed with the public consensus and did, in fact, determine not to regulate any new media services or content as broadcasting. In its *Report on New Media* (New Media report),[145] it found that Internet services were already achieving the goals of the 1991 Act and were vibrant, highly competitive and successful without regulation. In particular, the Commission found that:

- the new media complement, rather than substitute for, traditional broadcasting;
- there is a substantial Canadian presence on the Internet today, supported by demand for Canadian new media content and ample business and market incentives exist for the continued production and distribution of Canadian new media content; and that
- generally applicable Canadian laws, industry self-regulation, content filtering software as well as increased media awareness are the appropriate tools to deal with offensive and illegal content on the Internet.

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[144] The Commission apparently anticipated such a response since its initial Call for Comments included the following statement:

> The Commission wishes to underscore the fact that it brings to this proceeding no preliminary views with respect either to how new media should be defined, or to what role, if any, the Commission should play in their regulation or supervision. In this proceeding, the Commission intends to develop a comprehensive record in order to assist it in answering the following questions. (Broadcasting Public Notice CRTC 1998-82, Telecom Public Notice CRTC 98-20, 31 July 1998)

[145] Broadcasting Public Notice CRTC 1999-84, Telecom Public Notice CRTC 99-14, 17 May 1999.

Following the publication of the New Media report, the Commission issued an order unconditionally exempting any new media services that might fit within the definition of broadcasting from regulation under the Act.

It should be noted that the New Media exemption order stands out in comparison to most of the other exemptions from regulation granted by the Commission at this point in time since it exempted what it referred to as "new media broadcasting undertakings" unconditionally.[146] As noted above, most prior exemptions were for services that were temporary or of small impact on the broadcasting system, or, as in the case of exempted cable systems, those that were subject to such an array of conditions as to make exempt and licensed undertakings nearly indistinguishable. What then led the Commission to wholly decline to regulate and unconditionally exempt new media services? Clearly public opinion played an important part. The Commission's relatively new philosophic predilection towards competition and reduction in regulation no doubt also played into its decision. Much of the explicit rationale given by the Commission was based on the principle that new media – Internet – services were still nascent. Since its policy is to revisit exemption orders every 5 to 7 years, the Commission's approach left open the possibility that if technological and social uses changed such that unregulated Internet services threatened the viability of the regulated system, it would have the opportunity to revise its earlier determinations.

The view most frequently heard outside of the CRTC held that the Commission's decision was merely an acknowledgement that it *could not* regulate Internet services,

[146] This does not, of course, preclude the Commission from choosing to change its regulatory approach to new media in the future.

rather than a determination that it did not wish to do so. Commission documents tell a different story, however. Briefing and debriefing materials make it clear that the CRTC felt it had jurisdiction over at least some types of Internet services – as is clear from its view that it was necessary to issue an exemption order for at least some services.[147] CRTC documents also correctly recognized that all new media services were being offered over the facilities of telecommunications carriers and broadcasting distributors that it already regulated, and therefore could be regulated, at least indirectly, through these dependencies or choke-points, much as cable distributors were themselves used as regulatory choke-points.

Perhaps the greatest impact of Internet services on broadcasting policy and regulation has been to provide both distributors and programming services with a potent rationale for regulatory change. Distributors have argued consistently for further transition to a more market model-oriented regulatory approach on the grounds that current rules limit pricing and packaging flexibility that is necessary to compete with new unregulated Internet-based services. They express concern that they may ultimately be cut out of the distribution chain entirely should programming services take content directly to viewers through the Internet. Conversely, programming services have frequently argued for a return to more public sphere model-oriented regulation, insisting that additional layers of regulation should be introduced (on distributors) to ensure that programming services are able to maintain their audiences. Programming services also argue that they could be cut out of the distribution chain as distributors move to "on-demand" platforms and offer more and more foreign programming – primarily, but not exclusively, US programming.

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[147] *New Media Hearing: Factum*, 1998; *New Media Hearing: Debriefing Documents*, 1999.

In spite of these fears and a myriad of media predictions in the same vein, new media services have, to date, had little or no effect on traditional broadcasting services. Evidence of this fact can be found in the CRTC's response to a request by the Governor-In-Council (cabinet)[148] that it produce a report to provide "a factual record on the future environment facing the whole broadcasting system that will inform the Government's own policy determinations with respect to the future of broadcasting in Canada". The report produced by the CRTC[149] is rife with provisos with respect to the impact of new media undertakings, such as "Canadians can, *in theory*, bypass the regulated Canadian broadcasting system..." (par. 338, emphasis added) and "these characteristics have the *potential* to significantly impact ..." (par. 341, emphasis added). Ultimately, however, the CRTC concluded in a vein similar to that of the New Media Report seven years earlier, by noting that:

> The record of this proceeding confirms that Canadians' use of new audio-visual technologies continues to grow significantly and, for younger Canadians in particular, represents a shift in media consumption patterns. Nevertheless, the majority of submissions suggest that, *to date, any negative financial impact on the broadcasting system caused by such changes in media consumption patterns has been marginal.* As the CMRI research points out, while Canadians use the Internet on the order of six hours per week, aggregate tuning to radio and television has remained largely unaffected, and *broadcast industry revenues have continued to grow.* (par. 358, emphases added)

In fact, the impact of new media undertakings on traditional broadcasters and distributors has been more systemic than direct. Though no television broadcasters or distributors have yet experienced any significant subscriber or revenue loss, virtually all elements of the broadcasting system have altered their business models and lobbied for regulatory

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[148] Order in Council P.C. 2006-519, 8 June 2006.

[149] *The Future Environment Facing the Canadian Broadcasting System: A report prepared pursuant to section 15 of the* Broadcasting Act, 14 December 2006.

change in a pre-emptive response to this perceived bogeyman. As a consequence, an argument could be made that a significant portion of broadcasting industry growth is now attributable to involvement in the provision of new media services. For example, distributors benefit, generally, through the sale of High Speed Internet access services, while broadcasters have begun to seek ways of splitting rights for programming into broadcast and Internet categories that potentially yield incremental revenue.

By and large, however, regulators appear to have accepted at face value the rationale that regulatory and policy systems must change to accommodate the anticipated impact of new media services. As the new Chairperson of the CRTC, Konrad von Finckenstein confirmed that:

> The "new media" – what results from the application of new technologies to broadcasting – could undermine existing business models and regulatory structures. What can we do in the face of this reality to preserve and fulfill our mandate as defined in the *Broadcasting Act*? This is the main challenge confronting the regulatory agency. (*Address to the 2007 Convention of the Association des producteurs de films et de télévision du Québec*, 3 May 2007)

Whether new media services will have an actual direct impact on traditional broadcasting at any time in the future though remains an open question.

Telco competition

The relationship between broadcasting and telecommunications in Canada is the subject of a long and complicated history. As Babe points out, the first Canadian "broadcasts", as early as 1877, consisted of programs that were actually transmitted into homes via telephone (*Telecommunications* p.199-200). In his estimation, there is no technical or economic reason why broadcasting could not have been offered from the outset via telecommunications facilities and argues that the actual divergence between the two

industries was a result of a combination of collusive corporate agreements and federal/provincial government jurisdictional disputes (p. 205).

In fact, with the advent of cable systems, telephone companies once again found a means of becoming involved in broadcasting. As the new cable operators began to set up their first systems in the 1950's, it quickly became apparent that the most cost efficient way to build out their facilities to potential subscribers was to pay to have wires placed on pre-existing telephone poles. The facilities of the telephone companies were already ubiquitous and the new cable systems did not have access to the same municipal "rights-of way" that would permit them to build comparable facilities, even if they had the money to do so.

Though cheaper than building their own facilities entirely, the telephone companies still demanded substantial sums for "pole attachment" as well as other concessions. In addition to payment of 80% of installation costs and a rental fee, [150] telephone companies also enacted a number of other "policies", such as maintaining ownership of facilities installed on behalf of cable companies and refusing to install facilities for more than one cable company in any given area. Bell Canada Inc. – Canada's largest telephone company – also required cable companies, among other things, to agree that cable distribution systems would be "unidirectional", thereby hoping to preventing the possibility of cable companies offering services competitive with Bell's own (Babe *Cable* p. 122). In fact, Babe argues that the impact of cable operator's dependency on telephone

[150] In 1970, Bell Canada charged between $2,000 and $3,000 per mile for installation and $164.75 per miler per year (Babe *Cable* pp. 124-5). These rates are actually substantially better than the original rates proposed by Bell. The original rates dropped substantially when the now defunct National Community Antennae Association negotiated a cable leasing agreement with Bell Canada Inc. in 1958, and later with other telephone companies (Easton p. 79).

company facilities and the conditions of the corporate agreements reached to make use of these facilities was such that cable was effectively regulated by the telephone companies, rather than any government agency (p. 121). Problems associated with the conditions of pole attachment are still not entirely resolved, but the cable industry's most significant concerns were eventually addressed through a series of proceeding judicial and regulatory proceedings throughout the 1970s.[151]

Indirect influence over broadcasting through cable pole attachment hasn't been enough for telephone companies and, from its inception, the CRTC has faced frequent requests from several telephone companies[152] for licences to enter the television distribution market. As early as its first cable policy review in 1971, the CRTC denied such requests, on the following grounds:

> Since the common carrier is renting a communications medium and the cable industry is selling messages, the programs, they cannot be integrated without causing a serious disruption in the production of programs. (Public Announcement, 16 July 1971)

Essentially, the Commission took the view that a telephone company is a common carrier, while a cable company is involved in the sale of content, and mixing these functions would have a negative impact on program production.[153] The reader may recall from chapter three though, at the same time as it prohibited telephone companies from offering cable services, the CRTC also maintained restrictions on cable companies that

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[151] These proceedings are described in more detail in Babe's *Telecommunications in Canada* (pp. 215-218).
[152] Bell Canada did not make such requests for some time, however. Parliament was so concerned with Bell Canada Inc.'s potential involvement in broadcasting that it amended the Bell Canada Charter to explicitly prohibit Bell from applying for or holding a broadcasting licence (Babe *Cable* p. 121) and to define its role as a common carrier as precluding it from involvement in any content it transmits (s. 5(3) *Bell Canada Special Act*).
[153] There were certain exceptions to this policy. The most significant of which was the DTH satellite service license granted to Bell ExpressVu LLP, the majority owner of which, Bell Canada Enterprises, also owns and operates the Bell Canada Inc. telephone company.

wished to be involved in the production and broadcast of programs and frequently argued that permitting such involvement would inappropriately mix the content and carriage roles of television stations and cable systems, respectively. This raises the question why, if cable companies were already excluded from control of content, was it also deemed necessary to exclude telephone companies from acting as cable companies? There are two answers to this question. First, and most obviously, the Commission recognized that the cable industry was still nascent and that its reliance on telecommunications facilities would quickly make telephone companies unfair competitors to cable. Secondly, however, taking the two restrictions described above into account i.e., the prohibition against telephone companies operating cable systems and limitations on cable systems producing programming, it may also be that the Commission's intent was to use cable systems as a kind of buffer between telephone companies and television stations. As such, this could be read as a further public sphere model-oriented attempt on the part of the Commission to protect television stations.

The exclusion of telephone companies from the cable market was largely maintained for the same reasons, i.e., the separation of content and carriage, until the late 1990's. The first chink in the regulatory armour appeared following the Structural Hearing in 1993. Although not yet willing to take giant steps in the direction of open markets at that time, the CRTC remarked:

> With respect to the delivery of broadband video services by telephone carriers, the Commission acknowledges that new distribution technologies provide a basis for such services to be delivered over their local distribution networks. Accordingly, the Commission encourages the cable and telephone carriers to explore opportunities for cooperative ventures for the shared use of network infrastructures where such ventures would increase the efficiency, reach and

> delivery of services to Canadians in all regions of the country. (Public Notice 1993-74)

In its *Competition and Culture on the Information Highway* report the Commission eventually indicated that it would be prepared to issue cable television licences to telephone companies as soon as mechanisms were put in place to give effect to competition in the local telephone business. It noted that the trend appeared to be towards integrated networks and that continuing to prohibit telephone companies from entering the broadcasting distribution market, and vice versa, would prevent both types of companies from achieving economies of scope. It is not clear from the report, however, what interests would be served by these economies of scope, aside from furthering the profit motives of these companies. Presumably, such economies would be necessary to compete with alternative services provided by new media undertakings. However, what has already been described as the market model public interest objective of achieving competitive markets, as a goal in and of itself, appears to be the primary motivation for this policy change.

In the short term following the report, the only approvals granted were for very limited technical trials. The "mechanisms to give effect to competition in the local telephone business" referred to above were not addressed until the CRTC's *Head Start* decision in 1997.[154] In that Notice, the Commission listed several issues to be addressed with respect to competition in local telephony prior to its consideration of an application by an incumbent telephone company to carry on a broadcasting distribution undertaking. It also announced the timeframe for its consideration of applications by telephone companies for authority to carry on broadcasting distribution undertakings, indicating

[154] Public Notice CRTC 1997-49, 1 May 1997.

that, by 1 January 1998, barriers to entry into local telephony would have been sufficiently addressed and that applications for licences would be treated prior to this date so as to permit new distribution undertakings to go into operation on that date

Though telephone companies had been intent on entering the cable market for some 30 years by this time, relatively few of these companies rushed ahead to offer television distribution services. New Brunswick Telephone Inc. (later to be merged with other East coast telephone company incumbents and renamed Bell Aliant Telecommunications Inc.) quickly applied for and received licences in 1998. Sometime after, in 2001, Saskatchewan Telecommunications Ltd. also received a licence, followed by Manitoba Telephone Systems[155] (MTS) in 2002. It was not until 2003 and 2004 that the biggest telephone companies, Telus (formerly Alberta Government Telephones and British Columbia Telephone) and Bell Canada, respectively, finally applied for licences. In these latter cases, Telus has only launched its service in a very limited manner, while Bell has not yet launched at all.

Programmer vs. Distributor

The fact – discussed in detail above – that direct competition was actively discouraged amongst programming services, while being encouraged between distributors, highlights a significant fault line that runs through broadcasting policy and regulation, that between

[155] MTS is, without a doubt, the most successful of these services to date. Although licensed to operate only in the relatively small city of Winnipeg, Manitoba, MTS has rapidly increased its subscriber base from 0 to over 70,000 in the almost 5 years since it was licensed (*Telecom Update,* Angus Telemanagement, Issue #577, 27 April 2007). A large part of its success can be attributed to the fact that the incumbent cable company in Winnipeg is Shaw Cablesystems, and the manner in which Shaw entered the market in its purchase of its predecessor, Videon Cable Inc. Videon was locally based in Winnipeg and very active in that community, while Shaw is based in Calgary, Alberta, and may have been seen as less interested in the local Winnipeg market. Many of the Videon employees that were laid off by Shaw, following the purchase of the former company, have since been employed by MTS ("From an upstart medium to an all-pervasive cultural force", *Winnipeg Free Press*, B1, Sunday, May 30, 2004).

programming services and distributors. These two groups have continually found themselves at odds throughout the nearly 60 years of television broadcasting history in Canada and most of their conflicts have taken place in regulatory proceedings. Initially, over the air television stations were able to operate somewhat separately from distributors as significant numbers of Canadians received their signals directly over the air. The advent of the various pay and specialty programming services licensed throughout the 1980s and 90s though, which were entirely dependent on cable systems to reach subscribers, exacerbated the tensions between these two broadcasting industry segments, increasing the significance of television distributors as the number of subscribers to cable services increased.

Essentially, the relationship between Canadian programming services (including pay and specialty services and, to a somewhat lesser extent, television stations) and cable (later to include other types of distributors) has become imbalanced. Despite market model-based arguments that such imbalances can be addressed within the context of a free market in which the consumer may select whichever communications products she wishes, as Grant notes:

> "Consumer sovereignty is a good deal more restricted when it comes to cultural products. The marketplace for popular culture is largely dominated by "gatekeepers", "chokepoints" and "tastemakers", who decide (nominally on the consumer's behalf), which products get shelf space and which will be excluded from audience consideration." (p. 51)

Canadians generally must subscribe to cable or other distribution services, if they wish to receive more television programming than is available from the over the air television stations receivable in their homes. As more and more Canadians subscribed to distribution services, programming services became increasingly reliant of cable systems

to reach their audiences. This dependency increased as more and more Canadians chose to subscribe to these systems, placing distributors in the role of potential gatekeepers.

It is precisely this dependency that the CRTC has attempted to redress through regulatory and policy protections.[156] In attempting such redress, the majority of the Commission's focus has been on the relationship between distributors and programming services, i.e., on seeking to resolve such problems as:

- What services should distributors have to carry?
- What wholesale price should be paid by distributors to services?
- How can distributors and programming services better share revenues?
- To what extent can programming services and distributors themselves negotiate carriage/packaging/pricing of services, or where should the Commission intervene?
- What happens if such a negotiation fails?

These significant concerns generally stem from what we have argued is the CRTC's recent focus on competitive markets and regulatory transformation. Regulatory resources are limited, however, and the focus on issues related to the relationship between programming services and distributors, has resulted in neglect of other potentially significant areas of concern in the relationship between the public and programming services, or more importantly for our purposes here, between the public and distributors.

The orientation of regulatory activity to the resolution of distributor-programming service issues may be considered an alternative form of regulatory capture, at least in that the attempts to resolve these issues may be treated as a proxy for addressing other public interest concerns. In other words, when regulation focuses largely or entirely on

[156] These protections have, in turn, been the basis of accusations that "true" competition is not possible even in the distribution segment of the broadcasting market since the extensive array of regulatory protections for programming services ensure that each distributor may offer only the same group of programming services to their subscribers as are offered by all other distributors.

resolving disputes between the interests of distributors and those of programming services, other interests, such as those of the public, are subordinated or excluded. Excluded or subordinated issues include clear areas of public interest already discussed in this thesis, such as those related to affordability, extension of service, customer service and information, diversity of programming sources, etc. This focus has also come at the cost of a neglect of other current issues likely to have a significant impact on the Canadians in the future, such as those related to control of subscriber information and privacy, "net neutrality" and open networks.

Unfortunately, what should be one of the regulatory system's greatest strengths and its chief means of ensuring that public interests are not neglected or subordinated in favour of a focus on programming service/distributor relationship issues, i.e., the CRTC's public processes, may actually contribute to this problem. CRTC hearings and other proceedings have been open to public participation since the Commission was created in 1968. The CRTC continues to run hundreds of public proceedings each year, including oral or written hearings held with respect to virtually every issue that it addresses. Although statistics with respect to who participates in proceedings are not kept by the Commission, anecdotally, it is obvious that the "public" that participates in these proceedings consists generally of industry members and their representatives.

Participation by non-industry members is, while not rare, at least inconsistent, and usually occurs only in particularly high-profile proceedings or in those focused on changes to services provided in particular geographic areas. Consequently, only the views of industry members – distributors and programming services – are heard,

reinforcing the significance of their concerns. Given the limited public generally represented in these proceedings, it is not difficult to conclude why public interests may be neglected or redefined to equate with private interests. In the absence of public participation, the CRTC may itself incorrectly perceive that it is adequately addressing public interests by simply balancing the private interests of industry members against each other.

Digital and High Definition television

The transition from analog to digital distribution – including digital video compression or DVC - theoretically began around the time of the 1993 Structural hearing or even earlier. Little progress was made, however, until cable systems began to compete with DTH satellite systems and, more recently, with DSL-based telephone company distributors, both of which offer their services on wholly digital distribution platforms.[157]

It should be noted that digital distribution, whether offered by cable, DTH or DSL, is of greatest direct benefit to distributors themselves. More importantly, digitization permits the:

1. distribution of many more programming services through digital "compression" prior to transmission and "decompression" through a set-top-box at customer premises;
2. sale of individual programming services outside of packages and the ability to provide an array of packages;
3. sale of new services such as High Speed Internet access; and the
4. sale or rental of new equipment to access these services, such as set-top-boxes.

[157] Most of the largest cable systems (including Rogers, Shaw and Cogeco) did not launch digital cable services until 1999 and neither the CRTC nor the cable industry made digital cable subscriber numbers publicly available in any substantive form until 2002. In 2002, the number of digital cable subscribers was estimated to be between 1.15 and 1.29 million by the CRTC (*Broadcasting Policy Monitoring Report 2002*) and the Canadian Cable Television Association (*CCTA Annual Report 2002-2003*), respectively. The CRTC's *Broadcasting Policy Monitoring Report 2006* indicates that the number of subscribers to digital cable was 2.63 million in September 2005 or 38% of homes served by cable.

Although there are considerable costs involved for cable systems in upgrading network facilities, all of these costs are, ultimately, passed on to subscribers. Despite this fact, cable systems have used the costs involved in the transition to digital distribution as another rationale to argue for moving towards a more market model-oriented regulatory approach for the reduction or elimination of other regulatory requirements. In 2002, for instance, the Canadian Cable Television Association (CCTA) approached the Commission with its finding that, while investment in digital technology by the three largest CCTA members (Rogers, Shaw and Cogeco) had increased from just over $600 million in 1999 to just under $1 billion in 2001, their return on net fixed assets and free cash flow had been in decline steadily from 1994 to 2001.[158] The CCTA concluded that the investment made by cable companies in digital networks should be considered to be sufficient contribution to the Canadian broadcasting system, in and of itself, to meet the objectives of the 1991 Broadcasting Act and that, consequently, traditional obligations to carry Canadian services and to contribute to Canadian production should be reduced or eliminated.[159]

In terms of benefits to subscribers, distributors make much of the improved picture and sound quality associated with digital distribution. In most cases, however, viewers experience only minimal improvements in picture and sound quality related to digital distribution, which result from improvements to the underlying network needed as a prerequisite to implementing digital distribution rather than to any inherent quality of

[158] This result should not be surprising given that, in the 1999-2001 period at least, increased capital expenditures, such as those made on digital upgrades, would almost inevitably decrease return on net fixed assets unless offset by equal revenue increases.
[159] Canadian Cable Television Association presentation to the CRTC, November 2002.

digital distribution itself. In fact, it is entirely possible to receive a digitally-distributed service that has lower sound or picture quality than an analogue-distributed service, if the digital service has been poorly or overly compressed so as to minimize the amount of "space" (referred to as capacity or bandwidth) that it occupies on a distributor's facilities.[160] Substantive improvements in picture and sound quality do not occur until a programming service is distributed in High Definition (HD), and again, subscribers pay an additional premium for these services.[161]

The Commission generally regards a transition to digital and eventually fully HD services[162] as an inevitable technological change. In its own words, the Commission's goal

> has been to oversee the development of a framework that will ensure an orderly transition from the current highly structured technological and regulatory environment to an environment characterized by a more market-driven approach. Such an approach will maximize the benefits and encourage the rollout of digital technology, while ensuring that individual analog services are not unduly affected during the transition period and that they remain capable of making significant contributions to the broadcasting system. (Broadcasting Public Notice CRTC 2006-23, 27 February 2006)

For distributors, the Commission envisaged the regulatory approach to the transition to digital and HD services as essentially involving in three stages.[163] The first stage is happening now, as this thesis is being written, and entails requirements that distributors

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[160] Despite these facts, the improved picture and sound quality of digital distribution has proved to be an enduring myth. For instance, in its May/June 2003 survey of consumer attitudes on digital television services, Decima reported that the number one benefit of digital distribution perceived by respondents (71% of 2,002 respondents) was improved picture quality.

[161] Premiums include the cost of an HD set-top-box needed to view HD programming and, often, additional costs to receive the HD programming itself. At the time of writing, the additional cost to receive HD programming from a distributor ranged from between $8 to $10 per month.

[162] Moving services from analog to digital distribution is referred to as the first stage of the transition. The transformation of standard definition digital services into HD services is referred to as the second stage of the digital transition.

[163] The policy framework for the transition to digital and eventually HD services is set out across Public Notices 2001-62, 2001-130, 2002-31, 2003-61, 2006-23 and 2006-74.

offer both the analog and digital versions of services (some distributors, such as DTH, that offer exclusively digital services are not involved in this stage of the transition). Once 85% of subscribers – measured individually by distributor, rather than on an industry-wide basis – are able to receive digital services, analogue services would be phased out and distributors would offer only standard definition digital and HD services. In the third and final phase, all services would include at least some HD programming, though a certain amount of programming on many channels would still be in standard definition (Hyatt 2005).

Ultimately, however, the most significant decision taken by the CRTC with respect to digital/HD broadcasting, however, was to make no decision at all. In several other countries,[164] specific dates were set for "analog shut-off", i.e., the deadline for over the air broadcasters to begin broadcasting digitally and cease analog broadcasts, thereby freeing up all of the wireless spectrum used by analog broadcasts and enabling distributors to offer exclusively digital distribution services. In Canada, a voluntary, i.e. a "market-driven transition model", without mandated deadlines was adopted. In doing so, the CRTC took the view that, even without regulatory intervention, competition from US programming services (that do have a mandatory analog shut-off date) will likely force Canadian broadcasters and distributors to speed up the digital/HD transition and that consumer demand for such services in Canada will fuel the purchase of HD

[164] For example, despite several delays, analog shut-off will take place in the US in 2009. In both the United Kingdom and France analogue shut-off will take place in 2011.

television sets and other digital equipment, which will also compel Canadian licensees to accelerate the transition.[165]

To date, the CRTC's predictions have been true, in part. Consumers have certainly done their part in the digital transition as evidence by the rapid uptake and on-going demand for HD television sets[166] – even if this demand might be said to be generated by the electronics industry and artificially stimulated through policy measures, such as analog shut-off dates. For their part, distributors are fond of reiterating that they have made their contribution to the transition to digital and HD programming by making substantial investments in the infrastructure necessary to offer digital and HD services.[167] Unlike consumers and distributors, however, it would seem that the CRTC's strategy has been overly successful in minimizing the impact of the digital transition on programming services, since few of these programming services have begun to broadcast digitally or offer much in the way of HD programming.[168]

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[165] This is one area, at least, where various government actors publicly disagree. For example, in its submission in the CRTC's recent "TV Policy" hearing, Industry Canada, the department responsible for the management of wireless spectrum used by broadcasters, opposed the Commission's "market-driven" approach and called for the adoption of a fixed analog shut-off date (Broadcasting Notice of Public Hearing CRTC 2006-5, 12 June 2006).

[166] As of December 2006, approximately 2.1 million Canadians have purchased an HD television set. Only a third of these, between 600,000 and 700,000 also own a set top box that allows them to receive HD programming from a television distributor (*Broadcast Engineering,* 27 March 2007).

[167] See, for example, the comments submitted by Rogers in the proceeding that resulted in *Historia, Séries+, Canal Vie, VRAK-TV, Ztélé, Canal D, Super Écran, Teletoon/Télétoon and MPix – Licence amendments*, Broadcasting Decision CRTC 2007-2, 4 January 2007.

[168] Although 30 over-the-air television stations are authorized to offer digital services, terrestrial distributors are only required to carry and perform simultaneous substitution on behalf of the 14 stations that have built digital transmitters, in addition to their analogue transmitters. These 14 stations represent less than 10% of the total television stations currently broadcasting in analogue. By way of comparison, more than 1500 US television stations now broadcast digitally. With respect to specialty services, while several specialty services are offered digitally, many have lobbied to maintain analogue distribution requirements and none have been willing to commit to the minimum levels of HD programming necessary to be licensed as an HD specialty service.

Overall, from the perspective taken in this thesis, the Commission's regulatory approach to the transition to digital and HD distribution represents a number of missed opportunities to address public interests. Specifically, the Commission's focus has once again been almost exclusively on distributor/programming service issues, rather than on public interests. The refusal to set an analogue shut-off date, for instance, was based largely on concerns with respect to the impact of such a date on programming services, rather than on subscribers. Similarly, the Commission displayed no concern with the fact that the costs of the transition to digital services are passed on to subscribers.

The future environment

As this thesis was being written, the television broadcasting industries and the accompanying regulatory and policy structures have continued to evolve. Squabbles between programming services and distributors as to wholesale fees paid by distributors to programming services, as well as other terms of carriage, packaging, and auditing of all of the above, dominate the regulatory landscape. Programming services are attempting to absorb (or avoid) the costs of transitioning to digital and HD broadcasting, while distributors, having already made many of the necessary changes, tap their feet impatiently. And looking outside these regulated industries, both programmers and distributors speculate on future technologies and their impact on the services that they provide.

Meanwhile, the CRTC has announced a number of proceedings for 2007-2008 that are likely to radically alter the policy and regulatory landscape for television distribution for

years to come. The CRTC's new chair, Konrad von Finkenstein, described the likely direction of these proceedings as follows:

> In the past, we took a heavily regulated approach in order to nourish our broadcasting system. We now feel that there is a need for some rebalancing. We must avoid suffocating the forces of the market. In fact, we must give fuller play to the energy and creativity of market forces. (Address to the Annual Conference of the British Columbia Association of Broadcasters, 10 May 2007)

Overall, this language seems to suggest that the current trend towards an even greater reliance on market model perspectives of public interests will continue to be the basis of future regulation.

Chapter Five Conclusions

For 40 years, the Canadian government has been involved in the regulation of television distribution, and longer still in the regulation of television stations and broadcasting more generally. But what has been the result of all its efforts and how can they be correlated to public interests, if they can be at all? Broadly speaking, there is a large and thriving Canadian broadcasting system. But is this a result of effective government regulation, or in spite of it? Is it even the system we want as Canadians?

Successes and failures

In the preceding chapters we have described numerous examples of both the successes and failures of regulation, when considered in relation to public interests. During the earliest era of Canadian television, government actors largely ignored cable distributors, instead focusing on supporting television stations, and particularly public television stations. Accordingly, a number of public interests were also neglected and sometimes actively discouraged, such as those related to improved access to television services (outside of the areas in which Canadian television stations themselves operated).

The introduction of the CRTC and the 1968 Act brought cable to the forefront of the regulated broadcasting system. Not, however, as an enabler of greater access to television, but first, as a danger to television stations and to the fledgling concept of a Canadian broadcasting system, and second, as a thorny administrative problem. Despite these concerns, the regulatory perception of cable would shortly thereafter change radically. Instead of a problem, cable would then be viewed as a "national champion"

and a "regulatory choke-point" to be utilized to protect Canadian programming services. Treatment of public interests throughout this early period was again often characterized by its focus on protectionism. Regulation sought to protect both cultural sovereignty generally, and television stations and pay and specialty services specifically.

With the recent emphasis on competition and the related regulatory transformations, the CRTC's focus has most recently been placed almost exclusively on the relationship between programming services and distributors and on maintaining regulatory protections for the former, while simultaneously implementing a competitive market for the latter. Public interests, where explicitly considered at all, are often assumed to be adequately addressed through the spontaneous workings of economic markets.

While this broad overview may seem to portray a negative picture of regulation as it relates to the treatment of public interests, there have been numerous successes in particular areas that bear consideration as well. Cable system service areas were rationalized and licensed in a fashion that brought order from chaos and wrested control of access and the extension of service away from telephone companies and from political interference. Rate regulation successfully ensured affordability for a number of years before falling victim to a perceived need for administrative simplicity in the 1980's and eventually being eliminated in the 1990's. Community channel policy established a win-win situation for industry members and Canadians in offering new sources of local programming and providing the public with a means of participating, to some extent, in broadcasting. Pay and specialty services provided diverse programming which was made almost universally available to Canadians through distributors in an equitable and orderly

manner. Contributions made by distributors to Canadian production have ensured that there is a large pool of money available to (hopefully) provide diverse new Canadian programming. Finally, television distributors overall have extended their services to provide high quality and at least reasonably affordable access to television programming for virtually all Canadians that wish to avail themselves of these services. All of these are significant successes.

Re-examining the two public interest models

When considered in terms of the public interest, there is little explicit information as to what Canadian broadcasting policy and regulation currently seeks to accomplish. Most of our understanding of the public interest claims made by government actors has been gleaned from examining the implicit views that underlie regulatory rationales and decision-making. These rationales can be characterized, as we have in the preceding chapters, by the influence of at least one of two highly estranged viewpoints (the market and public sphere models), each of which is correlated with particular views as to how public interests should be defined and the role of government policy and regulation in addressing public interests. For instance, the market model assumes that public interests will be defined through the operation of economic markets, and that these interests will be addressed spontaneously, so long as government intervention remains limited to ensuring the efficient and uninhibited operation of these markets. In contrast, the public sphere model emphasizes that television and television distribution should not be treated solely as products and that the operation of economic markets does not adequately address the "public goods" associated with them. Instead, the public sphere model

suggests that television distribution should be regulated in such a way so as to maximize the benefits of these public goods.

As we have seen, Canadian broadcasting policy and regulation exhibits a mishmash of both viewpoints. Over the years, these tectonic plates have shifted over and under each other, frequently grinding together to produce metamorphic combinations of the two. Early policies from approximately the 1950s through the 1980s, under the on-going legacy of leading thinkers such as Graham Spry and others, appear to place an emphasis on the resolution of cultural issues more closely identified with the public sphere model. In particular, there is an overwhelming focus on cultural sovereignty through the creation and maintenance of a public broadcaster and later through the protection of domestic programming services, although never in the complete absence of considerations of fiscal feasibility. Similarly, although economic (market model) objectives have risen to dominance, from the 1990s to the present, these goals tend to be tinged with a strong element of economic nationalism, suggesting at least some on-going influence of public sphere-type views as well, such as through requirements related to the maintenance of Canadian ownership and the funding of Canadian production. In many respects, the integrality of both economic and cultural objectives can be seen to be an important strength of Canadian policy and regulation, and an indication of the political health and stability of the broadcasting system. Striking the correct balance between the two, however, is frequently a complex task and one that, as we have seen, can result in inconsistent or even irreconcilable regulatory decision-making.

From a broad historical perspective though, the sweep of policy and regulatory action by Canadian governments can be characterized as a slow and, at times, seemingly inexorable shifting from what was originally a generally public sphere model-based approach to one that is currently dominated largely by the market model. This shift towards a more market model approach has brought with it some significant benefits. Foremost amongst these is the removal of a number of industry protections that limited the availability of services to subscribers. For instance, the elimination of long-standing geographic cable monopolies through the licensing of competitors, particularly DTH services, has greatly benefited Canadians and can be directly attributed to the influence of market model oriented regulatory approaches. Similarly, the removal of at least some carriage restrictions has enabled access to a wider range of distant Canadian and foreign programming.

However, the current domination of the market model, however, brings with it a number of problems as well. The most significant of these relates to the tendency of market model regulatory approaches to reduce decisions with respect to television distribution to the application of economic theory. In this regard, television programming is treated as a product governed by the simple dynamic between the cost of providing it and the price for which it is sold. The focus of such a regulatory approach is solely on making markets more efficient so as to minimize the costs of production and thereby the price at which it can be sold. This is problematic, firstly, since these economic theories frequently fail to operate as predicted. We have seem several examples of this, such as in the funding of Canadian production and in the case of rate regulation Secondly and more importantly though, an extreme market model approach fails to acknowledge any role for the public

itself in identifying and addressing public interests, aside from that of consumers of products. Measuring consumption through economic markets is an extremely limited method of identifying public interests. The market model, unlike the public sphere model, therefore often focuses exclusively on only a narrow range of interests defined by the majority of viewers or the most desirable audiences, and fails to takes into consideration minority interests or those of less desirable audiences.

Further, the market model inaccurately portrays economic markets as inherently superior or preferable arbitrators of public interests than government policy and regulation. Markets have their own limitations and failures as well. For example, the operation of markets is limited by the high level of industry consolidation amongst distributors described in chapters three and four. Consequently, collusive practices within the incumbent industry oligopoly often creates negative norms in market behaviour and the incentives, generally profit-centred, for industry members to continue with such behaviour becomes greater than the fear of customer loss. Excellent examples of such market failures in the case of broadcasting distribution include negative option billing, which was resolved through government intervention, and industry-wide basic service rate increases following the elimination of rate regulation, which continues to present problems in terms of the ongoing affordability of broadcasting services.

As a final point, while the dichotomy between the public sphere and market model approaches to public interests has been a useful tool in analyzing the regulation of television distribution, it should be acknowledged that several flaws in this method have also appeared. Among these, it has become apparent that equating the public sphere and

market models with detailed regulation and reduced regulation, respectively, is a considerable over-simplification of what occurs as these models are employed in practice. As we have seen, market model regulatory approaches have often resulted in different forms of regulation or even in more detailed regulation than public sphere model approaches. Moreover, certain regulatory decisions focused on legitimate areas of public interest are not easily described in terms of these two models, but rather are composed of a complex interplay of factors that can be attributed to one, both or neither of these models. Consequently, it has been necessary to simplify our description of the outcomes of these decisions so as to fit more neatly within the categories we have established. Finally, the public sphere/market model dichotomy employed throughout this thesis does not adequately account for the influence of other potential models on regulatory approaches to public interests, such as those related to the concept of a Canadian broadcasting system, which is discussed in the following section.

The concept of a Canadian broadcasting system

In addition to the workings of the two models or viewpoints described above, our examination of distribution regulation has revealed a third, somewhat separate dynamic or model of public interests that has had a tremendous impact on the manner in which public interests are addressed in the Canadian regulatory system. As we have seen in previous chapters, a key characteristic of the regulation of broadcasting in Canada is its approach to broadcasting as encompassing a single national system. Being a "national" system, it is to some extent bounded by our geography, but the principles and concerns that lie behind the creation and maintenance of a broadcasting system are focused more on nation-building and identity, i.e., Canadian sovereignty and cultural identity, than on

these physical boundaries. This holistic conception of a broadcasting *system*, on which so much Canadian policy and regulation rests, is not defined so much by physical space, as by *conceptual* space. The regulatory preoccupation with this idea results in a number of outcomes, some obvious, others not so obvious.

First, government actors tend to take something of an ecological view of the broadcasting system – or eco-system, one might say. This appears most obviously in the somewhat reified grammar applied to describe the system and its characteristics. Officials will frequently refer to the "health" of the system, or its "growth" and, more often than not, its potential "death". More importantly, it also manifests in the persistent view that an appropriate (healthy) balance must be sought and maintained between components of the system, i.e., industry segments, usually between programming services and distributors, but often between conventional television and pay and specialty services, and, more recently, between so-called "analog" (meaning, generally, licensed before digital technology was commonly available) and "digital" programming services.

Much focus is also placed on determining what does or does not lie within this system. The primary method for denoting membership lies in the licensing process, which commonly involves extensive application and decision-making procedures in order to evaluate the acceptability of the applicant and to establish a variety of conditions for participation, i.e., conditions of licence and generally applicable regulations. If an activity is found to entail broadcasting, however, membership, along with the prerequisite benefits and burdens, is compulsory. In this sense, the system perpetuates itself by

continually reassessing both new areas of activity for broadcasting-like services[169] and the ongoing eligibility of its members.

Components of the system are not only expected, but required to contribute to the maintenance/improvement of the system, whereas activities or entities found to lie outside of the system are either ignored, marginalized, or, if neither of the first two is infeasible, exploited to the advantage of the system. For example, popular US television services are treated explicitly in this latter manner. As we have seen in earlier chapters, regulatory requirements compel distributors to offer these services only in packages with Canadian services. Subscribers to distributors' services then have no other option but to purchase the package in order to receive the desired US service. Accordingly, the US service acts as a package "driver", ensuring substantial subscriber revenues for its Canadian package "partners" regardless of whether they provide programming of interest or value to viewers. Such packaging requirements take into consideration only whether the components of the package are members of the system or not, rather than other features such as whether they might increase profits (private interest), or whether they might provide better services, introduce new services, reduce subscriber costs (potential public interests), etc.

Distributors themselves were initially considered a danger to this concept of a Canadian broadcasting system. Cable systems imported non-Canadian – and almost equally as bad, distant Canadian – television programming that theoretically threatened the ability of local Canadian television stations to provide programming and reach an audience for

[169] See the "New Media" section in chapter 4 for a detailed example of such an assessment. Another recent example pertains to mobile television, i.e., television services viewed on a wireless telephone (see Public Notice 2006-47, 12 April 2006).

their programming. Later, once integrated within the broadcasting system as described in chapter three, cable came to be viewed as the chief vehicle or "choke-point" for regulatory action. The rationale for inclusion of distributors within the system was fundamentally utilitarian: distributors are able to act as a method or tool for getting Canadian programming to Canadians, regardless of the quality or quantity of that programming.

This concept of a Canadian broadcasting system, as should be expected, deeply informs almost all regulatory practices. Certain rules preclude distributors from offering particular services,[170] for instance, foreign services that offer similar programming to that of domestic services, combined with other rules that require distributors to offer other services,[171] delineate both the external boundaries of the system and its internal contents. Consequently, these rules also provide limitations on the choices of members of the public (subscribers) in order to maintain this system. In other words, they prevent Canadians from making particular choices with respect to the programming that they wish to receive, not due to the relative merits of accessing such programming, but based on notions as to what may or may not benefit the system in general.

Attempts made to legitimate this type of regulation in terms of public interests must follow a somewhat long and convoluted path. This path begins with the assertion that a particular rule is of benefit or will prevent harm to the system. By strengthening or maintaining the system, the various components are also strengthened and maintained. If

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[170] Section 3 of the 1998 Regulations states

> A licensee shall not distribute programming services except as required or authorized under its licence or these Regulations.

[171] Sections 17, 18, 32, 37 and 38, among others, all set out requirements that distributors offer various types of programming services in certain circumstances.

these components are able to maintain or better the services they provide, then it is thought that the public benefits through access to these services. Accordingly, this logic assumes that this strengthening of the system ultimately (though indirectly) benefits the public interest. Such a claim of systemic benefits is difficult to assail since the indirect nature of such benefits make them difficult to measure or otherwise observe.

Alternatively, it might be argued that the concept of a Canadian broadcasting system is not so much a public interest model as it is a framework of separate interests that have tended to divert policy-makers and regulators from public interests. Out of concern for the maintenance and strengthening of the broadcasting system, the CRTC has tended to define a narrow set of potential public interests that form the focus of regulatory attention, other interests, either those deliberately or unintentionally excluded during the framing of legislation or those that change or appear afterwards, are marginalized. As a result, policy-makers and regulators may to some extent be considered to be subject to regulatory "capture" by their own invention.

Missed Opportunities

In setting out the methodology of this thesis in chapter one, I took the normative view that regulatory decisions are taken on the basis of particular concepts of the public interest, whether explicit or implicit. Yet throughout the preceding chapters, we have identified several instances in which regulatory decisions do not seem to involve consideration of public interests at all. Given the view taken in this thesis that the pursuit of public interests is fundamental to democratic governance in Canadian society,

regulatory decisions of this type should be regarded as missed opportunities for furthering such interests.

It should be recognized that the CRTC – and other government actors – is often limited in its ability to achieve address public interests by practical factors, such as the limited resources of the regulator itself. Given such limits, the CRTC has frequently considered itself compelled to adopt certain courses of action for reasons of administrative simplicity, rather than due to the assessment that the public or its interests would best be served by such a decision.

An additional practical limitation on the CRTC's ability to address public interests is that it – and again, most other government actors – cannot itself achieve its own goals but rather must rely on private entities to do so. That is to say that the CRTC does not produce its own television programming, nor does it broadcast or distribute it, but instead relies on other parties to carry out these tasks. Thus, attempts to influence private licensees, i.e., through regulation or moral suasion, have become the chief tools in achieving state goals for broadcasting. This fact leaves government actors in something of a quandary. To achieve its goals, the state must work chiefly through private entities with their own, often distinct, goals. In return for assisting in pursuing the goals of the state, regulated entities are permitted access to the broadcasting system, which may be quite lucrative. However, membership in this system also allows them to seek – and often achieve – regulatory concessions that may be contrary to the state's goals. As we have seen in chapters two through four, these may take the form of greater access to other

regulated areas of activity, direct or indirect funding, or reduced regulatory burden. The latter of which, in particular, permits licensees to whittle away at the tools governments use to achieve their goals, i.e., legislation, policy and regulation. Further, the state is largely dependent on regulated industries for the information necessary to determine whether its goals are achieved, e.g., how many Canadians are receiving services and where, how many Canadian services are being distributed, or how much Canadian programming is being viewed? The complex interplay of competing public and private goals, and the dependency of public interests on private interests, considerably complicates the decision as to when and why government intervention should take place and how public interests may be addressed or even if they are addressed at all.

Other circumstances in which the CRTC has missed opportunities to address public interests are less related to practical considerations than to ideological ones. For example, a number of the Commission's decisions seem to be guided by the understanding that certain technological changes are inevitable, such as the transition from analogue to digital technology. A similar fatalism has been extended to economic markets as well, such as in the Commission's treatment of changes in ownership and in its views as to what we have referred to as the "emerging communications market". In treating these matters as if they were the inevitable results of uncontrollable forces at work, the Commission has abdicated its responsibility for several areas of activity within its legislated mandate and thereby missed opportunities to identify and address public interests that may relate to those areas of activity.

Further missed opportunities relate to the Commission's focus on the needs and interests of the regulated industries, rather than on those of the public. Specifically, as is discussed at length in chapter four, the CRTC has almost exclusively focused its attention on regulating the relationship between the programming service and distribution sectors of the broadcasting industry. As such, the regulatory questions generally asked by it are, for example: Are programming services receiving sufficient revenues from distributors? How should distributors compensate programming services? To what extent should programming services and their advertising markets be protected from distributors, etc.? These questions indicate a regulatory approach that is preoccupied with structural or systemic issues and one in which the issues of concern to Canadians that subscribe to distribution services are ancillary or, at best, an extension of systemic biases.

Renewing the focus on public interests

I believe that public interests play a fundamental role in establishing government policy and regulation, as well as in democratic governance as a whole. In the case of television distribution regulation specifically, I have argued throughout this thesis that public interest concepts have historically been applied by Canadian legislators, policy-makers and regulators using some combination or form of the public sphere and market models of public interests. In addition, we have seen that regulation of cable and other distributors has also been characterized by a third approach to public interests that focuses on the concept of a Canadian broadcasting system and the maintenance of that system. Moreover, the history we have examined also includes several instances where regulatory decisions have been made for reasons that are not clearly relatable to public interests at all, which I have described as "missed opportunities".

Taking this all into consideration, it can be seen that the decisions taken by government actors with respect to television distributors have often resulted in a muddle of regulatory approaches to public interests as well as a number of missed opportunities to address such interests. Rather than continue on the current course, changes could and should be made – by the CRTC, in particular – to ensure that public interests are explicitly identified and addressed and that regulatory decisions are consistently tested against such interests. Having reached this conclusion, I will attempt to offer some concrete suggestions as to what form such an approach to television distribution should take.

First, in order for regulatory decisions to more consistently and directly approach public interests, the CRTC's focus should shift from the relationship between programming services and distributors to that between distributors and the subscribers (the Canadian public) that use their services. The current focus on programmer-distributor issues has distracted the Commission from other areas of specific public concern. These include issues such as affordability of distribution services, access by the disabled, customer service and subscriber equipment. Although it would seem self-evident that such issues should be a primary focus of regulation since they are fundamental to the ability of Canadians to access television services, the CRTC has almost completely abdicated its responsibilities in these areas, leaving them largely to self-regulation by distributors. Addressing these issues is of much greater significance than further regulation of the relationship between distributors and programming services.

Second, as has been discussed several times in this thesis, not only are public interest concepts difficult to locate and mobilize, once mobilized, they are frequently vulnerable

to strategic employment by other interests, e.g., as a result of technocratic tendencies and/or regulatory capture. Resolving these concerns would entail, at least, additional reinforcement of the independence of regulatory processes, i.e., from parliament (political influence), private interests (regulatory capture by the industry) and from the constructed concept of the broadcasting system itself (ideological regulatory capture). Although this might be achieved through changes to broadcasting policy and legislation, the best check against the co-opting of public interests by private interests is a greater degree of involvement by the public itself in representing its own interests, which is the subject of my last suggestion.

Finally and most importantly, the Commission's regulatory approach to public interests in television distribution must involve a larger role for the public itself. The current dominance of the market model of public interests has led to the conclusion that television viewing and other economic forms of participation, e.g., as consumers purchasing television products, represent a sufficient level of public participation. These types of participation are extremely limited. Instead, public participation should involve frequent and direct engagement in regulatory processes. Such participation might be made more likely if the substantive issues addressed in regulatory processes related to matters of more direct relevance to Canadians, e.g., affordability and customer service, as suggested above, rather than on the maintenance of the broadcasting system or on the protection of particular industry interests. Other specific initiatives to encourage public participation might entail changes to broadcasting legislation, such as the introduction of a public interest "test" as the basis of regulatory decision-making or the provision of

funding for individuals and groups that wish to offer public perspectives in regulatory processes.

However, it is not enough for legislators, policy-makers and regulators to improve the workings of public processes. The Canadian public itself needs to further engage in regulatory processes. The CRTC already has a strong tradition of providing the *mechanisms* necessary for public participation, i.e., it's public hearings and other public processes. Government actors cannot be blamed for continuing to focus on private interests if the public opts not to take advantage of the mechanisms available to it to represent its own interests. If the regulatory approach to television distribution is to be re-oriented towards a more consistent approach to public interests, a revitalized public must act as the primary force for change in that regard.

Taking all of the above discussions into consideration, the chief conclusions of this thesis could be summarized by saying that a renewed focus should be placed on the pursuit of potential public interests and the development of public interest standards in regulation. In many cases, government actors have been extremely successful in addressing public interests in television distribution. However, throughout this thesis we have identified a number of departures and distractions from such standards. In essence, although we are doing well, we could be doing much better. It is my hope that future efforts at policy and regulation in the field of television distribution will continue to pursue better regulatory approaches and ones that will consistently place public interests at the centre of government agendas.

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