

Beyond Convergence and the New Media Decision: Regulatory Models in Communications Law

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Abstract

While technological and economic changes have been the most influential factors in stimulating recent policy and regulatory reassessments in Canada with respect to telecommunications and broadcasting regulation, public interest and socio-political concerns should also remain significant in the design of new regulatory and policy responses to convergence and competition. When the CRTC announced that it would refrain from regulating broadcasting in new media for a period of five years, this occasion illustrated the increasing inapplicability of the sector-specific legislation from which the mandate of the CRTC is derived.

The first model addressed is the present sector-specific policy and regulatory treatment of communications, which accommodates certain new pressures, such as increased competition and privatization in the telecommunications sector, by using the power to forbear from regulation. However, this route lacks appropriate treatment of technological innovations, particularly with

regard to the blurring of the distinction between carriage and content. The second model explores the possibilities involved in the present trend towards generalized regulatory convergence in communications, with its increased reliance upon harmonized competition law and policy. While this direction takes account of technological and economic shifts, there is little attention to how public interest or socio-political concerns may be adversely affected by the trend. The third model, a multi-layered, object-specific policy and regulatory regime, has been proposed herein as an alternative that better accommodates recent shifts in communications due to convergence and competition. This model is recommended as an alternative policy strategy whereby regulatory supervision and effective governance are available where appropriate. The purpose-specific model also best responds to technological, economic, public interest and socio-political considerations, the balance of which should be considered a guide for adjudicating policy modifications in such essential areas as communications technologies and the information industry.

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[T]he phenomenon of convergence calls for complementary analyses of the relations between the different, possibly competing, authorities which are today given the task of controlling the domains of telecommunications and of media separately. ... [T]he institutional convergence could be a chance for a real taking into account of the complexity of the technological convergence whose treatment could as such escape specialised authorities which remain distinct.¹

Introduction

Technological convergence, privatization and increased competition have led to new challenges for communications law in the last decade. Consequent changes in the telecommunications and broadcasting sectors have given rise to doubts regarding the rationale for sector-specific legislation. The Canadian Radio-television and Telecommunications Commission (CRTC), which provides the policy guidance and implementation of the laws that govern communications technologies in Canada, recently issued a significant decision regarding new media undertakings, exempting them from regulation for five years. When combined with the erosion of the boundary between telecommunications and broadcasting, as well as the increasing reliance upon competition law to govern where the CRTC has forborne from regulation, the five-year abstention from regulation with respect to the new media illustrates a fundamental problem that exists with respect to the regulatory framework for communications in Canada in light of the parallel phenomena of convergence and competition.

To address this problem, three regulatory models are assessed in this paper to determine their relative success in meeting the challenges of convergence that arise in the context of the potential regulation of new media in Canada. The first is the present sector-specific demarcation between telecommunications and broadcasting, with its trend toward forbearance in the areas that are gradually being privatized. The second is the convergence model, which emphasizes competition; in many ways, the economic aspects of this model are currently being incorporated in the existing sector-specific regulatory model. The third is a multi-layered, or object-specific, regulatory regime. This paper recommends the latter model, as it provides a focus that is missing in policy debates emphasizing convergence. Furthermore, it more ably accommodates the various challenges raised by the phenomena of convergence and competition.

Indeed, regulatory and policy turbulence is not unique to Canada. Different nations and communities of nations are similarly in the process of adjusting to, first, the technological changes of converging, emergent technologies; second, the requirements of international trade commitments; and, third, the rise in competition and privatization of the telecommunications sector. The object-specific, multi-layer regulatory model is more adaptable to the international commitments to which Canada is a signatory. At the same time, it provides more

explicit guidance for industry stakeholders. Finally, the social and cultural significance of communications technologies require that regulatory models be adaptable to particular needs of users. The multi-layer regulatory model implements a context for the regulation that transcends simple economic factors, while also being more responsive than the present content regulation in broadcast law. New media undertakings and the privatization of regulated industries in telecommunications and broadcasting contribute to a highly dynamic environment in the development of new policy and regulatory strategies. This paper's assessment of the three regulatory models in view of technological, economic, public interest, and socio-political considerations demonstrates that the flexible and responsive multi-layer model provides an appealing alternative to current trends in the policy and regulation of communications in Canada.

Policy Instability in the Current Communications Regulatory Environment

The regulatory environment for communications typically develops in response to a variety of stimuli and challenges. These influences may be classified by four broad categories: (1) technological, (2) economic, (3) public interest, and (4) socio-political. Shifts in regulatory policy have thus traditionally occurred when one of these elements has changed in an evident way. Furthermore, regional differences in the amalgamation of influences help account for the legitimate distinctions in communications regulatory policy from nation to nation.

At present, the four categories of influences are in flux on a global scale, but with different concentration and emphases. Technological innovation and the convergence of media and carrier abilities are shifting the field with respect to communications and making former sector-specific regulatory distinctions increasingly redundant. The global move toward privatization and competition in the provision of telecommunications is shifting the economic field and rationale for regulation. Thus, where there had been controlled monopolies in the provision of telecommunications services, there is now deregulation, with an increased dependency upon competition law to make up for the shortcomings of the privatized sector. Members of the public are involved in these changes both as consumers and as potential participants in the policy development process. The public interest and the notion of universal access are significant factors in the regulatory policy of many nations, but these concepts are increasingly overlooked in the move toward the increasingly market-based treatment of telecommunications, as William Melody indicates:

There are two primary perspectives that require representation in policy debates, but that in most cases are absent. One

is the perspective of those groups in society that may be significantly affected by the policies adopted, but who do not have a sufficiently organized financial vested interest to mount a representation... The second perspective is that of society as a whole, focusing directly on the overall structure of benefits, costs, and consequences for society. This perspective would examine these consequences that lie outside the normal realm of special interest decision makers and would include an evaluation of economic externality, social and cultural consequences of policy options.²

The socio-political field is thus shifting as international agreements and transnational bodies develop increased authority over the implementation of communications. Indeed, we may therefore understand that "what is missing from these discussions ... is a conception of how the regulatory changes, given the technological shift, will affect democratic values shared by many of the countries posed with the regulatory quandaries of convergence".³ Simultaneously, previously less connected developing nations are joining the international communications infrastructures, which forces attention on the disparity in requirements and puts into question the rationale for capitalist models of communications service provision.⁴ Regulatory shifts respond to particular alterations in the balance of the four categories of influences. Responsive and responsible communications policy requires the accommodation of technological, economic, public interest, and socio-political influences in the changes to, or development of, regulation, even if there is no apparent shift to cause concern about any particular one category of influence.

The regulation of telecommunications and broadcasting in Canada, as elsewhere, has developed from the relation of the industry players and service providers, the government, and the public in response to how the four categories of influences were perceived. The concomitant phenomena of convergence and competition have garnered much attention from regulators in Canada, as in other nations. There is a move toward uniformity and harmonization in the regulation of communications as well as competition law. Nevertheless, as with most other nations, the situation in Canada remains unique with respect to the particular balance of influences. The present attention to mainly technological and economic influences in the present shifts in regulatory policy in Canada reflects the fact that such shifts are perceived as having little to do with the Canadian public interest or the socio-political situation, as these have only changed minimally in relation to the provision of communications services in recent years. Clearly, the shifts of influences in Canada are not identical to those of other nations. In developed nations such as the Western European states, for instance, there is a different balance of prominent influences than in Canada since their socio-political shifts with the European Union are altering the political field. Similarly, different influences are evident in certain developing nations as the public develops new relations to communications with increased access to basic communications services. Despite the different

combinations of prominent influences, each of the influences should be included when new regulatory policy is developed, or old regulatory policies are refurbished, to ensure that the balance of responses is maintained, even if particular influences have not shifted and would therefore appear less relevant to regulators.⁵ This paper shall therefore assess the three different regulatory and policy models to determine their relative advantages and disadvantages in treating technological, economic, public interest, and socio-political concerns.

Regulation of Communications in Canada

Canadian communications are managed and supervised by the CRTC. The governing legislation is presently arranged according to a sector-specific model that divides the carriage and content of communications as telecommunications and broadcasting, respectively. The CRTC is a Canadian independent tribunal created in 1976⁶ to ensure compliance with the Canadian *Telecommunications Act*⁷ and *Broadcasting Act*.⁸ These statutes are the responsibility of separate Ministries: Industry Canada is responsible for the *Telecommunications Act*, while Heritage Canada is responsible for the *Broadcasting Act*. The overlapping jurisdiction of the traditional split between carriage and content of information in the era of convergence makes it particularly advantageous to have a single regulator, even though the CRTC has traditionally had a division in its operations. The CRTC is presently restructuring its operations in order to more effectively respond to the new requirements of convergence in the regulated undertakings that it oversees. Indeed, the change of the governance of telecommunications and the creation of the CRTC in the mid-seventies demonstrates the recognition by the government that there was a close relation between carriage and content in a "communications system".⁹ Furthermore, the CRTC has an important role with respect to Canada's trade commitments since its existence satisfies the requirement of the World Trade Organization (WTO) for an independent tribunal to render policy with respect to telecommunications services.

Various principles guide the policy choices of the CRTC with respect to its decisions and actions. In general, these principles are commensurate with all of the categories of influences discussed above. The telecommunications and broadcasting policies for Canada are statutorily enacted by section 7 of the *Telecommunications Act*¹⁰ and section 3 of the *Broadcasting Act*.¹¹ The notable objectives of the *Telecommunications Act* policy include: orderly development, reliability, accessibility, efficiency, national and international competitiveness, Canadian ownership and control, use of Canadian facilities, innovation, users' socio-economic status, and personal privacy protection. The main principles included in the declaration of policy of the *Broadcasting Act* are: Canadian ownership and control, essential public service for national identity and cultural sovereignty, separate

English and French language broadcasting, the affirmation of various aspects of Canadian attitudes, Canadian content, high standards, and regulation and supervision by a single independent public authority. The references to Canadian values or attitudes in the policy are specifically explicated at subsection 3(d) of the *Broadcasting Act*:

- (d) the Canadian broadcasting system should
 - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
 - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
 - (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and
 - (iv) be readily adaptable to scientific and technological change [...]

Thus, in the enunciation of the Canadian telecommunications and broadcasting policies, all four of the categories of influences are evident since technological, economic, public interest, and socio-political factors are included insofar as they are relevant to each sector.

At the international level, a number of international trade commitments affect how the information industry is governed. Canada is bound with respect to intellectual property protection as well as certain aspects of telecommunications regulation by the TRIPs,¹² FTA,¹³ NAFTA,¹⁴ GATS,¹⁵ and BTA.¹⁶ Furthermore, with respect to the “old” telecommunications and broadcasting technologies, there are several long-standing agreements in place that regulate and assist in the control of such media as radio, telephones and television signals.¹⁷

The CRTC’s “New Media Report”¹⁸ was a policy statement on both telecommunications and broadcasting that followed public consultation on the regulation of new media. “New media” was treated quite simply as a catch-all for new media undertakings that primarily involved the provision of services over the Internet. The CRTC subsequently issued an exemption order, the “New Media Decision”, for new media broadcasting undertakings that indicated that broadcasting regulation would not apply to new media undertakings.¹⁹ Since the CRTC has a policy of reviewing its decisions every five years, and decided it would not be appropriate to review sooner in these circumstances, it follows that new media undertakings are exempt from broadcast regulations from the date of December 17th,

1999 until 2004.²⁰ The New Media Decision demonstrates certain shortcomings in the present sector-specific regulatory scheme of telecommunications and broadcasting.²¹ The relative flexibility of the New Media Decision with respect to future policy directions provides an opportunity to demonstrate how different regulatory models could manage the pressures that technological innovations and transformations in economic strategies have put on converging, privatizing, and increasingly competitive communications industry participants.

Recent developments have demonstrated the difficulty presented by the lacunae in the regulation. After the issuance of the New Media Decision, certain Canadian companies began operating Internet sites at which television signals were retransmitted. One such company, Jumptv.com Canada Inc. (JumpTV), had applied for a licence to do so under the compulsory licence to retransmit television signals provided by section 31 of the *Copyright Act*,²² while the activities of JumpTV seemed to fit the criteria for the CRTC’s exemption from regulation for new media. Following significant pressure within Canada and from the United States by cable television organizations and major content producers, as well as a public consultation process on the topic of Internet retransmission, the federal government’s Bill C-11, *An Act to Amend the Copyright Act*, received royal assent on December 12th, 2002.²³ The amendment of section 31 of the *Copyright Act* provided thereby effectively presented a sector-specific exclusion from the compulsory licensing regime by explicitly excluding new media retransmitters from the definition of “retransmitter”.

After the passage of Bill C-11, the CRTC issued its Broadcasting Public Notice 2003-2,²⁴ which revisited the New Media Decision in light of the amendment. The Internet Retransmission Notice indicated the position of the CRTC with respect to the specific topic of Internet retransmission of television signals:

[T]he Commission does not consider it necessary or appropriate to require the licensing of Internet retransmitters. Rather, Internet retransmission undertakings should remain exempt from these and from other requirements under Part II of the *Broadcasting Act*. In addition, since the recent amendments to the *Copyright Act* address the main concern identified in this proceeding, the Commission sees no need to amend the *New Media Exemption Order* at this time.²⁵

Thus, while the exemption continued with respect to communications law, the alteration of the governance of the intellectual property rights through a sector-specific solution provided a means by which the legislators were able to circumvent the implications of regulating the Internet through communications law. The sector-specific nature of the exemption, however, in the legislation of intellectual property rights, may set a dubious precedent from the perspective of intellectual property theory.²⁶

New Media and Alternative Policy and Regulatory Models for Communications

Three different models of policy and regulatory strategies present alternatives for treating communications in the current climate of technological innovation. Each of these three models will be described in relation to its current implementation and reception in communications policy doctrine. A practical description of how the new media would be regulated according to each model demonstrates the degree to which each model assures that the categories of technological, economic, public interest, and socio-political concerns are accommodated. The first model is the current, sector-specific treatment of communications in policy and law that divides broadcasting and telecommunications. It demonstrates a moderate degree of success in accommodating the concerns as they have been assured in the past, but is weak with respect to the attention to technological influences. The second model reflects current trends in communications deregulation, emphasizing the convergence that blurs the distinction between broadcasting and telecommunications, and looks to greater competition in a commercialized communications sector. It demonstrates flexibility with respect to technological and economic concerns, but is weak in the areas of public interest and, especially, socio-political concerns. The third model is based on theoretical proposals that would take communications policy in a different direction than current trends and would instead be based on purpose-specific regulation. The third model is recommended since it facilitates the flexible, yet balanced accommodation of the four categories of influences, allows for competition where appropriate, and is more versatile with respect to the public interest and socio-political influences when different communications requirements create unique policy and regulatory environments.

Regulatory Model One: Sector-Specific Legislation and the Status Quo

The regulatory model presently used in Canada is sector-specific legislation, which creates a distinction between telecommunications and broadcasting. While some jurisdictions collapse the two, the underlying discrete treatments of carriage and content often subsist. It is important to note that even though convergence and the greater privatization and commercialization of telecommunications and broadcasting are taking effect in Canada, as yet there has been no true shift away from this regulatory model. Instead, there has been an increase by the CRTC in forbearing from regulation where it is deemed appropriate. It is clear that the present delineation of communications law has been regarded as less tenable given the last decade of technological developments and likely future innovations in communications. The maintenance of the same system despite technological shifts, particularly when viewed in combination with

the regulatory response of the reliance upon forbearance to implement competition and the partnership with the Competition Bureau, fails to address the growing unsuitability of sector-specific laws in the context of convergence.

Technological changes are making the sector-specific legislation obsolete because the distinctions between telecommunications and broadcasting activities and undertakings are growing less distinct. At the same time, there is a push toward privatization of communications markets, particularly as the industry players are similarly engaged in business convergence in order to better compete. Thus, the rise in competition and privatization draws attention away from the fundamental changes that have been occurring in communications, as it is made to appear to be simply an evolution in the technology in a field that is now, therefore, ready for competition.²⁷ The substantive preservation of the content/carriage model does not accommodate the kinds of policy considerations that arise with the shift in significance of communications technologies. It is true that this regulatory model was certainly representative, at one time, of the reality of certain kinds of information transmission; their attendant policies addressed the concerns that arose with the significance of each branch to economic stakeholders and the public. New kinds of communications technologies give rise to new relations among the public, the technologies, and the manner by which information is transmitted, carried, processed, and received.

While the CRTC made definitive policy statements on convergence, its New Media Decision demonstrated a unique stopgap procedure. By effectively indicating it would “wait and see”, the CRTC provided itself with time to shift its policies and procedures to respond to the industry and international pressures brought about by technological convergence and the demand for industry competition. Indeed, the New Media Decision is particularly instructive since it reflects the sector-specific division and the CRTC’s recognition of the effect of technological convergence and the insufficiency, or perhaps growing inadequacy, of the sector-specific communications laws.

With respect to telecommunications, the following description of the New Media Decision underscores this difficulty:

Noteworthy for telecommunications purposes, the CRTC confirmed in the Report on New Media that Internet Service Providers (“ISPs”) are not required to own or operate their own transmission facilities in order to provide Internet services. ISPs operating in Canada thus continue to have the choice to offer Internet services using transmission facilities leased from other carriers, or to build or purchase their own transmission facilities. An ISP that does the former is analogous to a “reseller” and is not subject to direct CRTC regulation, whereas an ISP which owns or operates transmission facilities would have the status of a telecommunications common carrier and be subject to the Canadian ownership

requirements and other forms of direct CRTC regulation under the Telecommunications Act.²⁸

By contrast, the New Media Decision made the following distinctions with respect to broadcasting:

(i) predominantly alphanumeric services, (ii) “customizable content” (i.e. content allowing end-users to create their own uniquely tailored content), and (iii) other content. The CRTC concluded that material in categories (i) and (ii) is not broadcasting, whereas material in content (iii) does fall within the definition of broadcasting. The CRTC determined that new media content on the Internet that is broadcasting should be exempted from regulation under section 9(4) of the Broadcasting Act on the basis that regulation would not contribute to the achievement of the Broadcasting Act policy objectives.²⁹

The CRTC based its decision on its findings that significant Canadian new media content exists on the Internet, that there is no evidence of a problem regarding the visibility of Canadian new media content, and that the new media industry is taking steps to ensure the continued strong Canadian presence on the Internet.³⁰ Nevertheless, these changes do not alter the fact that the sector-specific legislation may in fact be unsuitable to current and possible innovations in communications.

The framework characterized by sector-specific legislation and an increasing dependency on the power to forbear from regulation performs somewhat adequately with respect to public interest and socio-political factors. It also facilitates economic growth by competition where it does not regulate, but fails to adequately respond to technological changes. By relying upon increasingly outdated distinctions, the sector-specific regulatory scheme fails to provide a flexible response to the increasingly interactive and technologically advanced communications environment. With respect to economic factors, the sector-specific model incorporates the rise in privatization and competition in two ways: by forbearance from regulation and the reliance upon competition law to police market abuse. While this permits a certain amount of flexibility to the industry participants, it requires the arduous process of applying for forbearance where the regulations are presently applicable. On the other hand, new media undertakings that are presently exempt from regulation face a regulatory lacuna that will become increasingly significant as the end of the five-year period of exemption draws to a close. This situation has not yet been remedied. With respect to both the public interest and socio-political considerations, the present policies in the sector-specific regulation provide adequate protection. Where there has been forbearance from regulation, on the other hand, such policy may not be so easily imposed.

Regulatory Model Two: Convergence and Competition

Changes in technology have given rise to most of the legislative shifts in communications law and policy in the past. At present, the rise in convergence and the

introduction of different and new ways of transporting and transmitting communications have created a turbulent situation regarding various policy developments. The growing obscurity of the distinction between content and carriage renders the legislative differentiation between broadcasting and telecommunications meaningless.³¹ It has been suggested by some, such as Bernard Clements, that a single, general communications regulatory model should therefore be developed:

An instinctive approach might be to create a new category of “multimedia” services for which a suitable regulatory framework could be devised... [I]f a regulatory approach cannot be developed in isolation of current frameworks, there is a danger that existing regulation might be extended inappropriately to the new environment. One solution might be to take a completely fresh approach, with provisions for migrating from today’s regulatory framework to a future unified regime.³²

Furthermore, it has also been argued that the rise in competition makes the regulation of the communications industry unnecessary, and shifts the responsibility of governance to competition law.³³ Concerns about this trend often arise in telecommunication policy analyses, such as the following observations by Colin Scott:

Increasingly, there is pressure to treat telecommunications for regulatory purposes as part of the broader information society apparatus, attempting to develop common regimes for the economic and content regulations aspects of broadcasting, computing and telecommunications. Most general is the broadly characterized shift from detailed sectoral rules to broad competition/antitrust rules as the basis for regulation.³⁴

This single communications regulatory model would therefore likely follow the present trend in communications and facilitate greater privatization and competition. It would determine the circumstances by which regulation would be deemed necessary, and move toward a greater deregulation of much of the communications industry.

Clearly, competition law is another area of law that is becoming more important in this era of convergence in communications technologies. The shift toward competition is definitely under way, which places Canada in a transitional position with respect to the CRTC’s regulation of telecommunications and the Competition Bureau’s jurisdiction over the open market.³⁵ The *Competition Act*³⁶ identifies the practices that are subject to review by the Competition Tribunal, “notably the abuse of a dominant position and entering into anti-competitive mergers”.³⁷ There are important distinctions between the sector-specific legislation that governs telecommunications as discussed above and the “technologically neutral” competition law.³⁸ Competition law does not have the same kinds of policy objectives as those espoused in the *Telecommunications Act*. Instead, the *Competition Act* is intended to “assist in the restoration of competitive conditions” where markets are monopoly or oligopoly, and to prevent anti-competitive acts, or the abuse of market power.³⁹ It has been noted that competi-

tion law is appropriate to governing “a highly dynamic telecommunications industry” since it is not based on eroding technological distinctions and so would likely be very active in the emerging communications system.⁴⁰

The converged regulatory model provides certain benefits, particularly in comparison to the sector-specific legislation. The notional basis of the legislation would be more adaptable to the kinds of innovations that may arise in communications: “Regulatory dichotomies work best when technological categories remain discrete and absolute ... [but] they surely do not work when technological convergence results in porous service categories and diversification by operators”.⁴¹ With respect to technological problems that are raised by convergence, it has been suggested that the problem of “bottlenecks”, for instance, could be suitably regulated by self-regulation within the industry in concert with competition policy. The move toward a market-based scheme may stimulate greater innovation and allow a more efficient international environment for a uniform system of telecommunications service provision.⁴² The reduction of national regulation in the field of communications may create more consistency internationally as it reduces the possibility of contradictory rules. Indeed, this has been suggested as one of the positive consequences of deregulation in telecommunications.

Furthermore, much recent speculation has considered the possible international application of competition law, and whether multilateral trade agreements impose competition law principles upon their signatories. The Canada 1999 OECD Competition Report indicates that the Competition Bureau has been active in a WTO working group “examining the interaction between trade and competition policy”:

Rather than continue with the ad hoc approach to competition policy reflected in recent WTO agreements, the Bureau has been active in examining the viability of establishing a sound multilateral framework at the WTO which will advance competition policy internationally. Roundtable discussions with domestic stakeholders on the internationalization of competition policy were conducted by the Economics and International Affairs Branch of the Bureau.⁴³

The near future will thus likely see a cooperative trans-national framework for negotiating core competition law principles, or a broad set of minimum requirements that are established for the regulation of international competition law problems.⁴⁴ This would be useful once the competition in communications law becomes more stable and established:

[T]he importance of cross-sector cooperation in both policy-making and regulation should not be overestimated. In a nutshell, the best response to technological convergence may be for regulators themselves to converge, across national borders and, more importantly, across industry sectors. The goal of regulatory convergence should not be homogenization but rather harmonization. Regulatory responses should produce an agreeable harmony, not a set

of identical responses. At the same time, competition policy must not be viewed as a cure-all capable of permanent solutions. The WTO cannot expect competition principles that may be developed for audio-visual services, or for any other convergence-related sector, to have immediate and profound effects on competition throughout the converging industries.⁴⁵

Nevertheless, there are also drawbacks to this regulatory model. Since the legislation would no longer be sector-specific, it would be necessary to ensure that it would be adaptable to new and emerging communications technologies and information transmission media.

At present, the CRTC is implementing changes in response to technological convergence that reflect the regulatory shifts that are required to accommodate innovations in communications. The changes in the CRTC structure itself provide encouragement to those commentators who recommend moving toward a unified regulatory model. Also, the New Media Decision demonstrates the rising indeterminacy of the telecommunications and broadcasting distinction where the application of the regulation is forborne. With the approach of the New Media Decision's expiry date — though it may be renewed — a legislative solution to the problems raised by technological convergence would ideally be ready to be harmoniously implemented in the framework of Canadian communications. As demonstrated by the Public Notice regarding Internet retransmission discussed above, the implementation of certain regulatory responses to convergence in communications technologies may arise from the confluence and intersection of other laws such as those that govern intellectual property rights. Nevertheless, such re-regulation may work to circumvent the application of the stated policy objectives in communications law.

The comprehensive viewpoint allowed by the analysis of this particular regulatory model according to the technological, economic, public interest and socio-political considerations indicates that while the competition model responds to certain technological and economic concerns, it is weak with respect to public interest and socio-political concerns. Accordingly, there are two significant elements that are relevant with respect to the policy factors that enter into the reliance upon competition in the regulation of communications. In the sector-specific legislation, the enumerated policy in each of the *Telecommunication Act* and the *Broadcasting Act* had similar values at base, but were suited to the kinds of considerations that would be relevant to the particular sectors. While any treatment of communications in law would certainly include policy considerations that protected the fundamental values of universal access and the promulgation of Canadian identity and values, the greater abstention from regulation in favour of competition makes it seem less likely that such principles would be effectively upheld.

Regulatory Model Three: Object-Specific, Multi-Layered Regulation

In contrast to the present trend in communications law that is moving toward the synthesis of telecommunications and broadcasting, with a greater reliance on competition law, another model is proposed herein that may serve more specific purposes. A multi-layered regulatory model alters the sector-specific view of communications law by changing the focus of the delineation. The traditional split of telecommunications and broadcasting reflects the relation between technologies and communications. Telecommunications refers to the carriage of the communications; broadcasting refers to the content of the communications. The multi-layered model, on the other hand, responds to convergence in a more complex way than simply proposing the synthesis of the two modes. It is true that the effects of technological convergence confound the traditional split of carriage and content, but this does not mean that the transmission of information should be identically regulated since essential distinctions remain with respect to their purposes, whether for infrastructure, interconnection, or consumer uses.

The discussion of multi-layered models by Jan van Cuilenburg and Pascal Verhoest emphasises the variety of policy and regulatory responses that may be explored as alternatives in the regulation of convergence in technologies and the changes that are occurring in telecommunications.⁴⁶ The authors point to and critique the three-layer model proposed by the European Green Paper on Convergence.⁴⁷ This three-layer schema of the telecommunications market makes the following delineation: (1) infrastructures; (2) carriers; and (3) applications. It marks a departure from viewing telecommunications as simply infrastructure and applications, as had been common in Europe at the start of the liberalization of telecommunications. Responding to convergence and competition, the three-layer model was originally advanced in a study for the Dutch government in 1990: "This model combines the idea of different layers within communication with the notion that content provision and exchange is the finality of any telecommunications service".⁴⁸ Cuilenburg and Verhoest go further to suggest that a five-layer model would be more effective. The three-layer European model is modulated by including interoperability at two levels of interfaces, so that the layers are: (1) infrastructures; (2) network interfaces; (3) carriers; (4) user interfaces; and (5) applications.⁴⁹

By breaking down the telecommunications model and allowing for the incorporation of what is now separately treated as broadcasting, the multi-layer model permits appropriate treatment for the different purposes of the communications services that are provided by the industry participants. This may be accomplished by creating legislation that treats the purpose or object of particular services, providing guidelines by which services

may be deemed as (1) essential and therefore worthy of rigorous regulation and control, which would correspond to the infrastructure and interface levels of the five-layer model proposed by Cuilenburg and Verhoest; (2) consumer-directed applications, which would be open to a certain amount of regulation with respect to what is presently referred to as "content" regulation, yet which may in fact be implemented at a self-regulatory level, and competition with respect to the provision of the services; and (3) information transfer services, which would be more open to deregulation and competition, and which could correspond to carriers and user interfaces in the five-layer model described above. However, this breakdown is simply provided as an example of the versatility that should arguably be accorded to appropriate levels of supervision and control based on an appropriate assessment of the technological, economic, public interest and socio-political considerations that are relevant in a particular jurisdiction or regulatory regime.

Various benefits flow from this kind of regulatory and policy framework. Appropriate solutions could be crafted that are adequately flexible so as to accommodate international commitments in facilitating competition. Such situations would include flexible negotiation regarding the applicable criteria for "essential" communications services. Indeed, this has been the focus of many policy discussions involving particular aspects of communications service provision such as interconnection.⁵⁰ The multi-level model also facilitates the entry of new players and innovations, where the emphasis solely on competition would likely only favour established industry players or strategically merged and therefore powerful incumbents, so long as they do not threaten competition with monopoly practices or other prohibited practices.

To demonstrate how this model would function, we may examine how new media undertakings would hypothetically be regulated. Where new kinds of services involving advances in new media undertakings are introduced as a result of technological convergence and related developments, a more technically detailed and rigorous regulatory scheme would allow the purpose of the services provided to guide the regulatory response. Thus, regulators would need to determine the kinds of services that required more rigorous regulation and protection.

Indeed, this already occurs in communications with the interconnection and interoperability standards. This is evident in the following excerpt in relation to its relevance to new media and Internet communications:

Since the information highway is essentially a network of networks, interconnectivity is of great importance and incompatible standards can delay or obviate interconnection at different levels of the information highway, for example, between different services, between content providers and services and between alternative channels and facilities.⁵¹

Nevertheless, the establishment of protections for basic services and the provision of secure facilities should guide regulators in making decisions as to what is appropriate to market-based considerations. Much of the present realm of broadcasting, for instance, would be suitable to greater competition. While some may argue that Canadian content would suffer under such a lack of regulation, this could be an area where standards for self-regulation may be developed. Similarly, many commentators have suggested that restrictions on foreign ownership serve little purpose and should therefore be removed.⁵² Such deregulation indicates an area where competition might be appropriate. Indeed, many aspects of what is now categorized as broadcasting are already subject to self-regulation standards.⁵³ More rigorous regulation, by contrast, would be appropriate for aspects of service provision with respect to network infrastructures, interconnection, security services, and information databases. With the integration of the Internet in the regulation of communications, the assurance of protection by regulation of services based on their purposes may therefore be extended to ensure network protection, security and interconnection.

Certain criticisms may be levelled against the multi-level model. First, the multi-layer model could be critiqued since it appears complex. Second, the flexibility of the regulations based on the purpose of the services may also mean that certain substantially similar activities of service providers would be subject to different regulatory classifications. Third, this model would also likely come under a great deal of critical scrutiny from the U.S. if it led to a substantially different regulatory environment for communications undertakings than exists there. These critiques will be addressed in turn by comparison to the first two models.

As compared to the first two models, the multi-level model may certainly appear more complicated, but it would create more certainty and uniformity in the areas where increased protection would be deemed necessary. Furthermore, where there is a sector-specific model, yet a dependence on the forbearance from regulation where it is found to be appropriate, this leads to a situation where the regulations continue to be in operation, while exceptions are made based on the purposes of the services. This could arguably lead to an even more complex situation, where new media undertakings — as the five-year exemption draws to a close — would be required to face not only the growing confusion as to the difference between the present sector-specific legislation for telecommunications and broadcasting, but would also attempt to present themselves as appropriately forborne from regulation. Where there was a multi-layer model, the principles that would guide the level of protection or regulation would be more clearly defined and lead to greater certainty in this regard. With the second model, if there were new media undertakings that had more general regulation to suit the converged environment, this may solve the problem of the grey area between carriage

and content, but the move toward deregulation and greater reliance upon competition indicates that there would likely be a lack of regulation where some may be warranted. If competition law becomes the sole arbiter when problems arise, it could lead to a situation where new media undertakings would be deterred by the power held by a market-controlled communications field.⁵⁴

The second critique concerns the application of different regulations to different sets of services by the same service provider. The complexity of this scenario nonetheless seems preferable to the present sector-specific regulatory model, with its increasing grey area between broadcasting and telecommunications, and the necessity to apply for forbearance from regulation on a case-by-case basis. This forbearance may be granted, withheld, or may be limited to only particular aspects of the operation of the provision of communications services. Indeed, there is already uncertainty and unpredictability in the present legislative environment with respect to new media and certain convergent service providers that could lead to a complex variety of applications of regulation — or non-regulation, depending on the results of a forbearance decision, or the determination on the applications of either the telecommunications or the broadcasting regulations. This has been addressed by commentary on the consequences of convergence in Canadian communications regulation:

Technological convergence raises myriad competitive issues that either add to or amplify those raised in the traditional vertical sectors. It disrupts the conceptual separation between the regulated industries at the centre of convergence — telecommunications and broadcasting — whose regulators have often been unmindful of the competitive impacts of developments in other sectors. For the same reason, convergence also creates the risk of inconsistent regulation. Technology-neutral legislation may extend telecommunications and broadcasting regulation to the converging industries indiscriminately, or for different reasons. Alternatively, like services may be excluded from regulation. Conflicts are aggravated with respect both to convergence as a broad phenomenon, and to specific convergence technologies such as Internet telephony, Web broadcasting and content portals.⁵⁵

In the second model, fewer problems would arise for new media since whichever more generalized principles guide such new regulations, they would likely be adequate. Thus, there would likely be more clear direction in regulation with the development of specific regulations for communications services in a converged environment; however, to the extent that these rules will likely be rudimentary and encourage competition, there will not be a great deal of opportunity for specific regulations to be developed to protect the more essential features of communications infrastructures and security.

The third critique involves the reaction and influence of the United States with respect to the development of Canadian communications regulations. It should be noted that the U.S. is often an influential policy maker; this influence is made even greater due to

the trade agreements between Canada and the U.S. as well as the recent WTO agreement with respect to trade in telecommunications.⁵⁶ However, Canada and the United States have always differed to a certain extent in the regulation of telecommunications and broadcasting. Indeed, it may be argued that there would likely be similar results in the multi-level model as compared to using the sector-specific model, forbearance, and finally the reliance upon competition. With the multi-layer model, however, there would simply be a mechanism by which communications and new media undertakings may anticipate the regulations that would be applicable to the particular aspects of their services. Furthermore, there would be a greater protection for the provision of essential services without the necessity of relying upon the interplay of various limitative rules.

In the final analysis, the multi-level regulatory scheme should be assessed according to its success in accommodating the technological, economic, public interest, and socio-political influences. This regulatory framework certainly suits technological advancements, as the type of regulation would depend upon the nature of the particular services. The model is therefore purpose-specific rather than sector-specific, which permits greater flexibility in its application to both the old, traditional communications technologies as well as the innovative new communications technologies and new media undertakings. The flexibility of the multi-level model creates an approach that may be used in different jurisdictions, with the particular aspects of the legislation crafted to suit the particular balance of pertinent considerations that take precedence in the given jurisdiction. If the four fundamental considerations are kept in mind, as well as the regard to the basic purpose of the particular communications technology application that is regulated, the purpose-specific model would suit the requirements of the various perspectives and regulatory jurisdictions, in contrast to the polarized models that accommodate either the market-based regimes or the schemes that are determined solely by the public interest.

With respect to economic influences, the multi-level model provides a moderate and balanced solution for the advocates of competition in the telecommunications, broadcasting and converged media sectors. By allowing competition for appropriate communications technological applications and services, this realm would be able to develop with the reliance on the competition model that exists at present. At the same time, rigorous regulation and industry protection could be reserved for what would be determined to be essential services. Indeed, it would stand to reason that the services that were suited to competition would benefit from the dependability that would result from the protection and regulation of more essential infrastructure and interconnection levels in the provision of communications: "In the context of convergence, regulatory stability will also be essential in ensuring that the risks encountered by investors are lim-

ited to those inherent in addressing the associated embryonic markets".⁵⁷

Broader public interest concerns could be better protected by the proposed multi-level model since there is no guarantee, either when there has been forbearance from regulation or when competition or intellectual property law is left to govern the field, that public interest concerns would be accommodated. The public interest concerns, which range from policy considerations presently relevant to telecommunications and broadcasting such as universal access to Canadian identity, could be preserved in the regulation of particular, directed aspects of the provided services. Finally, socio-political concerns could be addressed by purpose-specific regulation, since protection for the security of Canadian databases and information security as well as the infrastructure that provides the basic infrastructure for services provided in Canada could be controlled in the specific context of protection and security.

Conclusion

When the CRTC announced that it would refrain from regulating broadcasting in new media for a period of five years, this occasion illustrated the increasing inapplicability of the sector-specific legislation from which the mandate of the CRTC is derived. The purpose-specific, multi-level model for the regulation of communications technologies proposed by this paper offers a coherent alternative to the current trend toward the governance of communications technologies by competition law. The purpose-specific model also best responds to the technological, economic, public interest and socio-political considerations, the balance of which should be considered a guide for adjudicating policy modifications in such significant industries as communications technologies. While technological and economic changes have been the most influential factors in stimulating recent policy and regulatory re-evaluation in Canada with respect to telecommunications and broadcasting regulation, public interest and socio-political concerns should remain significant in the design of new regulatory and policy responses to convergence and competition. The increasingly essential nature of services provided by and established upon communications technologies and new media require that their governance have sound theoretical and rational policy foundations rather than the simple regulation by default.

Appendix 1

Broadcasting Act, S.C. 1991, c. 11

Broadcasting Policy for Canada

Sec. 3. Declaration. (1) It is hereby declared as the broadcasting policy for Canada that

- (a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;
- (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
- (c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;
- (d) the Canadian broadcasting system should
 - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
 - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
 - (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and
 - (iv) be readily adaptable to scientific and technological change;
- (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
- (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
- (g) the programming originated by broadcasting undertakings should be of high standard;
- (h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;
- (i) the programming provided by the Canadian broadcasting system should
 - (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
 - (ii) be drawn from local, regional, national and international sources,
 - (iii) include educational and community programs,
 - (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and
 - (v) include a significant contribution from the Canadian independent production sector;
- (j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;
- (k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;
- (l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;
- (m) the programming provided by the Corporation should
 - (i) be predominantly and distinctively Canadian,
 - (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,
 - (iii) actively contribute to the flow and exchange of cultural expression,
 - (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,
 - (v) strive to be of equivalent quality in English and in French,
 - (vi) contribute to shared national consciousness and identity,
 - (vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and
 - (viii) reflect the multicultural and multiracial nature of Canada;
- (n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);
- (o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (q) without limiting any obligation of a broadcasting undertaking to provide the programming contemplated by paragraph (i), alternative television programming services in English and in French should be provided where necessary to ensure that the full range of programming contemplated by that para-

graph is made available through the Canadian broadcasting system;

- (r) the programming provided by alternative television programming services should
 - (i) be innovative and be complementary to the programming provided for mass audiences,
 - (ii) cater to tastes and interests not adequately provided for by the programming provided for mass audiences, and include programming devoted to culture and the arts,
 - (iii) reflect Canada's regions and multicultural nature,
 - (iv) as far as possible, be acquired rather than produced by those services, and
 - (v) be made available throughout Canada by the most cost-efficient means;
- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
 - (i) contribute significantly to the creation and presentation of Canadian programming, and
 - (ii) be responsive to the evolving demands of the public; and
- (t) distribution 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.

(2) *Further declaration.* It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

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¹ L.-L. Christians, "Convergence and Proceduralisation: Generalisation vs. Contextualisation?" (1998) 22 *Telecom. Pol'y* 255 at 258.

² W.H. Melody, "The Information Society: The Transnational Economic Context and Its Implications" in G. Sussman & J.A. Lent, eds., *Transnational Communications: Wiring the Third World* (Newbury Park, Calif.: Sage Publications, 1991) 27 at 36-37.

³ Y. Benkler, "Communications Infrastructure Regulation and the Distribution of Control Over Content" (1998) 22 *Telecom. Pol'y* 183 at 184.

⁴ See on this point Melody, *supra* note 2 at 37:

It would appear that Third World nations will bear the brunt of the risk and instability associated with the exploitation of information industry technologies and markets. As producers in the periphery, they will have little, if any, control over the product or profit from their labor and other resources. Moreover, successful global marketing by the TNCs requires that Third World leaders be convinced to import the latest computer/telecommunications systems.

⁵ See L.-L. Christians, "Convergence and Proceduralisation: Generalisation vs. Contextualisation?" (1998) 22 *Telecom. Pol'y* 255 at 257:

Faced with the new overlapping due to the phenomenon of convergence, regulation, rather than denying complexity by a discourse of pure generalisation, must be given the means for a real pluridisciplinarity, that is to say, for an articulation among the three poles, economic, democratic and technological, reflected not as theoretical and formal juxtaposition but as a true osmosis, within which no pole has a pre-established rational priority. The problems linked to this complex intertwining can only be effectively apprehended on condition of being collectively reconstructed beforehand in the enlarged field of all the interested parties. In this way, concretely, we can revise the regulation of content, certainly by abandoning any substantive conception of the general interest or of what is, for example, to be suppressed as "pornography", but also by reconstructing deliberative procedures which allow these questions to be posed and resolved without it being a question again of opposing sex chatlines, pornographic magazines or broadcasts by giving whatever technological or economic diktat as an excuse. This collective reconstruction must be democratically inscribed in the particular mechanisms enabling all the interested actors, with regard to which the mechanical increase in curbs on market supply and demand is insufficient.

⁶ *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22 [hereinafter CRTCA]. See discussion in S. Handa *et al.*,

Communications Law in Canada (Markham, Ont.: Butterworths, 2000) at para. 3.39.

⁷ *Telecommunications Act*, S.C. 1993, c. 38.

⁸ *Broadcasting Act*, S.C. 1991, c. 11.

⁹ Handa *et al.*, *supra* note 6 at para. 3.39. See also M. Ryan, *Canadian Telecommunications Law and Regulation* (Toronto: Carswell, 1997) at 5-2.

¹⁰ The objectives of the Canadian Telecommunications Policy are set forth in s. 7 as follows:

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

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(d) to promote the ownership and control of Canadian carriers by Canadians;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services; and

(i) to contribute to the protection of the privacy of persons.

¹¹ The Broadcasting Policy for Canada is set forth by *declaration* in s. 3 of the *Broadcasting Act*, which is cited in the Appendix I to this paper due to its length.

- ¹² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to G.A.T.T. 1994: Final Act and Agreement [hereinafter TRIPs].
- ¹³ *Canada-United States Free Trade Agreement*, 22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281 [hereinafter FTA].
- ¹⁴ *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 32 I.L.M. 289 [hereinafter NAFTA].
- ¹⁵ *General Agreement on Trade in Services*, see discussion in Handa *et al.*, *supra* note 6 at paras. 2.143ff.
- ¹⁶ World Trade Organization, *Fourth Protocol to the General Agreement on Trade in Services*, WTO Doc. S/L/20 (30 April 1996) [hereinafter BTA].
- ¹⁷ See e.g., *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 U.N.T.S. 67, U.K.T.S. 1973 No. 41.
- ¹⁸ CRTC, *Telecom Public Notice CRTC 99-14/Broadcasting Public Notice CRTC 1999-94* [hereinafter New Media Report].
- ¹⁹ CRTC, *Public Notice, CRTC 1999-197* [hereinafter New Media Decision]. Discussion of the new Media Decision herein incorporates the reasons set forth in the New Media Report, *ibid.*
- ²⁰ Handa *et al.*, *supra* note 6 at para. 12.150.
- ²¹ See R.M. Frieden, "Universal Service: When Technologies Converge and Regulatory Models Diverge" (2000) 13 Harv. J. Law & Tech 395 at 431: Any attempt to extend regulatory regimes to Internet-mediated applications runs the risk of creating a dichotomy in regulatory rights and responsibilities between providers of functionally equivalent services... The development of Internet-mediated services presents a regulatory challenge to governments, particularly to those governments disinclined to treat the new services as equivalent to services transmitted and delivered via traditional media. The juxtaposition of different regulatory regimes typically creates an asymmetry that has the potential to tilt the competitive playing field in favor of the less-regulated service. To the extent that regulation imposes financial and operational burdens, the service provider subject to greater regulation typically finds itself at a competitive disadvantage to a less heavily regulated operator. Governments need a compelling justification to establish different regulatory regimes in view of the potential for such an asymmetry to affect the relative attractiveness of different services in the marketplace.
- ²² *Copyright Act*, R.S.C. 1985, c. C-42.
- ²³ Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess., 37th Parl., 2002 (assented to 12 December 2002, S.C. 2002, c. 26). The bill was originally introduced in the 1st session of the 37th Parliament as Bill C-48, but died on the Order Paper when Parliament was prorogued on 16 September 2002. By motion adopted 7 October 2002, the House of Commons provided for the reintroduction in the 2nd session of legislation that had not received Royal Assent.
- ²⁴ CRTC, *Broadcasting Public Notice CRTC 2003-02* [hereinafter Internet Retransmission Notice].
- ²⁵ *Ibid.* at para. 79.
- ²⁶ For more information regarding Internet retransmission and its regulation in both Canada and the U.S., see S. Handa, "Retransmission of Television Broadcasts on the Internet" (2001) 8 Sw. J. of L. & Trade Am. 39.
- ²⁷ See B. Clements, "The Impact of Convergence on Regulatory Policy in Europe" (1998) 22 *Telecom. Poly* 197 at 203: The balance between *ex-ante* sector-specific regulation and the application of a *posteriori* competition rules was a recurrent theme of the debate leading to the full liberalization of telecommunications services and infrastructure. At that time, there was general consensus that increasing dependence on competition rules, accompanied by a progressive reduction of *ex-ante* regulation, would be a feature of the post-1998 environment.
- ²⁸ T.G. Kane, "Recent Case Law, Regulatory and Policy Developments in the Canadian Telecommunications and Broadcasting Sectors" online: *Lexpert Articles on Recent Legal Developments (2000)* <http://www.lexpert.ca> (date accessed: 7 May 2003).
- ²⁹ *Ibid.*
- ³⁰ *Ibid.*
- ³¹ See P. Larouche, "EC Competition Law and the Convergence of the Telecommunications and Broadcasting Sectors" (1998) 22 *Telecom. Poly* 219 at 219: These changes have been reflected in the regulatory framework applicable to telecommunications and broadcasting, respectively, although it is still open to question whether it has evolved sufficiently or rather is still running behind the [technological] development of these sectors. Not only have these advances brought major changes to the telecommunications and broadcasting sectors, they have also all but erased the technological frontier between them, a phenomenon now known as convergence. The Internet provides a ready example of what convergence can lead to in practice, and it is often said that it constitutes a scale-model (on a narrow-band basis) of what awaits us in the not-so-distant future. Just like the transformation of each of these two sectors had to be echoed in the regulatory framework, their convergence must also have legal consequences; indeed, it puts into question the very notion of "telecommunications" and "broadcasting" as discrete phenomena which can be addressed and governed by a specific regulatory framework in order to achieve certain ends.
- ³² Clements, *supra* note 27 at 199-200.
- ³³ See Larouche, *supra* note 31 at 241-42: Competition law is often presented as a laboratory for regulation: as cases arise, problems are identified and solutions put forward, which can then be turned into a regulatory framework applicable to the whole sector.
- ³⁴ C. Scott, "The Proceduralization of Telecommunications Law" (1998) 22 *Telecom. Poly* 243 at 245.
- ³⁵ See W.T. Stanbury, "Competition Policy and the Regulation of Telecommunications in Canada" in W.T. Stanbury, ed., *Perspectives on the New Economics and Regulation of Telecommunications* (Montreal: Institute for Research in Public Policy, 1996) 103 at 103. For a more detailed analysis of market power in the "information economy", see R.F.D. Corley, "The Competition Act and the Information Economy" in J.B. Musgrove, *Competition Law for the 21st Century: Papers of the Canadian Bar Association Competition Law Section 1997 Annual Conference* (Aylmer, Qc: Juris Publishing, 1997) 143.
- ³⁶ R.S.C. 1985, c. C-34.
- ³⁷ Handa *et al.*, *supra* note 6 at para. 15.67.
- ³⁸ *Ibid.* at para. 15.11.
- ³⁹ *Ibid.*
- ⁴⁰ *Ibid.* at paras. 15.5, 15.13.
- ⁴¹ Frieden, *supra* note 21 at 431.
- ⁴² See Scott, *supra* note 34 at 251: It is said that what is now required is "technology neutral law". Globalization of telecommunications services has created pressure on nation states to reduce the restrictiveness of national regimes, while at the same time supranational institutions (such as the EU and WTO) have sought to expand their competence into telecommunications, and have inevitably based their regimes on the most general possible norms so as to permit their widest possible application. The deployment of such generalized norms is consistent with a broad conception of subsidiarity as applied at EU level (and implicitly by the WTO), and permit a degree of regulatory competition between jurisdictions seeking to encourage inward investment in communications infrastructures. Further pressure for generalization of norms arises from the use of a principle of reciprocity as the basis for bilateral agreement on access for foreign companies to national telecommunications markets.
- ⁴³ OECD, *Canada — Annual Report on Competition Policy Developments in Canada* (1 April 1999 to 31 March 2000), online: OECD http://www.oecd.org/daf/clp/Annual_reports/1999-00/canada.pdf (date accessed: 7 May 2003) at 15.
- ⁴⁴ See the discussion of the alternatives in a speech by then Deputy Secretary-General of the OECD, Joanna R. Shelton, "Competition Policy: What Chance for International Rules?" (Wilton Park Conference 545, 25 November 1998), online: OECD <http://www.oecd.org/daf/clp/Speeches/JS-WILTO.htm> (date accessed: 7 May 2003). See also A. Gates, "Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector" (2000) U.T. Fac. L. Rev. 83 at 119, where the author advocates the implementation of

competition policy “across sectors and across national borders so as to maximize competitive opportunities and minimize anti-competitive behaviour”.

⁴⁵ Gates, *ibid.* at 119.

⁴⁶ J. van Cuilenburg & P. Verhoest, “Free and Equal Access: In Search of Policy Models for Converging Communication Systems” (1998) 22 *Telecom. Pol’y* 171.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 177.

⁴⁹ *Ibid.* at 178.

⁵⁰ See e.g. P. Nihoul, “Competition or Regulation for Multimedia?” (1998) 22 *Telecom. Pol’y* 207 at 213:

Another example [in EC law] concerns the obligation for dominant firms to share essential resources with the participants in a given market — despite the fact that they may be competitors. . . . It has now been recognised as a landmark for the application of competition rules to interconnection agreements. The essential-resource doctrine does not enhance market freedom. The best way to describe it is probably to refer to a nationalisation or an expropriation of a competitive advantage acquired or developed by a company: all participants in the given market are allowed to share in the resources acquired or developed by the firm.

⁵¹ S. Globeman, “The Economics of the Information Superhighway” in T.J. Courchane, ed., *Technology, Information and Public Policy: Proceedings of a Conference Held at Queen’s University 17-18 November 1994* (Kingston, Ont.: John Deutsch Institute for the Study of Economic Policy, 1995) 243 at 256.

⁵² See e.g. Gates, *supra* note 44 at 118-19: “The way forward may be to develop more focused investment review provisions, rather than to perpetuate foreign ownership restrictions that have only incidental and unpredictable effects on competition”.

⁵³ See the Industry self-regulatory Codes listed online at: Canadian Radio-television and Telecommunications Commission, “Broadcasting Industry at a Glance”, online: CRTC http://www.crtc.gc.ca/eng/ind_broad.htm#codes (date accessed: 7 May 2003).

⁵⁴ See Melody, *supra* note 2 at 35:

As TNCs [trans-national corporations] expand through the use of the information technologies, they can reduce their dependency upon any single resource supply or production location, thereby enhancing their negotiating power with individual governments, unions, and other groups. A higher proportion of risk can be transferred to the resource supplier and producing regions. This can be done by means of pressures: (a) for subsidies, tax concessions, and regulations conferring special privileges or even government promotion of TNC interest; (b) for the maintenance of a labor force of specialized skills at low wages in the face of unstable employment; (c) for exemption from social controls, such as health and environmental standards; and/or (d) for a privileged position in the domestic market of the peripheral producing nations.

⁵⁵ See Gates, *supra* note 44 at 117-18.

⁵⁶ See text accompanying note 16, above.

⁵⁷ Clements, *supra* note 27 at 203.