Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Regulatory Policy CRTC 2009-329

Route reference:
Broadcasting Notice of Public Hearing 2008-11

Additional reference:
Broadcasting Notice of Public Hearing 2008-11-1

Ottawa, 4 June 2009

Review of broadcasting in new media

The Commission sets out its determinations regarding its review announced in Canadian broadcasting in new media*, Broadcasting Notice of Public Hearing CRTC 2008-11, 15 October 2008. The key areas addressed include the following:*

- *maintaining new media broadcasting undertakings' exempt status;*
- *amending the definition of new media broadcasting undertakings to include point-to-point mobile broadcasting undertakings;*
- *introducing reporting requirements and undue preference provisions for new media broadcasting undertakings; and*
- *fully endorsing the development of a national digital strategy.*

In addition, the Commission stated that it would refer to the Federal Court of Appeal the legal issue debated in this proceeding as to the applicability of the Broadcasting Act *to Internet service providers.*

Finally, within the context of this review, the Commission has also issued today a call for comments in Call for comments on proposed amendments to the Exemption order for new media broadcasting undertakings*, Broadcasting Notice of Consultation CRTC 2009-330, on the following:*

- *proposed amendments to the exemption order for new media broadcasting undertakings*

A concurring opinion by Commissioner Timothy Denton is attached.

Introduction

1. In 2007, the Commission launched the New Media Project Initiative (the Initiative) to examine the cultural, economic and technological issues associated with broadcasting in new media. The Initiative compiled research and stakeholder views on the broadcasting in new media environment and published the results in *Perspectives on Canadian Broadcasting in New Media*, on 15 May 2008.

2. At the same time, the Commission issued Broadcasting Public Notice 2008-44 calling for comments on the scope of a future proceeding to examine issues pertaining to Canadian broadcasting in new media. Based on the submissions received, the Commission, on 15 October 2008, initiated a public proceeding in Broadcasting Notice of Public Hearing 2008-11 (the Notice) in which it sought responses surrounding the following six main themes:

    i) a definition of broadcasting in new media
    ii) the significance of broadcasting in new media and its impact on the Canadian broadcasting system
    iii) the necessity or desirability of incentives or regulatory measures for the creation and promotion of Canadian broadcasting content in new media
    iv) issues concerning access to broadcasting content in new media
    v) other broadcasting or public policy objectives
    vi) the appropriateness of the new media exemption orders

3. The Commission received over 150 comments in response to the Notice and over 70 final submissions. At the oral hearing, the Commission heard submissions from more than 50 parties.

4. The written record and oral public hearing (the Proceeding) provided an opportunity to review the broadcasting environment in new media, its significance in the Canadian broadcasting system and its role in advancing the broadcasting policy objectives of the *Broadcasting Act* (the Act).

Background

5. In Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14 (the New Media Policy), the Commission determined, among other things, that some new media services constituted "broadcasting" within the meaning of the Act, but that regulation of these services would not contribute in a material manner to the broadcasting policy objectives set out in subsection 3(1) of the Act.

6. Following that public notice, the Commission issued Public Notice 1999-197 (the New Media Exemption Order), in which it exempted broadcasting undertakings that provide broadcasting services delivered and accessed over the Internet from any or all of the requirements of Part II of the Act or of a regulation thereunder.

7. The New Media Exemption Order was clarified with respect to Internet retransmission of broadcasting services in Broadcasting Public Notice 2003-2; interpreted to include mobile Internet broadcasting undertakings in Broadcasting Public Notice 2006-47; and supplemented by an exemption order for undertakings that provide television broadcasting services that are received by way of mobile devices in Broadcasting Public Notice 2007-13 (the Mobile Broadcasting Exemption Order).

8. The Commission's objective in exempting new media broadcasting undertakings in 1999 was to allow continued innovation by stakeholders to exploit the new opportunities made possible by Internet technology. The Commission noted at that time that Canadian content was being created for and consumed on the new platform and that access to the Internet was growing. Furthermore, the Commission was of the view that the effect of new media on television audience size would be limited until such time as high-quality video programming could be distributed on the Internet.

9. In December 2006, the Commission's *Report on the Future Environment Facing the Canadian Broadcasting System* (the Future Environment Report) was prepared pursuant to section 15 of the Act. The Future Environment Report was presented in response to the Governor in Council's order that the Commission create 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."

10. The Future Environment Report provided details on technological developments and trends, presented research and statistics on stakeholder and consumer trends, and suggested public policy action would be required within three to seven years.

11. In the decade since the Commission exempted new media broadcasting undertakings from regulation, the landscape has evolved significantly. Residential broadband Internet access is available to 93% of households across the country and has been adopted by 48%[1] of Canadian households. Technologies that enable the delivery of high-quality broadcasting content on new media platforms are in commercial use. Canadians have steadily adopted a wide array of Internet-connected and multimedia-capable devices and are spending more time accessing broadcasting content over the Internet and through mobile devices.

Exemption for new media broadcasting undertakings

Issues

12. As noted above, in 1999, the Commission determined in the New Media Policy that regulating new media broadcasting undertakings was generally not necessary to achieve the broadcasting policy objectives set out in the Act.

13. The Commission stated, at that time, that evidence that the new media environment was having an undue impact on traditional radio and television audiences would suggest the need to review its approach to new media. The majority of the parties in the Proceeding, whether content creators, broadcasters, or broadcasting distribution undertakings (BDUs), were optimistic about new media's positive potential to affect their respective businesses, stating that new media is more of an opportunity than a threat and that it currently complements traditional broadcasting by promoting programs and services, and building audiences.

[1] Service above 1.5 mbps. CRTC Communications Monitoring Report 2008, Section 5.3
http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2008/cmr2008.htm

14. Parties were generally in agreement that licensing undertakings in the new media environment would be inherently challenging. They submitted that while they are actively participating in providing broadcasting in new media, no viable business model has yet been realized. These parties argued that since business models are still evolving in the new media environment, the Commission must allow this environment to evolve free of regulatory requirements.

15. Furthermore, broadcasters asked that the Commission be mindful of the global nature of new media and the competition from content providers and aggregators around the world with respect to the provision of broadcasting content to audiences, both Canadian and international. Broadcasters argued that new media must remain unregulated if they are to effectively compete in a global environment, and added that transporting the perspective of the regulated Canadian broadcasting system to the new media broadcasting environment would interfere with the flexibility and experimentation new media broadcasting undertakings must embrace to succeed.

16. Many parties submitted that the Commission's hands-off approach has been instrumental in allowing new media to flourish to this point and that regulatory intervention remains unnecessary for continued development and innovation in the new media environment. Most parties, however, supported the Commission's ongoing monitoring of the new media environment, its impact and its evolving role.

17. Nonetheless, while the majority suggested that the exemption orders should be maintained, or maintained with conditions, to foster the innovation and creativity that the environment demands, several parties, including artists and writers groups, and associated unions, suggested that the time has come to revoke the exemption orders to foster a strong Canadian presence in new media.

18. With respect to the revenue potential of new media broadcasting content, some parties identified the Alliance of Canadian Cinema, Television and Radio Artists' (ACTRA's) new National Commercial Agreement as a positive development. These parties submitted that the agreement should allow advertisers to experiment more cost effectively with new media commercials, thus potentially increasing broadcasters' ability to monetize their new media broadcasting endeavours, thereby providing further incentives for their involvement in the new media environment.

19. By contrast, the Commission also heard that there are currently limitations on the realization of new media's potential. Creators and broadcasters, among others, highlighted issues surrounding digital rights as significant impediments to the increased use of new media as a broadcasting platform. Broadcasters, on the one hand, expressed the wish to exert greater control over ancillary rights as distribution across platforms becomes increasingly important. Independent producers, on the other hand, claimed that they are disadvantaged in these rights negotiations and reported that broadcasters often expect digital rights to be surrendered for little or no additional compensation, which reduces the incentive to exploit them. Some parties submitted that this has hindered the distribution of Canadian content on multiple platforms.

20. In response, producers advocated for terms of trade that would incorporate a “use it or lose it” provision. For example, a broadcaster that acquired digital rights would have to demonstrate that it had utilized them within a specified time frame. If it failed to do so, it would have to forfeit the rights back to the producer or possibly pay an additional amount to renew them. The producers contended that such an agreement would lead to greater proliferation of content on new media platforms since they would be free to find other distribution outlets for programming that was not exploited by broadcasters within the prescribed time.

Commission’s determinations

21. The Commission notes that the current policy review highlighted the growing importance to Canadians of broadcasting in new media and the challenges and opportunities in defining the appropriate business model to capitalize on this new platform.

22. The Commission considers that broadcasting in new media creates opportunities for the broadcasting system to better serve Canadians and commends parties for their willingness to embrace the new media environment. Based on the record of the Proceeding, the Commission does not consider that broadcasting in new media currently poses a threat to traditional broadcasting licensees’ ability to meet their obligations. In fact, new media is currently being used in a complementary manner by many broadcasters for activities such as providing audiences with the ability to catch up on missed programs, promoting broadcast offerings and building brand loyalty. As such, the Commission is satisfied that broadcasters have the tools to adapt to the challenges posed by technological change and the motivation to incorporate new platforms and formats into their business models.

23. For the reasons set out above, the Commission concludes that traditional broadcasting frameworks should not be imposed in the new media environment without evidence that intervention is warranted. The Commission is of the view that parties advocating repeal of the exemption orders did not establish that licensing undertakings in the new media environment would contribute in a material manner to the implementation of the broadcasting policy set out in the Act. The Commission retains its view set out in the New Media Exemption Order that the exemption of new media broadcasting undertakings will enable continued growth and development of the new media industries in Canada, thereby contributing to the achievement of the broadcasting policy objectives, including access to those services by Canadians. To a significant degree, the Commission’s position is based on its conclusion that a successful commercial business model for broadcasting in new media has yet to emerge.

24. In light of the foregoing, the Commission finds that exemptions for new media broadcasting undertakings continue to be appropriate at this time. Specific details regarding proposed amendments to the current New Media Exemption Order are discussed in the following sections.

25. Notwithstanding the above, the Commission notes the importance of resolving digital rights issues if the Canadian broadcasting system is to take full advantage of the new media environment. The Commission therefore expects the broadcasting and production sectors to develop the appropriate frameworks from which to base individual negotiations respecting the ownership and exploitation of digital rights. In the long term, such terms of trade will provide clarity and stability to the industry, facilitate the distribution of original Canadian content across platforms, permit Canadians access to content on the platform of their choice and stimulate a Canadian presence in the new media environment. In addition to benefiting the Canadian public, these outcomes will benefit all segments of the broadcasting system.

26. As new media's significance in the Canadian broadcasting system continues to evolve, further consideration of its appropriate regulatory treatment will be warranted. In Public Notice 1996-59 (Policy regarding the use of exemption orders), the Commission indicated that the review of exemption orders will normally take place five years from the date of issuance of the order and will be subject to the Commission's standard public process. Given the pace of change in the new media environment, and in accordance with established policy, the Commission expects to conduct the next review of the broadcasting in new media environment within five years, or at such time as events dictate.

Defining broadcasting in new media

Issues

27. In the New Media Policy, the Commission determined that new media services consisting predominantly of alphanumeric text and those with the potential for significant user customization do not involve the transmission of programs for reception by the public and are, therefore, not broadcasting. The Commission also concluded, however, that some new media services do fall within the definitions of "program" and "broadcasting" set out in the Act.

28. In the New Media Exemption Order, the Commission defined new media broadcasting undertakings as undertakings that provide broadcasting services delivered and accessed over the Internet.

29. In the Mobile Broadcasting Exemption Order, the Commission distinguished mobile television broadcasting undertakings from new media broadcasting undertakings in its definition of the former as "undertakings that provide mobile television services that are received by way of mobile devices, including cellular telephones and personal digital assistants […] using point-to-point technology to deliver the service."

30. To frame the broadcasting in new media discussion that would take place in the Proceeding, the Commission stated in the Notice that it would use the term "new media" to encompass both the method by which services are delivered and accessed over the Internet and the method by which services are received by way of mobile devices, using point-to-point technology. No party disagreed with this definition.

Commission's determinations

31. While the Commission recognizes that some parties in the Proceeding disagreed with its determination in the New Media Policy, it affirms, for the reasons set out in that policy, its determinations that there is "broadcasting," within the meaning of the Act, in new media.

32. Further, the Commission acknowledges that broadcasting in new media is available in many different forms but maintains that it does not intend to regulate in any way the content, quality or availability of material created by individual Canadians in a personal capacity.

33. While only mobile *television* broadcasting undertakings are presently exempt in the mobile point-to-point broadcasting environment, the Commission no longer considers the distinction between audio and video programming to be relevant. Extending the New Media Exemption Order to cover all point-to-point mobile broadcasting undertakings will further the Commission's stated objective of technological neutrality, as all mobile broadcasting undertakings will be treated similarly, whether they rely on point-to-point or Internet technology. The Commission therefore intends to expand its definition of new media broadcasting undertakings to encompass all undertakings that provide broadcasting services either delivered and accessed over the Internet or delivered using point-to-point technology and received by way of mobile devices. Accordingly, in Broadcasting Notice of Consultation 2009-330, also issued today, the Commission proposes amendments to the definition of a new media broadcasting undertaking.

Funding for Canadian new media broadcasting content

Issues

34. The proposal put forward by cultural groups to establish a fund for the creation and presentation of Canadian new media broadcasting content, along with the sources of such funding, was a primary focus of many parties in the Proceeding.

35. Many parties that were in favour of creating such a fund stated that there is insignificant funding for high-quality, professional Canadian new media broadcasting content. Creative groups noted, in support of this position, that funds such as the Bell Broadcast and New Media Fund are typically oversubscribed. Other parties in support of a fund for Canadian new media broadcasting content were of the view that such funding could be used to ensure appropriate reflection of Canada's diverse culture, specifically through programming that reflects Canada's linguistic duality and the special place of Aboriginal peoples.

36. However, other parties, including Internet service providers (ISPs), argued that the proposed fund is not required to support Canadian new media broadcasting content. These parties pointed to the complementary nature of broadcasting in new media to traditional sources. They added that there are market incentives to repurpose traditional,

high-quality, professional television content for online and mobile distribution channels and to create collateral material distributed through these channels to assist in marketing television programming.

37. With respect to the source of the funding for the creation of such a fund, certain parties, including creative unions, guilds and producers, argued that ISPs and wireless service providers (WSPs), to the extent that they deliver broadcasting content, are an important part of the broadcasting system in Canada. These parties were of the view that ISPs and WSPs, in their distribution capacity, should be required to contribute to Canadian program creation and exhibition.

38. ISPs argued that they are not subject to the Act and that the Commission lacked the jurisdiction to impose a levy on their revenues for broadcasting-related purposes.

39. For their part, the National Film Board of Canada (NFB) and the Canadian Interactive Alliance, among others, advocated for a greater direct contribution from the Government of Canada.

Commission's determinations

40. The Commission considers that no evidence was presented to establish that additional funding to support the creation and presentation of Canadian new media broadcasting content would further the objectives of the Act. Furthermore, funds such as the Bell Broadcast and New Media Fund and the Quebecor Fund continue to provide funding for new-media-related projects.

41. The Commission also notes that the absence of established viable business models for broadcasting in new media suggests that the creation of a new fund as proposed is not appropriate at this time.

42. The Commission notes that the Minister of Heritage announced, on 9 March 2009, the establishment of the Canada Media Fund (CMF). The CMF, which is expected to be implemented by April 2010, will combine the Canadian Television Fund (CTF) and the Canada New Media Fund (CNMF) into a single fund to support Canadian content destined for multiple platforms.

43. The Commission considers that the creation of the CMF is a fundamental step in recognizing that the broadcasting environment is evolving past the traditional television screen. The Commission is of the view that the CMF, in conjunction with existing funding programs, will foster continued growth and development in the new media environment.

Promotion of Canadian broadcasting content

Issues

44. The visibility and promotion of Canadian broadcasting content in the global new media environment presents obvious challenges.

45. Parties provided limited details as to what the promotion of Canadian new media broadcasting might entail. Some parties suggested that services offering a defined set of program choices to their customers, most notably wireless service offerings, should be required to carry and promote Canadian content. For their part, representatives of the wireless industry emphasized that these packages (often described as “walled gardens”) have not proven very successful. They argued that the industry is quickly moving toward the open Internet model, whereby mobile users can access content of their choice through the Internet.

46. Many parties submitted that, to ensure a Canadian presence in an environment of seemingly limitless content, Canadian content must be favourably placed and visible among service provider content offerings. In addressing this issue, Rogers Communications Inc. proposed a broadband video portal that would allow more programming to be offered in new media and provide greater visibility of Canadian programming. Quebecor Media Inc. also highlighted its plans to provide increased access to Canadian content through a similar portal initiative.

47. Finally, with respect to technological solutions for Canadian content promotion, some parties suggested the possibility of requiring ISPs to use filtering or other technology to give priority access to Canadian content (but not to prevent access to foreign content). Many parties opposed this prioritization of Canadian content based on the view that the Internet should be equally open to all sources of information. Further, several parties asserted that such prioritization could not be implemented in a practical way.

Commission’s determinations

48. The Commission is of the view that the promotion and visibility of Canadian content in new media is important to implementing the broadcasting policy set out in the Act. It notes that many new media broadcasting undertakings are currently developing innovative and creative approaches to promote Canadian content on new media platforms. However, the Commission considers that, at this early stage, specific measures for the visibility and promotion of Canadian content in new media would not be appropriate.

Measurement

Issues

49. The measurement of the availability and consumption of Canadian broadcasting content on new media platforms was an issue raised frequently during the Proceeding. Parties addressed the measurement of two different but complementary kinds of data: internal

and external. Internal data, which is data compiled by a new media broadcasting undertaking about its content offerings on new media platforms, could include a list of all the programs offered, how often each was viewed, and the associated revenues and expenditures. Discussions about external data, which is data on broadcasting activities offered over new media platforms at an aggregate level, raised issues about the feasibility of identifying and measuring such data.

50. Parties differed in their opinions as to the effectiveness of existing measurement tools that report and track broadcasting activities in new media. While some parties expressed doubts regarding the accuracy of the metrics involved with internal data collection, broadcasters acknowledged having kept track of this information despite its perceived limitations.

51. Many parties supported the idea of a requirement for new media broadcasting undertakings to regularly report data on their new media activities to the Commission while others argued that any new reporting requirements would just increase the regulatory burden.

Commission's determinations

52. The Commission considers that the measurement and monitoring of Canadian broadcasting content are necessary to ascertain the growing importance and significance of broadcasting in new media in the Canadian broadcasting system. The Commission acknowledges the limitations of current data measurement tools but nonetheless sees value in collecting the best information available. Broadcasting content data will provide the Commission with a more complete base from which to review and develop appropriate broadcasting policy in an evolving environment.

53. Furthermore, the Commission is of the view that, given that new media broadcasting undertakings are already collecting broadcasting content data for their own purposes, imposing reporting requirements for this data would not substantially increase the regulatory burden.

54. Accordingly, in Broadcasting Notice of Consultation 2009-330, the Commission proposes amendments to the New Media Exemption Order that would require new media broadcasting undertakings to report details of their new media broadcasting activities, which may include broadcasting content usage and offerings, revenues and expenditures, at such time and in such form, as requested by the Commission.

55. For greater clarity, given the stated challenges concerning measurement tools and standards for the monitoring and reporting of broadcasting activities in new media, the Commission will initiate at a later date, for comment by interested parties, a follow-up public proceeding on proposed reporting requirements for new media broadcasting undertakings. The follow-up proceeding will explore in greater detail the specific reporting requirements of new media broadcasting undertakings, identify which undertakings will be subject to the requirement and potentially examine the feasibility of identifying and measuring new media broadcasting content.

Undue preference

Issues

56. A number of content providers argued that despite new media's promise of open access, there are gatekeepers in the new media environment with the power to give certain content providers preferred access to their platforms and customer base. During the Proceeding, this issue was most frequently discussed with respect to wireless carriers that offer walled garden mobile entertainment packages.

57. As mentioned previously, representatives of the wireless industry submitted that the walled garden model is being replaced by open access to the Internet, using a new generation of sophisticated mobile devices that incorporate web browsers and access to third-party downloadable applications. They contended that wireless customers, like wireline customers, are not prevented from accessing the content of their choice on the Internet.

58. Several parties also submitted that any concerns about undue preference in the new media environment are hypothetical and therefore do not merit a Commission response. Other parties, however, stressed that it was essential for entities controlling the distribution of broadcasting content in new media to be subject to undue preference provisions.

Commission's determinations

59. The Commission takes no position on whether situations of undue preference with respect to broadcasting content have or have not occurred to date in the new media environment. The Commission considers, however, that the ownership structure within Canada's wireless industry suggests that the potential for unduly preferential treatment needs to be addressed because the industry structure comprises vertically integrated companies with ownership interests in content providers.

60. Despite assurances from the wireless industry that walled gardens are being replaced with open Internet access, the Commission notes that closed services are the norm in advance of greater mainstream adoption of more sophisticated devices. As such, the process of selecting content for those services must not subject unaffiliated programming undertakings to undue disadvantage with respect to reaching mobile audiences.

61. With respect to other new media broadcasting undertakings, the Commission does not consider that such concerns over undue preference are warranted. It recognizes, however, that this could change as business models for the aggregation of content offerings evolve. The Commission therefore considers the imposition of an undue preference provision to be appropriate.

62. Accordingly, in Broadcasting Notice of Consultation 2009-330, the Commission proposes amendments to the New Media Exemption Order, prohibiting new media broadcasting undertakings from conferring an undue preference on themselves or another person, or subjecting any person to undue disadvantage.

63. To provide guidance on the type of situation that could give rise to an undue preference in the new media environment, the Commission offers the example of a new media broadcasting undertaking engaged in programming distribution that acquires content from an affiliated programming undertaking either to the exclusion of non-affiliated programming undertakings or on more favourable terms or conditions than those applicable to non-affiliated programming undertakings.

64. The Commission considers that allegations of undue preference in the new media broadcasting environment should be subject to the same reverse onus provision as elsewhere in the broadcasting system. The party alleged to have engaged in preferential behaviour will generally be in the best position to provide information on its own practices. Once the complainant has established the existence of a preference or disadvantage, the onus should shift to the allegedly infringing party to demonstrate that its actions were not undue.

65. The Commission further considers that parties to undue preference disputes involving new media broadcasting should be able to avail themselves of the Commission's mediation and dispute resolution framework.

Applicability of the *Broadcasting Act* to Internet service providers

Issues

66. The question of whether ISPs (wireline or wireless) are subject to the Act when they provide end-users with the means to access broadcasting through the Internet was a controversial issue in the Proceeding. Whereas some parties argued that ISPs are subject to the existing New Media Exemption Order, others argued that they do not fall within the class of undertaking that is subject to that order. More specific polarized opinions were also expressed, supported by extensive legal opinions. For example, ISPs argued that they are not engaged in broadcasting and are involved solely in telecommunications activities. In response, cultural groups argued that ISPs play a critical role in the Canadian broadcasting system and carry on as broadcasting undertakings subject to the Act.

Commission's determinations

67. The issue of the applicability of the Act to ISPs was raised primarily in relation to the proposal by cultural groups in the Proceeding for a levy on ISPs to create a fund to support the creation and presentation of Canadian new media broadcasting content. Although the Commission has determined that funding (and, consequently, a levy) is neither necessary nor appropriate at this time, it considers that the question as to whether ISPs are subject to the Act must be resolved. If ISPs were subject to the Act, they would fall within the scope of the New Media Exemption Order given that it was intended to encompass all broadcasting undertakings whose services are delivered and accessed over the Internet. Accordingly, legal certainty with respect to the status of ISPs under the Act is necessary in order to know whether ISPs are subject to the New Media Exemption Order and, as such, whether the proposed amendments to that order to impose reporting

requirements and undue preference provisions for new media broadcasting undertakings will apply to them.

68. The Commission notes that, pursuant to subsection 4(4) of the *Broadcasting Act*, a telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity, is not subject to the *Broadcasting Act*. Likewise, pursuant to section 4 of the *Telecommunications Act*, that statute does not apply in respect of broadcasting by a broadcasting undertaking. The legal issue as to whether ISPs are subject to the *Broadcasting Act* raises fundamental questions regarding the distinction, for the purpose of the *Broadcasting Act* and the *Telecommunications Act*, between telecommunications common carriers and broadcasting undertakings.

69. In the circumstances of this case, the Commission considers that, pursuant to section 18.3 and subsection 28(2) of the *Federal Courts Act*, it is appropriate to refer to the Federal Court of Appeal (the Court) for resolution the question of whether ISPs, when they provide access to broadcasting content, are broadcasting undertakings within the meaning of the *Broadcasting Act* and are thus subject to the New Media Exemption Order.

70. The Commission intends to take the necessary steps to initiate the reference to the Court in the near future and expects to receive directions on procedure from the Court. These directions on procedure will be available at the Court, and copies can be obtained from the Commission on request.

National digital strategy

Issues

71. The NFB emphasized the importance of the digital revolution and predicted that its political, social, economic and cultural impact will mirror that of the industrial revolution of the late 18th and early 19th centuries. The NFB strongly urged the Government of Canada to develop a national digital strategy to ensure that the various components of new media are part of a coordinated national approach.

72. The Ontario Minister of Culture, the Ontario Media Development Corporation, Astral Media Inc., Bell Canada/Bell Aliant, the Canadian Film and Television Production Association, Corus Entertainment Inc. and Quebecor Media Inc. are among a number of parties that endorsed the development of a national digital strategy. These parties expressed the view that a national strategy would not only foster strong Canadian companies that can compete globally but would also help to ensure that Canada is one of the leading knowledge-based economies of the 21st century.

73. Several parties also raised new media issues that were outside the scope of the Proceeding or otherwise beyond the Commission's jurisdiction under the Act, including copyright legislation, privacy, taxation policy, broadband infrastructure, spectrum management, digital archiving of cultural works and converged legislation for broadcasting and telecommunications. These topics were mentioned as part of a broader discussion on new media issues that merit comprehensive deliberations.

Commission's determinations

74. The Commission highlights that several countries have already recognized the value and the importance of a national digital strategy and, as a result, have developed plans for their citizens' and economies' futures that both respond to perceived challenges and take advantage of expected opportunities presented by the digital age. The Digital Britain Review, Digital France 2012, New Zealand's Digital Strategy 2.0, Germany's iD2010, and Australia's Digital Economy Future Directions Paper, while tailored to their national priorities, send a clear message of the importance of a holistic approach to this environment.

75. In Canada, initiatives such as the Canadian Digital Information Strategy undertaken by Library and Archives Canada (LAC) recognize Canada's enhanced position in a global digital information economy as well as the significance and value of embracing digital technology in creating, managing and preserving Canada's digital information assets. The LAC strategy is based on three broad opportunities: strengthening content, ensuring preservation, and maximizing the access and use of Canada's information assets, accumulated knowledge, and intellectual and creative accomplishments.

76. While the Commission's focus on broadcasting in new media has been appropriate given its mandate under the Act, it is limited in scope compared to the wide range of issues resulting from developments in the digital age. The Commission recognizes that issues raised in relation to matters of taxation, copyright, privacy, spectrum management, and convergence of broadcasting and telecommunications industries, among others, are all interrelated and warrant a coordinated approach.

77. The digital environment is rapidly changing the everyday lives of Canadians and presents economic, cultural and technological opportunities. As the pace of change accelerates with technological advances and the proliferation of digital devices, Canadians will be presented with endless opportunities in the ways in which they live, work and interact with media. Canada's ability to compete and prosper in this environment demands national leadership and a focussed agenda.

78. Given the breadth and magnitude of the issues and their importance to Canada's future, the Commission fully endorses the call by the NFB for the Government of Canada to develop a national digital strategy.

Secretary General

Related documents

- *Call for comments on proposed amendments to the Exemption order for new media broadcasting undertakings,* Broadcasting Notice of Consultation CRTC 2009-330, 4 June 2009

- *Canadian broadcasting in new media* – Notice of consultation and hearing, Broadcasting Notice of Public Hearing CRTC 2008-11, 15 October 2008, as amended by Broadcasting Notice of Public Hearing CRTC 2008-11-1, 22 January 2009

- *Call for comments on the scope of a future proceeding on Canadian broadcasting in new media* – Notice of consultation, Broadcasting Public Notice CRTC 2008-44, 15 May 2008

- *Perspectives on Canadian Broadcasting in New Media*, 15 May 2008

- *Diversity of voices* – Regulatory policy, Broadcasting Public Notice CRTC 2008-4, 15 January 2008

- *Exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2007-13, 7 February 2007

- *Report on the Future Environment Facing the Canadian Broadcasting System: A Report Prepared Pursuant to Section 15 of the* Broadcasting Act, 14 December 2006

- *Regulatory framework for mobile television broadcasting services*, Broadcasting Public Notice CRTC 2006-47, 12 April 2006

- *Internet retransmission – Report to the Governor in Council pursuant to Order in Council P.C. 2002-1043*, Broadcasting Public Notice CRTC 2003-2, 17 January 2003

- *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, 17 December 1999

- *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999

- *Policy regarding the use of exemption orders*, Public Notice CRTC 1996-59, 26 April 1996

This document is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: http://www.crtc.gc.ca.

Concurring opinion of Commissioner Timothy Denton
(Revised as of July 8 2009)

The Commission's regulatory policy announced today has my support. It has arrived at the correct result in terms of good public policy. It is the best possible result obtainable within the confines of the *Broadcasting Act* (the Act).

The issue for me and for many Canadians is that the Act fails to provide the right kind of guidance to the Commission in rendering a decision so fundamental to the future of the Internet in Canada. Unless the decision-making framework is changed, there is a good chance that a future Commission will feel obliged to extend broadcasting licensing over Canadian portions of the Internet in an effort to preserve an obsolete system.

I base my judgment on having been one of the several authors of the most recent Act, as a former counsel to the Canadian Association of Internet Providers and other Internet service providers (ISPs) and as having worked on Internet-related domain name and addressing issues over the past ten years.

1. This decision is about the Internet and we get no help from our statute

This decision is about the Internet, not broadcasting. Though the Commission is obliged to consider matters through the perspective of the Act, the fundamental issue here was whether that should be the case. An invasive and transformative technical innovation such as the Internet creates a distinct reality and set of facts that cannot be ignored.

The Act is an artefact of history. Nevertheless, it remains what the Commission must apply. It informs the debate and instructs the CRTC how to think. Therefore no sensible discussion of the Internet and the Act can take place in terms exclusive to the Act. Yet this is what Commissioners are asked to do.

Commissioners of the CRTC should not be deciding at five-year intervals or less whether massive amounts of personal and corporate communications should be subjected to a comprehensive scheme of prior approval by the state. This is the issue which should be put permanently beyond the reach of the CRTC. It is for this reason especially that steps must be taken to limit the Act to "broadcasting", as it is popularly understood, and to leave the Internet to evolve.

Such a result is achieved, for the next five years, maybe less, by the exemption policy confirmed in this regulatory policy. Clearly the danger remains that, guided by the terms and categories of the Act, a future set of Commissioners are asked to subject a portion of the Internet to the Act.

This possibility must be eliminated. The Commission has recommended two approaches, both of which have merit. One is a reference to the Courts. The other is a broad look at a national digital transition strategy. One of the principal benefits which could be achieved

by a broad governmental review would be to put this issue – the freedom of people to communicate across the Internet without being subject to state licensing – permanently to rest.

2. The last analog vacuum tube in the house

The issue for many cultural nationalists and television production interests – though not for broadcasters themselves – was the perceived need to bring the Internet into conformity with Canadian broadcasting policy.

The Internet is beginning to reach the home television set, described once by George Gilder as "the last analog vacuum tube in the house."[2] (Unless the family TV set has been replaced by a flat screen version.) So the question arises whether the legal system which governs broadcasting needs to adapt to the Internet, or whether the Internet needs to adapt to the legal system which governs broadcasting. Many Canadians dependent on the Act for their revenues and business model seriously argued before the Commission that the legal model informing the Act both could and should be applied to the Internet, or at least to the portion of the Internet which distributes television programming. Such a confidence in the power of state regulation has undergirded Canadian broadcasting policy from its inception in the 1930s. To devotees of Canadian cultural nationalism, the Internet and the possibilities it creates is yet another threat to cultural sovereignty that far-seeing government policy should refashion to its own purposes.

They have several reasons to be confident. Every previous technical development – cable television, satellites, pay and specialty services – has been brought under the control of the CRTC.

In a nutshell, Canadian video broadcasting policy is predicated on licensing a set of businesses which make money from the Canadian taste for imported U.S. programs. Some of the profits obtained are then poured back into the development of Canadian productions. (Radio is not subject to the same conditions, since domestic production is economically feasible.) The value of the broadcasting licence has been founded on, first, advertising revenues available in the market in question and, later, the subscription revenues obtainable for various specialty channels.

To the Act and its devotees, the Internet looks like yet another innovation in television program delivery which can and should be turned to the advantage of domestic television program production. The proposed tax on Internet carriers, which was the central economic issue in this proceeding, was the preferred means to raise money for television program production, on the theory that Internet content is a threat to Canadians because of its ability to draw eyeballs away from Canadian television.

[2] Gilder, George. *Microcosm: The Quantum Revolution In Economics And Technology*, Free Press, July 1990

3. The *Broadcasting Act* hinders our understanding of the issues

The Internet is much more important than a device for slipping American programming past the vigilance of the Commission. Moreover, I consider the statutory lens through which we are required to ponder the significance of the Internet is a barrier to understanding its nature and possibilities.

Why this should be so is quite simple. The Act is a comprehensive scheme for the regulation of the transmission and content of a certain kind of speech. Alone among the many kinds of speech available to Canadians, broadcasting requires a licence from the state: specifically, from the Commission. Neither talking on the telephone nor printing requires that one obtain the prior permission of a state agency. But to "broadcast" within the meaning of the Act is to engage in an activity which requires state approval. Failure to obtain such prior permission makes one liable to serious punishment.

Many may be unaccustomed to considering broadcasting a form of speech that involves a certain technical apparatus, but I use "speech" in the sense of encompassing print, drama, or talking, whether or not augmented by a technical system of transmission. Speech through a printing press is a 15th century augmentation of the written word; radio is a 20th century augmentation of speech, and television in the main is an augmentation of drama.

Why broadcast speech requires a licence from the state and written speech does not is predicated on certain attributes of the technology of broadcasting in the early 20th century, most all of which have been surpassed or eradicated. It also reflects some purely accidental results of our constitutional history.[3] Because broadcasting used electromagnetic spectrum which was declared a public resource, it has been a licensed activity since its inception. The technical regulation of spectrum is accomplished by the *Radiocommunication Act*.[4] The use of spectrum for communicating meaningful messages is governed by the Act, which has entirely different and aspirational purposes, and which directs the Commission to a comprehensive scheme of regulation of people called "broadcasters".

The Act is so crafted to define full-motion video or music distributed in Canada through a communications carrier as "programming." Once defined as "programming" it becomes "broadcasting" which then cannot be conducted without being licensed by the state. A legal analysis might spend more words to say the same thing with more qualifications but this is basically the deal. I take no position on whether this view would ultimately be supported in the Supreme Court if it were applied to transmissions across the Internet; it is sufficient that serious legal minds consider this to be true, and it has been proposed to the Commission as the correct interpretation of the law. (Other law firms disagree.)

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[3] De Sola Pool, Ithiel. *The Technologies of Freedom,* Belknap Press, 1983, Original from the University of California, Digitized 30 September 2008. De Sola Pool discussed these issues of legal convergence of printing and broadcasting presciently in 1983.

[4] R.S., 1985, c. R-2 at http://laws.justice.gc.ca/en/R-2/index.html

Consequently, if this were so, the application of the Act to the Internet necessarily involves a *vast* extension of government licensing over speech of a certain kind passing through computers. This is the central issue in this proceeding.

In the course of the hearing, the Commission heard from many parties calling for the extension (or application, if you will) of the Commission's authority over the Internet. Few expressed concern for what such a licensing scheme would mean in practical terms for freedom of speech, or freedom of commerce, or the consumer interest. "Just do it" several parties told us, and we will figure out the implications later. They assumed that the Commission could craft regulations to avoid interfering with the right – sorry, the legal privilege – of people to communicate through the Internet.

The Act itself causes parties to frame their arguments and considerations in its terms, rather than in terms of the features of the Internet. When appearing before a regulatory commission it is wise to argue in the same terms as the regulators themselves are required to think. In this instance, the law the Commission is obliged to administer significantly distorts accurate understanding of the phenomenon subject to regulation. The Internet works on principles quite alien to broadcasting, when understood as a technical system, yet it is squeezed and distorted into categories created by an Act which never contemplated its existence. This amazing platform for innovation[5] becomes yet another regulatory category within the framework of the Act, to be exempted, regulated, or licensed, according to its danger or lack of harm to the Canadian broadcasting system and its dependents. Canadian broadcasting policy is the only aspect of the Internet which the Act allows us to consider.

It is not useful to attempt to understand the Internet in terms of how it conforms to the categories embedded in the Act. It is akin to judging the Copernican system (planets go around the sun) in terms of how well it conforms to the view that the planets and stars rotate about the earth. Yet that is the set of conceptual tools the Act gives us as Commissioners. It was fortunate that the findings of fact were that the Internet does not currently harm Canadian broadcasting. What if they had been otherwise? What if the Internet harmed Canadian broadcasters? The answer would be to reach for regulation and licensing, as always.

4. The Platform for innovation

We are all aware that the Internet has fundamentally changed the range of possibilities available to us, but fewer would be aware why this is happening. The essence of the Internet is *innovation without permission*. No one has to ask permission of a carrier or a regulatory agency before introducing a new product or service. The foremost example of this is the introduction of the World Wide Web by Tim Berners-Lee in 1994. The World Wide Web was a program given away for free. It enabled the creation of *web pages*, and with web pages came the need for *browsers* to open up web pages and the *domain name system* to provide convenient addresses by which to locate *web pages*. To this day many

[5] See Lawrence Lessig's speech about this issue at http://www.itu.int/wsis/docs/pc2/visionaries/lessig.doc.

people understandably confuse the World Wide Web with the Internet, because the first *application* they found useful was the Web.

The triggering event for the invention of the Internet may have started many years earlier in 1967 when the then head of the information processing techniques office of ARPA, the Advanced Research and Planning Agency of the US Department of Defense, Bob Taylor,[6] asked why the three computer terminals in his office could not be replaced by one terminal attached to three different computer networks.[7] This question gave rise to the Internet protocols, which are machine languages for connecting computers independent of their internal operating systems. The Internet protocols have several functions, but at their most basic they are a form of Esperanto for machines. These languages are the deliberate compositions of engineers, acting collectively in standards-making bodies. They should be thought of in the same way as we would think of a sonnet or a haiku, as the invention of human minds.

The results of the research and thinking that took place in the 1960s in computer science labs invisible to the outer world, was a system which refashioned communications into something suitable to the characteristics of computers. Messages were broken up into *packets*, which were directed to their destinations by a specialized type of computer called a *router*. Packet switching was particularly suited to computers, which receive information in millisecond bursts.

The game-changing innovation brought by the Internet protocols was to separate the contents from the carriers in such a way that the carrier did not and could not control the content of the packets.

Such a development was impossible before the invention of the digital computer. By contrast, the public switched telephone network (PSTN), invented in the 1880s, still runs on basic design notions which pre-date the computer. Despite the fact that the PSTN was computerized, its basic design was not refashioned in the light of computer technology, only made to run faster and cheaper on the same technical concepts with which it began.

Dissociating the development of "programs" or "applications" – the content – from the carriage has had momentous consequences. The innovative characteristic of the Internet has been described in terms of its ability to allow *innovation from the edge*, rather than the centre, of networks.

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[6] Bob Taylor's career is described in http://en.wikipedia.org/wiki/Robert_Taylor_(computer_scientist).

[7] A concise official history of the Internet is provided by its creators at http://www.isoc.org/internet/history/brief.shtml. The story of Bob Taylor's three terminals is told in *Nerds: A Brief History of the Internet* by Stephen Segaller, TV Books, New York, 1998, pp.49-50. His purpose was to cut the costs of too many computers and too many non-communicating networks. Another useful history of the development of the Internet is given in John Naughton's *A Brief History of the Future: the Origins of the Interne*t, Weidenfeld and Nicolson, London, 1999.

Open endpoints, open standards, innovation from the edge: these terms denote a fundamental technical shift in the design of communications networks. The standards which govern the Internet are fashioned by discussion among engineers and technicians in voluntary assemblies, principal among which is the Internet Engineering Task Force.[8]

By contrast, cable television and the telephone system are designed as closed proprietary networks running on proprietary standards. Their endpoints are closed. While closed endpoints convey many advantages – there is no spam through such a system – they are not conducive to uncontrolled innovation.

Table 1. Major Characteristics of Internet versus Telephony and Cable Systems

Internet	Cable Television and Telephony
Underspecified	Fully specified
Peer-to-peer	Master-slave
End-to-end	Service control points
Open to innovation from third parties	Innovation controlled by system owners
Applications are split from transport	Applications integrated with transport
Standards developed in open forums	Proprietary standards

The table above captures in bullet form the differences. While this is not the space for a thesis on the subject, my purpose is to highlight the fact that the Internet represents a fundamentally different approach to network design than the other two networks we have developed to carry telephone calls and television signals.[9]

The dissociation of the application from the carriage has meant that entirely different organizations can create content from the organizations which carry signals. E-mail, the World Wide Web[10] and Skype[11] were invented by individuals or small groups, and put out on the Internet for free or for pay. No one could stand in the way and say: "that program shall not run across my network". The design embedded in the protocols of the Internet has dissociated the carriage of signals, and thus the costs of systems which carry signals, from the signals themselves.

This amounts to an enormous technological revolution. Programs and applications (roughly speaking, software) can be produced at vastly less cost than the costs of the physical network itself. The costs of the network are still governed by the immutable costs of physical things, such as the costs of wires, trenching, ducts, towers, and poles, while the other is governed by Moore's Law,[12] which doubles the price performance of computers roughly every 18 months.

[8] See http://www.ietf.org/

[9] A place to begin might be "Protocol Interfaces are the New Bottlenecks" by Timothy Denton and François Ménard, at http://www.tmdenton.com/pub/presentations/bottlenecks.pdf. A longer, more nuanced discussion would qualify the discussion of the end-to-end nature of the net with the issue of Network Address Translators and traffic management techniques. But that is another essay.

[10] http://en.wikipedia.org/wiki/History_of_the_World_Wide_Web

[11] http://en.wikipedia.org/wiki/Skype

[12] http://en.wikipedia.org/wiki/Moore's_law and http://research.microsoft.com/en-us/um/people/gray/moore_law.html

5. The relevant issue is freedom of speech, not potential damage to the broadcasting system

The issue as I conceive it is the freedom to speak across the Internet through full-motion video, music, or recorded speech, without the threat of government licensing. It is a more fundamental concern than what happens to the protections and economic models of Canadian broadcasters and the other interests vested within broadcasting policy. It is the right to speak freely – albeit through modern technology – which is challenged every time the Commission looks at its new media exemption orders.

The boundary between what is "broadcasting" and what is not is defined by the predominance of written text.[13] If written text predominates, it is not likely to be considered "broadcasting". If it is predominantly full-motion video, or sound, it will be considered "broadcasting" unless the Courts clarify otherwise or Parliament changes the Act. Increasingly, as bandwidth available to Canadians increases, communication among individuals will be conducted in full-motion video, and thus be subject to state licensing of the speakers. Some may welcome this development. I and a great many others do not.

The Commission's authority over licensees is enormous and consistently supported by the Courts. Its authority has been exercised in a visible and transparent way in a manner consistent with the rules of fundamental justice. Its decisions have been confirmed or corrected by the Courts and the federal Cabinet. The Commission has no plans for the regulation of Internet speech, it needs to be said. However, part of its licensing and regulatory authority deals with the boundaries of expression, and to this subject we turn.

The regulation of speech by this Commission takes place both by it acting directly and by instituting a regulatory regime where speech controls are exercised indirectly. The Canadian Broadcast Standards Council (CBSC) is a case in point. The CBSC describes itself as follows:

> The CBSC is a creature of the private broadcasters and plays an intermediate role in the regulatory process. With the support of the Canadian Association of Broadcasters (CAB) and the approval of the Canadian Radio-television and Telecommunications Commission (CRTC), but without the heavy club or formalities of government sanctions, the Council promotes self-regulation in programming matters by Canada's private sector broadcasters.[14]

The CBSC would not exist, in my opinion, unless the broadcasting industry was regulated. Self-regulation of this type is only necessary when it staves off more onerous regulation. Recently an Ottawa talk show host was reprimanded by the CBSC[15] for discussing Islam in what the CBSC considered to be contemptuous terms. The CBSC conducts detailed and careful examinations of complaints against broadcasters.[16]

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[13] See the definition of "programming" in section 2 of the Act.
[14] http://www.cbsc.ca/english/about/role.php
[15] http://www.cbsc.ca/english/documents/prs/2009/090206a.php
[16] http://www.cbsc.ca/english/decisions/list.php

In some other cases, speech controls are exercised directly by the revocation or non-renewal of broadcasting licences. Such a non-renewal occurred in the case of a Québec radio station whose talk show host was conspicuously offensive.[17] In the case of a particular religious channel, the Commission directly governs the composition of the Board of Directors of the licensee by condition of licence.

Overt regulation is only the outer edge of the problem. So extensive are the Commission's powers over broadcasters that it is easy to conceive regulation of speech by a wink and a nudge, by back channels, and by the very terms of the exemption order itself. It is entirely conceivable that such an exemption order could incorporate by reference the standards (or lack of them) agreeable to the Canadian Human Rights Commission, or any other speech-controlling body. In other words your right to communicate across the Internet could be revoked by administrative fiat for failure to comply with a speech code devised by parties other than the CRTC, if the Commission so established. Nor is it difficult to imagine a state of affairs where "broadcasters" across the Internet could be subject to some of the existing regulations, for instance, those concerned with linguistic, religious or political balance that apply to those who use "scarce" public airwaves. Imagine Pat Condell,[18] the acerbic British atheist, having to "balance" his views about religion and religions if he were subject to Canadian broadcasting regulation, for example.

Much more important values are engaged by free speech than by preservation of an industrial policy for broadcasting, which is the aim of the Act. History shows that schemes of regulation – and censorship – have a tendency to expand, notwithstanding the decision the Commission has wisely made here.

Both the political left and the right, indeed, everyone with blogging software, have found themselves able to express viewpoints via the Internet which for one reason or another are kept out of the mainstream media. In turn, the Internet has had decisive effects in shifting power from institutions to individuals, and in allowing people to self-organize.

However, if the Canadian portion of the Internet could be placed under the Act, and speech involving video, or sound, became a licensed activity, we would have reversed several centuries of constitutional evolution and gone back to the days prior to 1688[19] of licensed printing presses or, in our case, licensed video telephone transmissions as well as licensed computer users. Several important political revolutions have been fought to ensure freedom of the press and speech; it would be repugnant to nibble away at it in defence of anything as comparatively unimportant as Canadian broadcasting policy. Yet such a possibility does not lack for advocates.

With no change of the statutory language since the Act was passed in 1991, its reach has exploded. Since the latest version of the Act was devised, in the years 1986-87, and 2009, when this hearing took place, 22 years have passed. In that time there have been

[17] http://www.cbc.ca/canada/story/2004/07/13/choi_040713.html
[18] www.patcondell.com
[19] http://en.wikipedia.org/wiki/Glorious_Revolution

more than 14 doublings of the power of computers and equivalent reductions in cost, or roughly more than 16,000 increases. The price performance of computer memory has increased at the same pace. What this means is that the video on a mobile telephone held by any citizen may be uploaded through the Internet and reach millions of people, without passing through any "broadcaster" – as the term is commonly understood.

Yet we are confidently presented with the view that the Act says this is a licensable activity – one subject to prior permission of the state. Clearly there is a contradiction between an Act designed for a certain era, when communicating through technical systems was extremely expensive and rare, and the one we are in now. The Commission has to take this reality into account, yet the Act would have us ignore it.

6. Who decides?

The CRTC may well be an appropriate group to determine the boundaries of "broadcasting", but the equipment the Act gives it to think with is wholly inadequate for the task.

If Commissioners had decided otherwise this time around, or if the Commission at some future time decides otherwise, large portions of Internet traffic generated by Canadians within federal jurisdiction could be subject to federal licensing and an intrusive scheme of regulation. It is no use to say that such user-generated content would be exempt, because exemptions necessarily imply that the communication exempted could be regulated by the government, and the terms of the exemption order itself are a form of regulation. Exemptions imply conditions. Speech across the Internet should not be subject to prior government approval of the speakers. Speech should not need permission by the equivalent of a hunting licence; nor does it need to be controlled by the equivalent of a driver's licence. Speech is a right. It is not a legal privilege granted by the state. Yet speaking in full-motion video through any digital transmission system is potentially subject to the licensing power of the federal government, because it can be defined as "broadcasting".

Unlike speech, a broadcasting licence is merely a privilege and not a right.[20] To remain exempt from regulation would likewise be a conditional privilege granted by the regulator and revocable by same.

Canadians are also aware that the Act allows the Commission to attach a wide-ranging and intrusive set of conditions to the production, display, content, and communication of anything that qualifies as "broadcasting". Everyone familiar with Canadian broadcasting is aware of all kinds of requirements that the Commission imposes on broadcasters and distribution undertakings in how they may sell and how Canadians may consume "programs".

7. The *Broadcasting Act* and its governing assumptions versus the Internet

[20] The CRTC's licence fees are justified on this basis. See http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/rtc/rtc03-eng.asp.

The conceptual framework of the Act squeezes all phenomena through its filters. The term "new media" itself is just another way of plastering ideas generated out of the Act onto the Internet. "New media" are not new; they are simply the Act's idea of what the Internet is. The Act sees the Internet in terms of itself.

As long as debate is framed in terms of the Act, it is extremely difficult to fight the law's relentless compression of issues into what is good or harmful to Canadian broadcasting policy.

Communication through the Internet needs to be liberated from the threat of government licensing contemplated in the Act. There are several reasons for doing so, political, cultural, and technical.

Politically the extension of government licensing to speakers using the Internet for music or full-motion video is a disproportionate extension of government authority for little or no long-term gain. Broadcasting policy cannot ultimately be protected from the Internet. In telecommunications regulation, the Commission is obliged to think about the proportionality of its regulations to the anticipated benefits to be derived from regulating.

The same kind of reasoning ought to be applied to broadcasting. The Commission is told to be "sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings",[21] but compared to the whole scheme of the Act, which is massively intrusive and which in effect shapes the entire industry, such an admonition is lost in comparison to the entire scheme of regulation. Absent statutory or policy direction, the Commission has no authority to think in terms of proportionate benefits to all of society for its regulatory intrusions. The Act does not ask us to consider trade-offs between broadcasting policy and freedom of speech, for instance.

In addition, the Act is predicated on a set of technical and cultural assumptions which are being progressively undermined and eliminated by technological progress.

- There is no limitation of scarce radio spectrum to justify regulation unless we artificially engender one through regulation, in the same way that there is no limitation on iron ore, butter or any other physical commodity whose "scarcity" is determined by its price.

- There is no possibility of limiting the choices of what people will watch or engage with on the Internet, since there is no practical limit on the number of sources. There are 4.8 billion addresses in the current version of the Internet Protocol. In the one which will be introduced over the next decade,[22] there are as many IP addresses for each of the six billion people on this planet as there are

[21] Section 5(2)(*g*) of the Act, RSC 1985, c. B-9.01
[22] http://en.wikipedia.org/wiki/IPv6

stars in our galaxy.

- Culturally, the assumption that what we engage with in electronic media is a "program"– video that is designed to inform, enlighten and entertain – is strongly influenced by what television already offers. The half-hour television "program" may in time be as much an artefact of history as baroque opera, production of which may well become a subsidized elite activity. The form in which culture is transmitted across the Internet and which is also worth protecting and subsidizing has not yet been determined. The production communities appearing before us seemed in most respects to assume the continuity of the cultural format of the half-hour television show. If this cultural activity needs to be subsidized, let us do it. But regulating the Internet to do so is like burning down the house to roast a pig.

Such a discussion might go on at much greater length, but would not change the basic facts that all acknowledge.

The television system as we have experienced it is being replaced by a variety of other platforms and media. It is being integrated into a computer-driven world with computer-driven possibilities. All this is as completely obvious to those who favour extending the Act as it is to those who think that such a course of action would be folly. In any frank and private discussion of the way the world is heading, sensible people of all persuasions would be in agreement on the nature of the challenges posed by the Internet. They disagree on the effectiveness of the regulatory apparatus found in the Act to stem the tide, and they disagree on the desirability of employing government licensing to protect the Canadian broadcasting industrial policy. At its heart, the argument for applying the Act to the Internet rests in the belief that the authority of government is sufficient and effective and may be applied proportionately to other relevant policy objectives, to save the broadcasting system from the future. Most important, the exercise of political will is sufficient to channel the impact of the Internet into patterns familiar enough to save the groups which have come to depend on state intervention for their livings, from adapting to the Internet.

Television is being transformed, and its future nature and direction are unclear. Applying the Act to some portions of the Internet within Canadian jurisdiction might save another three to ten years for the subsidized production of Canadian content, but at what cost in terms of retarding the nation's technological progress?

Moreover, the extent of direct subsidy of Canadian television through various production funds indicates that we do not necessarily need direct regulation of licensees to channel money into Canadian television production. Much of the subsidization of television production occurs outside the framework of the CRTC. Thus the extension of licensing authority is arguably not the solution to the problems that the Internet poses for Canadian television. We need as a society a more comprehensive and subtle discussion beyond whether something fits into an existing statutory definition of "broadcasting" before we embark on a massive intervention into people's rights to communicate through the

Internet.

8. The *Broadcasting Act* is *so twentieth century*

By its nature, broadcasting gives some people megaphones: the few talking to the many through powerful machines. In the 20th century governments felt it necessary to control those voices because of the unequal power they gained over the population. Every premise underlying the world envisaged by the Act – spectrum scarcity, limited channels, lack of addressability, limited geographical reach, expensive distribution infrastructure, expensive production equipment outside the budget of the average person – is passing out of existence. The Internet is in the process of overcoming the implications of few voices talking to mass audiences. It is empowering wider and wider ranges of people to talk back, to say yes or no, to argue with authorities, to show the facts to the world. It is also changing perhaps the most essential feature of the mid-to-late twentieth century world: the concentration of human attention on centrally produced news and entertainment. In future ages, people will be amazed that their ancestors ever submitted to watching so tiny a set of sources of information and entertainment, until it is explained to them that we had no choice. The lack of choice will shock our descendants even more.

The paradigm of broadcasting is bound in time by the technology which informed it. We are moving away from that technology and its limitations and our laws should move to address problems appropriate to today and not those of 1958 or 1997.

The rights of Canadians to talk and communicate across the Internet are vastly too important to be subjected to a scheme of government licensing. If more Canadians were aware how close their communications have come to being regulated by this Commission, not by our will but because we administer an obsolete statute, they would be rightly concerned. Fortunately, good sense prevailed and the evidence for intervention was not yet present. But this confluence of facts may not always be there. Thus the call for a government review of a digital transition strategy is both wise and opportune. Let us fix this problem.