

Does the Broadcast Industry Need a New Regulatory Model?

By

Timothy Denton, BA.,BCL

May 1, 1998

An article prepared for the Canadian Institute's
"Canadian Cable, Satellite and Broadcasting Congress",
June 23, 1998
in Toronto, Ontario

The opinions expressed in this paper are personal and do not necessarily reflect the views of any clients with which I have been, am now, or may hereafter be associated.

Does the Broadcast Industry Need a New Regulatory Model?

The answer is "no". And the answer, paradoxically, may be "yes". But it depends on what question you really want answered.

You can choose to understand the question in several different ways. Some might wish to talk about more flexible procedures within the Commission. Some might wish to talk about the competition between telephone and cable companies. All well and good. But what I want to talk about is whether broadcasting regulation as we have known it will survive. The whole big idea.

If you ask the question in the sense: "does broadcasting needs a new regulatory model because television programming, or something like it, will eventually be transmitted over the Internet?", the answer is no, in my opinion. If you ask the question: "will the Internet have so great an effect on television that the underlying ideas of the Broadcasting Act will have to be rethought?", then the answer is possibly "yes." But I suggest that by the time Canadians feel the need to change the Broadcasting Act, we will be in a whole new world. The relevant issues for Canadian television programming will have changed so much that the statute will be called something different, such as the Promotion of Canadian Programming Act.

Whether the broadcast industry needs a new regulatory model depends on what you want to achieve, and it depends on what the problem is that needs solving.

The problem that needs solving, according to those truly concerned with Canadian television and radio broadcasting, is the scarcity of top-quality Canadian programming that people will want to watch. It is unnecessary to rehearse the arguments about the American economic advantage in entertainment media. We are all familiar with them in this audience. To respond to this problem, the Canadian government has since 1905 devised first a spectrum allocation system and then a broadcasting regulatory system that by now has the following features:

Radio spectrum is a nationalized resource, by which is meant the allocation and assignment of spectrum is made by governmental decisions, rather than by markets,

Coaxial cable distribution systems, and other television distribution media, such as satellites and local broadband microwave systems, are subject to the carriage requirements of the broadcasting regulator, and

Canadian television production is subsidized through direct expenditures on the CBC and by the creation of television production funds, paid for out of the gross revenues of the distribution systems, including cable and satellites.

All of the extensive and intensive regulation of television program delivery derives from the federal government's jurisdiction over radiocommunications and its ability to regulate for the "peace, order and good government" of the realm.

Radio communications is one of three great models we have for understanding and regulating communications carriers; the other two are, common carriage, and printing. The first two have been governed by sector-specific legislation, while the latter has been largely left to the ordinary processes of contracts and civil remedies governed by the common law. Broadcasting, common carriage, and printing are the three available models for treating communication media. Each conceives the carrier to be under sharply distinct rights and obligations.

The print model is free from regulation in general, though it is subject to laws of general application such as copyright and libel.

The common carrier model is distinguished by the fact that, even when the government does not regulate prices, it still seeks to secure equal access for all to the facilities of the carrier.

The broadcasting model is characterized by the fact that the government issues licences to the private owners of broadcast facilities, and may coerce them in many ways to achieve a number of different programming and public policy objectives.

"A convergence of modes is upsetting what was for a while a neatly trifurcated system". So wrote Professor Ithiel de Sola Pool in 1983, and he said: "The choice between them is likely to be a key policy issue in the coming decades."

How right he was.

We have been talking about convergence for many years now but we are at last seeing visible evidence that it is occurring, at least in the telecommunications and computer fields. As George

Gilder remarked a while back, the term convergence is not really appropriate. It is actually the annihilation of one form of signal transmission technology by another. Steamships replace sailing ships. Internal combustion engines replace external combustion engines. Horses are replaced with automobiles. So it goes.

These developments would be important enough without the attendant legal ramifications. Fortunes are being won and lost and lives are continuously being reorganized in the wake of these developments. Yet our concerns must also encompass the legal and political issues that go with these developments. Legal regimes governing media are like countries riding on the back of tectonic plates. As the plates converge, new borders must be found or one regime must prevail over another.

So the underlying concern in all of these discussions of "Whither the Broadcasting Act?" is really this: will the scheme of government control embodied in the Radiocommunications Act and the Broadcasting Act be extended to new media such as the Internet?

And I can only say again that the answer to that question depends - or should depend - on the problem that needs solving. And that means, for me, that purely legal and constitutional arguments must finally take account of the technologies, on the one hand, and where we want to go as a society, on the other,

The questions that the panel were asked to address were several, and others can speak to them better than I can. Five were of interest to me and within the range of what I can speak to.

- What is the impact of the Internet and other new technology?
- Is regulation of the Internet a feasible approach to generating Canadian content?
- Is regulatory control of the Internet possible?
- Is access by Canadian cultural product to the Internet a real concern?
- How does borderless distribution affect the control of content?

1. What is the impact of the Internet?

I cannot decide whether the Internet will have any effect on television as we know it, apart from changing the amount of time we spend in front of the boob tube versus the computer screen. But in the world of telecommunications, the impact - and I use that word advisedly - is going to radically transform the telephone companies.

Last year I was thinking to myself that the telephone companies were going to be in serious trouble. Theirs is the empire of circuit switching. They invented it; they own it; they have been Masters of the Universe for as long as any one can recall.

But like a great asteroid hitting the Earth at a million miles an hour, packet switching has hit Cyberspace. To borrow the language of the film "Deep Impact", it is an Extinction Level Event for circuit switching. The shock waves are spreading out at the speed of sound, the tsunami is knocking over the Great Switching Pyramids of Telephony as we speak. The telecommunications industry will be reorganized as rapidly and as fundamentally as computers were in the 1980's.

It is not clear to me that the same fate is inevitable for television. Indeed, it is at least arguable that television as we know it will survive, as a continuous form of culture, albeit at a price in terms of its future relevance.

The great installed base of analog vacuum tubes known as television sets protects broadcasting, for the time being, from the transformation that is overtaking the telephone industry. At a 99.1% level of household penetration, television sets surpass even telephones in popularity, at 98.7% of household penetration. Over half of Canadian households had two television sets in 1996. It is indeed possible that, as long as the installed base of largely dumb television sets remains, they will be immune to the Internet and the revolution in signalling technology it embodies. Television could continue to be an art form and a medium as resistant to change, and as bound in time, as opera is, for instance. The price that will be paid for this technological stability may not appear to be too high, at first, because existing television sets will continue to require a stable, analog signalling technology to feed them. The one-to-many characteristics of broadcasting would remain. Interactivity would not invade this sphere. It is quite possible to imagine that the Internet might pass over the television set entirely, and that the television and television watching could remain a stable island of technological stability and cultural continuity, as opera has become.

In other words, as long as the television set remains as it is, and as long as people desire it to be so, there is no immediate threat from the Internet. As soon as the television set starts to run on serious computer power, however, the television broadcasting system as we have understood it until now will be over. The only issue is the timing of the fundamental change. Right now your television set is the dumbest terminal in your house. When it turns into a computer, the broadcasting regime as we have known it is over. And for the reasons I have stated I think it is many years away:

- the installed base is very large
- the systems feeding the set have to be digitized and run on Internet protocol
- there must be clear advantages for people to give up their old sets for something better.

The television set will be in serious rivalry with the computer for time and attention, but as soon as the television set becomes another form of computer, the television broadcasting system as we have known it is finished. Yet I do not expect this anytime soon, because people are conservative. Inertia will keep us watching television passively, inertia will keep the television set where it is, and perhaps only slowly, as a new computer generation grows up, will the importance of television diminish.

2. Is regulation of the Internet a feasible approach to generating Canadian content?

No. The Internet does not lack for Canadian content now. There is no lack of Canadian content for the same reason there is no lack of Canadian content in voice communications. The entry cost consists of

An account with an Internet service provider,

Access to that ISP through the phone or cable systems, and

Adequate web-authoring tools, which are available with word processing software these days.

All of which is available for hundreds of dollars not thousands or millions. Many thousands of Canadians maintain websites and that number is growing. It is difficult to see what resources could be gathered and directed toward Canadian websites that are not already being spent *gratis* by the Canadian public.

The Internet does not demonstrate the technological characteristics of television broadcasting or the economics of television program production. As Mr. Justice Dalzell said in *Reno v. ACLU*:

"First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers."

The result is an abundance of Canadian content on the Internet, by any measures one could care to employ. Given the fact that Canadian per capita participation in the Internet is one of the highest in the world, what is the nature of the problem that needs solving? In addition, there are profound technical reasons to think that the scheme envisioned by the *Broadcasting Act* is irrelevant to the Internet. The Internet, by drastically lowering the price at which any one can publish, is one of the most democratizing influences at work in the world today.

3. Is Regulatory Control of the Internet Possible?

Those who imagine regulatory control of the Internet is possible - I am not saying that any such people exist, but they may need to take into account the findings of fact in *ACLU v. Reno*:

"46. A distributed system with no centralized control. Running on tens of thousands of individual computers on the Internet, the Web is what is known as a distributed system. The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point."

These findings of fact and law were confirmed by the US Supreme Court in *ACLU v. Reno*. In the words of Mr. Justice John Paul Stevens:

"Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."

And further, the Supreme Court addressed the body of precedents concerning the extensive regulation of broadcasting, which have been founded on the extent to which media were pervasive - entered the home without adequate control -and found them irrelevant:

"Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.

Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" 929 F. Supp., at 844 (finding 88).

The Supreme Court also laid to rest that old shibboleth, spectrum scarcity as the basis of the government's right to regulate:

"Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999."

Despite these findings, I believe the answer is that regulatory control of the Internet is possible, but not at a price most Canadians are willing to pay. A court might determine, on purely legal forms of reasoning, that television programs accessed on demand by consumers was legally "broadcasting". The result would be to absorb the entire distribution system into broadcasting jurisdiction. If it could not be successfully done, it might still be tried. One can never be sure that a Canadian court would not lean more strongly to state intervention in the public interest than towards the right of people to govern their lives without the benefit of state instruction. Technical difficulties might be lost sight of in the red leather chamber of the Supreme Court. A packet switched system is more difficult to regulate than a circuit switched one, and we have never attempted a comprehensive scheme of regulation for the content of telephone calls.

Here we must be careful to distinguish regulation of any kind from the rule of law. Conversation and publications are subject to laws of general application; they are subject to the rule of law. But that rule is a rule of general freedom, within carefully crafted restraints. No one seeks permission of the government to write, speak or preach. A recent study by Industry Canada spent three hundred pages showing the limitations of free speech that apply in the form of copyright, libel, hate speech, and other criminal and civil offences. But the penalties after the fact do not disguise the fact that no one speaks or prints by licence from the government, as do broadcasters. The rule of law is an entirely different conception than regulation.

As a matter of policy, if not of law, it needs to be demonstrated that there is a problem of Canadian content on the Internet that needs solving, and that the *Broadcasting Act* provides the right tool or combination of tools to solve this problem.

Second, it is undesirable in principle to try to envelop peer-to-peer, computer based, on-demand communications in a comprehensive scheme of political regulation, which in addition does not suit the economic and technological characteristics of the medium.

Third, the attempt to apply the Act to the Internet will threaten a number of important citizen and business interests, with two consequences: first, capital and talent will flee the Internet industry

for the United States and other places off-shore, and second, the attempt will be challenged constitutionally, with a high probability of success.

3.1. Negative economic effects

The real issue is that even to consider the application of the *Broadcasting Act* to any portion of the Internet raises uncertainties that hinder the development of Canadian content. Companies will not invest unless they are sure of the rules, and especially where, if the Act were applied, they would be disqualified on the grounds of foreign ownership.

It is also certain that any attempt to apply the *Broadcasting Act* to the Internet would be immediately greeted by large scale shifts of web-sites out of the country to storage in the United States and offshore. This would lead to a decline of Net-based technologies and knowledge workers in Canada, which would rebound in declining opportunities for all Canadians in the net-based economy of the future.

3.2. Broadcasting regulation will not work

Broadcasting legislation, if applied, would not work. For regulation to be effective, the licence must have an economic value that makes obedience to the terms of the licence possible. Pure coercion is not really conceivable in a liberal society. Licences have value when they permit the exploitation of something relatively scarce. In the old days, spectrum was sufficiently scarce, and the technical problems of exploiting it sufficiently complex, that broadcasting could be regulated effectively. The history of broadcasting regulation in Canada recounts the move from a three channel universe to a 50 channel universe. But what is to be done in a universe where each user and provider selects from an infinite variety of webpages at a time of their own choosing?

There are no 'channels' on the Internet. There are billions of IP addresses. Channels are a scarcity concept derived from the characteristics of broadcast television.

Where is the scarcity that would make regulation effective, even if it were legal and constitutionally possible? If every IP address in the world is a potential source of programming, and there are billions of such numbers, what is the scarcity that needs managing? Where is the antenna that government can take down? What is it that you can effectively padlock? What is the entry barrier that gives a licence any economic value? What scarcity rent can be extracted from an endless supply of low-cost bandwidth?

Some portions of the government may believe that the routers in the local ISP are the control point, and that they can be likened to "distribution undertakings", such as cable companies. However, what is going to be controlled? The routing of digital packets through the router? The content of the packets going through the router? The storage of "programs" in a computer? Or the taxation of the monthly bill sent out by the ISP to the customer?

Regulation can only be made to work when the cost of escape is too high. The advances in telecommunications are bringing us a world of flat rate calling - all calls will be local. As the telephone companies and their rivals reconfigure their networks for broadband Internet Protocol-based communication, voice telephony will be a cost-free add-on. Therefore it is probable that the cost disadvantage of reaching an ISP, even one in a foreign country, will soon

be negligible. So the ability of the government to regulate the system for content is small now and getting smaller.

Further, on purely political grounds, has anyone seriously considered what the response will be to the proposed taxation and regulation of nearly three million Canadian Internet subscribers, when this educated and relatively well-off portion of the Canadian public is alerted to the issue? The first sign of government interference in web-sites will see a massive transfer of websites to servers outside federal jurisdiction. The content of websites can be transferred electronically to any point on the globe. Canadian ISP's will lose the revenues that come from hosting websites. They will also lose the webpage development business as scarce talent migrates to jurisdictions more friendly to the Internet.

3.3 Will the Internet be within federal broadcasting jurisdiction?

A final and important consideration: will the Courts find that the Internet is within federal broadcasting jurisdiction? To understand the question, we have to consider that authority in the Canadian constitution is divided between federal and provincial levels. Criminal legislation, for instance, is assigned exclusively to the federal power, whereas property and civil rights to the provincial. A statute of the federal Parliament may purport to regulate an economic activity on the basis that it falls within federal jurisdiction, or vice-versa. Such was the case with provincially-regulated telephone companies for sixty years, before the AGT and Guévremont cases ruled that all telephone companies were within exclusive federal jurisdiction.

There is also another long line of cases which hold that an enterprise is not within federal jurisdiction merely because it employs the services of federally-regulated undertakings to transact its business. When you and I communicate across a telephone system, which is federally regulated, this fact does not attract federal jurisdiction to the whole enterprise. When a law firm in Toronto contacts a client in British Columbia, the fact that the firm might use federally regulated services to communicate does not cause the legal profession to be federally regulated. And so forth.

A strong argument can be made that those ISP's which are not otherwise federally regulated telecommunications undertakings are in a like position. If this is so, then, despite what the *Broadcasting Act* might say, ISPs are in the same position as, say, video rental stores, enterprises wholly within provincial jurisdiction.

The entire constitutional issue needs to be more thoroughly considered than it can be here. Many other factors will be at work besides pure constitutional argument, including, for example, the deference that the Courts will show to the CRTC's own definition of "broadcasting". Nevertheless, federal attempts to regulate and tax the Internet as broadcasting will unleash forces beyond its control, forces which have the means, incentives, and constitutional arguments available to contest the authority of the federal government.

4. Is access by Canadian cultural product to the Internet a real concern?

We have a reasonable idea of what television programming consists of. As the number of channels expands, we begin to get new styles of programming. But with regard to the Internet, none of us really knows what the access problem would be. As illustrated above, the current

entry costs to posting material on the Internet are trivial.

In the light of these facts, one is left to wonder what future state of the Internet would generate a reasonable apprehension of exclusion by someone of Canadian cultural product. Would search engines fail to point to Canadian sites? Some of them are already programmable to look through Canadian sites first. I am unaware of anything in the architecture of search engines that could possibly cause them not to refer to Canadian sites, and even if one did so exclude, many others are available that do not.

Those who wish to regulate "programming" on the Internet must assume that something like mass entertainment programming of the television age will continue in recognizable form, even though delivered on demand through computer networks, and that its supply can be augmented by the tools of licensing and taxation available to the CRTC under the Act. Neither is likely. They further suppose that the licence will be worth enough for the licensee to comply with government content regulation, and that Canadians will not have practical and effective means to escape the regulated regime.

Even assuming that the Internet becomes a competitive medium for the transmission of "programs" within the meaning of the *Broadcasting Act* - and this is unlikely for many years to come - there is no reason to believe that the creators will be harmed, and every reason to believe that they will be helped, by the ease and affordability of reaching a world-wide audience via the Internet.

Putting it in industrial terms, the current holders of broadcasting licences may see the economic value of their licences decline. However, the creators and their packagers, be they publishers, authors, film and television producers, scriptwriters, actors and so forth, can only benefit from a medium that eventually may drastically lower the cost of reaching their audiences, greatly expand the number of windows for their products, and possibly eliminate the need for the current set of program packagers.

Accordingly, in any plan to regulate and tax the Internet, policy makers should be explicitly clear whom they intend to help. Is this in aid of the packagers and assemblers, whose role is threatened by the new technology, or is it in aid of the artists, producers, and story-tellers? On whose behalf would regulation work, and do they need the help? It is my observation that we do not yet know what the problems would be that need solving, and we have strong reasons to suppose that the tools available in the Broadcasting Act are neither appropriate nor applicable. It is worth noting that a recent extensive review of policy instruments to assist Canadian new media made no mention of the Broadcasting Act as a potentially useful tool and treated its possible application as a menace to investment.

5. How Does Borderless Distribution Affect the Control of Content?

I think the answer to this question is the same as the answer to the first: as long as the installed base of television sets remains functionally the same as they are now, the possibility of escaping content regulation is nil. Regulatory capture of every level of the generation and distribution of television is complete. We have seen that, between the prohibitions contained in the *Radiocommunications Act* against unauthorized receiving equipment, and the powers contained in the *Broadcasting Act*, and the *Broadcasting Distribution*

Regulations<http://www.crtc.gc.ca/eng/legal/bdue.htm>, even direct to home satellites have been tamed, and their American rivals repressed but not extinguished in this country.

So borderless distribution is not the relevant issue; it is the cost of escape. That cost is plummeting, for reasons we are all becoming acquainted with. Computers linked to networks have never been subject to the form of regulation derived from radiocommunication. Economic regulation touches on the Internet principally in the cost of obtaining access through the bottleneck facilities of a carrier, be it a phone company or a cable company, to the Internet. Thereafter the citizen has no further connection to the regulated universe. The networks that make up the Internet itself are largely private property.

The contrast to spectrum regulation and broadcasting is profound. You may recall that electromagnetic spectrum is the first and foremost example of borderless distribution in this century. I make three points:

Broadcasting is regulated like no other medium of communication in a liberal society. (We touched upon this earlier.)

Intensive content regulation has followed directly from the licensing of the use of spectrum.

Content regulation has been extended to new media, in this case, the cable television industry, on constitutional grounds, despite significant technological differences in the medium of transmission.

I make these points because, whether feasible or not, once the law begins to understand a technology in a certain light, a train of consequences follows over decades.

It can be argued that the fate of broadcasting was sealed by the technological concepts that governed radio spectrum in the 1920's; no one knew how to prevent interference and make the airwaves usable without a scheme of regulation, and that this could not be enforced without government ownership of the airwaves.

"From the earliest days of radio, few doubted that regulation of some kind was called for. The reason was not interference but the safety of ships at sea. Regulation was required in order that standard wavelengths could be designated as calling frequencies or distress frequencies, to ensure that radio stations using different equipment would communicate with each another, and to mandate that all vessels over a certain capacity carried radio equipment and operators. This is the context in which the Berlin Conference of 1906 and the London Conference of 1912 were held. The problem at the time was not congestion or over occupancy but rather protocols by which radio operators could locate and communicate with each other in what was virtually empty terrain. The spectrum could be a lonely place in those days."

Whether congested or empty, Canadian radio regulation from the first forbade the establishment of a radio apparatus without the permission of the Minister. The 1905 *Wireless Telegraphy Act* stipulated no one might operate a wireless telegraphy station without the approval of the Minister of Marine and Fisheries. The *Radiotelegraph Act* of 1913c. 43, coming after the Titanic disaster, added certificates of proficiency for radio operators, the classification of equipment, licence fees, and the prescription of watches to be kept on ships. The general prohibition against the establishment of any radiotelegraph station without the approval of the

Minister remained, and was strengthened and widened in the *RadioAct, 1938* to include receiving apparatus.

Broadcasting in the modern sense was first regulated by *The Canadian Radio Broadcasting Act, 1932*. The power "to regulate and control broadcasting in Canada", including the power to control the proportion of time that is to be devoted to national and local programmes" and the proportion of advertizing time, and its character, was granted to a Canadian Radio Broadcasting Commission, progenitor of both the CBC and the CRTC.

We can see clearly in the words of the statutes that control over radio apparatus is the key, that it was imposed from the beginning, and that it preceded regulation of program content and the licensing of broadcast radio stations by an arm of government. We can also see that, once radio stations were subject to regulation, the long arm of government spread into the transmission apparatus, even when the signals went to wires. In the words of the then Chief Justice Mr. Laskin:

"I do not see how legislative competence ceases in respect of those signals merely because the undertaking which receives them and sends them on to its local subscribers does so through a different technology."

And further:

"It would be incongruous, indeed, ...to deny the continuation of regulatory authority because the signals are intercepted and sent on to ultimate viewers through a different technology. Program content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of a total enterprise."

"The fallacy of the contention... of the appellants is in their reliance on the technology of transmission as a ground for shifting constitutional competence when the entire undertaking relates to and is dependent on extra-provincial signals which the cable system receives and sends on to subscribers."

The record shows that, despite different constitutional traditions and concerns, in both Canada and the United States, the same fundamental decisions were made regarding cable, which led to the direct subordination of cable to broadcasting, rather than competition. In both countries, it was established for many years that cable could retransmit programs without paying copyright. Free retransmission may have been justified in Canada on the basis that television programming was not a "public performance", but I venture to say that the underlying reason was a belief that broadcast television was supposed to be free, universal and advertiser-supported.

While this decision was eventually corrected, the elimination of the broadcaster's property rights in their signals required the regulator to act on their behalf to secure the economic underpinnings of the broadcasting business. In both countries, the Courts and the broadcasting regulator acted to suppress the competitive potential of cable and to make it the servant of the broadcasting industry. It was ensured that cable companies would carry local stations first and foremost, low on the dial. Then potentially competitive programs or stations carrying the same

signals as local stations were banned. In addition, cable was, until recently, prevented from being a significant programmer. In Canada, we have successfully implemented a program of protecting the economic value of Canadian programming rights by policies of simultaneous substitution of American advertising. I submit that Canada has done all these things because the government could do all those things effectively and be backed by the Courts. The ability of any part of the broadcasting system to move outside the scope of regulation was nil and the desire to leave the regulated game was low.

Conclusion

I begin from the belief that freedom is the paramount issue of social life, and that it begins with the freedom to communicate. History records the depressing fate of societies that have institutionalized Truth and enforced social and intellectual conformity through coercive means. The centuries-long political and economic decline of Spain, for instance, was long preceded by the stifling of intellectual life by an oppressive social conformity, for which the Inquisition is justly blamed. We do not lack other examples where ideologies and religions have suppressed the vigorous intellectual inquiry that is the basis of science and the personal freedom which is the basis of economic growth, as well as of other social virtues.

If you accept that freedom is the paramount issue, and that the freedom to communicate is vital to the maintenance of a healthy society, then the different treatment by the legislatures, the Courts and the constitution, of communication media are of great concern. The print media and the pulpits of this country are governed by the ideas of the late 18th century, but broadcasting is governed by the more restricted notions of the early twentieth. The fundamental decisions about spectrum and broadcasting were made in the 1920's of this century, and a train of constitutional reasoning ensures that these ideas have been applied to new media.

On the topic of the legal issues in convergence, the words of Ithiel de Sola Pool are particularly apt. In 1983 he wrote:

"The mystery is how the clear intent of the Constitution, so well and strictly enforced in the domain of print, has been so neglected in the electronic revolution. The answer lies partly in the changes in the prevailing concerns and historical circumstances from the time of the founding fathers to the world of today; but it lies at least as much in the failure of Congress and the courts to understand the character of the new technologies. Judges and legislators have tried to fit technological innovations under conventional legal concepts. The errors of understanding by these scientific laymen, though honest, have been mammoth. They have sought to guide toward good purposes technologies they did not comprehend."

It is fortunate that we have evidence that, since that time, the courts in the United States and Canada have begun to pay closer attention to the actual technology before assigning it to constitutional categories. Both the *AGT* and *Guévremont* cases, which assigned telephone companies to federal Canadian jurisdiction, and the *Reno v. ACLU* decisions, which declared the Communications Decency Act unconstitutional on its face, were based on close and careful attention to the technology. We can only hope that these examples will be followed when the CRTC and the courts come to consider the character of the Internet.