

University of Ottawa Conference

May 22-23 2015

Thank you for the introduction and the invitation to participate here today.

My nearly 15 years at the CRTC were the most enjoyable of my working career. I enjoyed the work we did but more importantly I enjoyed working with a great group of hard working bright people. Some of who are here today.

It has been 10 years now since I “retired” from the CRTC and I am enjoying retired life. However I still have a keen interest in communications industry and follow the major issues both here and elsewhere. I appreciate the chance to meet with you and to talk about the issues on the conference agenda.

To show my perceived and maybe real biases you should be aware that I am a member of the board of the Bragg group of Companies. Through Oxford Frozen Foods, Bragg is the largest blueberry producer in the world, the largest carrot producer in North America and the largest battered foods producer in Canada. The group also includes real estate holdings as well as Inland which recycles the deicing fluid from most major airports in NA. Earlier this month we began generating electricity from a 35 unit wind farm in Nova Scotia. We are also the fifth largest cable operator in Canada with systems from Newfoundland to B.C. Under the Eastlink brand we provide phone, cable, and high speed internet in communities across the country and we now offer wireless service in Atlantic Canada.

One year ago I joined the board of DHX Media which has one of the largest libraries of children's programming in the world (including titles such as Teletubbies, Cailou, Johny Test, Inspector Gadget, Slugterra and DeGrassi). In 2014 DHX became the owner of the Family Channel.

While DHX sells programs to broadcasters around the world and is a broadcaster itself we now derive much of our revenue from viewers using video over the internet through such services as Netflix and YouTube.

Notwithstanding my involvement with Eastlink and DHX Media the opinions expressed here today are mine and mine alone and do not reflect the views any of the companies I have been involved with.

My comments are also not based on any sort of academic research but rather simply my take on several issues.

So with all that as background I will turn to the theme of this conference which I understand is: Should Parliament change Canada's communications laws? Have the existing laws achieved their purpose or not?

We have seen tremendous change in this industry over the past few years driven largely by growth in broadband, the internet and wireless and all the "apps" that use this capacity. No doubt you all have your own ideas as to where you think these changes will lead us. However, I am reminded of a line I heard a number

of years ago – we tend to overestimate the impact of technical change in the short term and underestimate it in the long term.

It seems to me and I would guess everyone in the room that we are witnessing a dramatic shift from traditional media to...something!

However we have seen this picture before:

- Radio was going to kill records,
- TV was going to kill radio and the cinema,
- Pay and specialty channels were going to kill broadcast TV,
- Satellite broadcast ,”the death star” was going to kill cable,
- And now, the internet is going to kill all of the above.

Millennials are supposedly game changers. They live with their smart phones and tablets. They apparently share different attitudes toward work, social life, transportation (they have little interest in cars) and entertainment.

My son, an older millennial did away with cable several years ago and went with Netflix and other internet based services for

information and entertainment. His kids, two young boys, are growing up on Netflix YouTube and video games. What will they watch and how will they watch it as they get older? Not likely the same as we have been doing!

At Eastlink we are beginning to see the impact of this shift as a number of customers are dropping the “bundle” and just going with high speed internet.

It seems our experience with video is changing perhaps dramatically. Or is it?

On the other hand the cinema which was supposed to have been killed off years ago several times by TV, pay TV and video stores (where are they now?) seems to be thriving. Look at the success of Frozen and Avengers. Every time there is a school holiday (a personal development day for teachers) my wife and I take our grandkids to the cinema to see the latest kids movie – and the cinema is packed. (My favorite was Despicable Me)

So in some cases the old technology can and does survive along with the new.

It seems people are consuming as much, if not more, music and video than ever, they are just getting it in different ways

I don't know where technological change in this industry will lead us, more importantly I don't think the government or the regulator knows. Regulators tend to be REACTIVE not PROACTIVE! (And that is not inappropriate!)

I think the best government/regulators can and should do is provide for an industry structure that allows technological change and creativity to prevail.

I think for example the Telecommunications Act in stressing reliance on market forces and its technical neutrality accommodates changing technology such as the internet and whatever else might come along. Similarly the Broadcasting Act allows the Commission to not regulate where it not needed or not appropriate.

So, for the most part our existing laws are flexible enough to allow the changing environment to evolve and therefore don't need major change. But they may soon become redundant!

I still believe what I believed back in 1998 when we at the CRTC under the guidance of Francoise Bertrand issued our New Media decision. We decided (as the Act allows) to exempt internet services from regulation pursuant to the Broadcasting Act. In my view internet services can best develop and serve society's wants and needs through minimal regulation. While I believe our current Telecom and Broadcast laws are written in such a way to allow regulation of internet and internet services I think the CRTC should continue to take a hands off approach.

JUST BECAUSE YOU CAN DO SOMETHING DOES NOT MEAN YOU SHOULD!

As I have said I don't think our laws need major change.

However as we proceed through the current technological transition there are a few issues I think should be addressed. I will present to you three.

I came to Ottawa and the CRTC in late 1990 with an agenda; you might say a bias, although the lawyers in the room might

not appreciate that turn of phrase. My bias was in favor of competition and against monopoly.

Up to that point telephone service was a monopoly except for some business services which were provided on a duopoly basis. Of course cable television was provided on a monopoly basis by over 1600 separate systems.

I believed and still believe that competition would provide more innovation, newer and better services and more importantly lower prices while not jeopardizing universal service.

So a group of commissioners and many hard working, bright dedicated staff at the Commission began a journey with the industry to open all telecom markets to competition.

I should note that when we started the Telecom Act did not explicitly state a “bias” toward competition. That came later.

If you had asked me in 1990 what I thought the landscape might look like 25 years later, (yes, can you believe it is 25 years since the CNCP long distance application?), I can confidently say I

would have guessed a lot more players than we have in the market today. (1999-2000 Internet bubble!)

Perhaps I was naïve. Perhaps I still am, but I thought we would see more than one cable operator and one former phone company competing for phone, broadband and video services in most markets. In the business market we have some more competition but for the most part we still have a duopoly. In my experience duopolies are one small step from monopoly which leads to ever increasing prices and little innovation.

The same is true in the wireless/cellphone/smartphone business. While it is true there are a number of wireless licensees, in most markets based on market share we also basically have a duopoly. Relative to other markets/countries we have higher rates and roaming charges and high tower access fees.

In the past some of the new entrants have struggled to become established and two in particular were bought out by existing players, Microcell by Rogers and ClearNet by Telus.

More recently there was considerable controversy around the ownership of Wind and questions as to whether it satisfied the foreign ownership rules.

Within a few years wireless spectrum will be able to compete with landline for broadband services. Therefore wireless service providers will be able to compete with cable and fiber for many if not most consumer services. However our wireless services are already being provided by these same “phone” and “cable” companies.

The government has expressed a concern that we need more competition particularly in the wireless industry and has tried to expand the number of players through its spectrum auction process. But there is one huge obstacle!

So, what is the problem?

Not enough competition, not enough competitors!

What is a possible solution?

In my view we need to significantly amend or eliminate the foreign ownership rules!

One major factor in any discussion of foreign ownership in communications is the fact that, while the telcos were once simply common carriers they are now, and cable operators have always been considered ,“broadcast distribution undertakings” which gets us to broadcasting which gets us to CULTURE!!!

As soon as the “C word” comes up we have apoplexy about any discussion of foreign ownership.

For almost 50 years we have been dragging the Canadian broadcasters kicking and screaming to the altar of Canadian content with small success. The minimum Canadian content rule becomes the maximum delivered – the “floor becomes the ceiling”. Who’s to say a foreign company would not obey the content rules any better or worse than the Canadian ones.

More importantly in this new world of open access it is not clear to me that quotas are necessary or needed. I note here that DHX buys program content from around the world including Canada

and produces programs around the world including Canada and sells programs around the world. Little of this is regulated except of course the Family channel here in Canada.

So if competition is good, and I think it is, and if we need more of it, and I think we do then I think we need to review our foreign ownership rules perhaps with a view to eliminating them.

I believe this needs to be done soon but done carefully. We want new additional competitors not simply foreign companies buying up existing operators. Furthermore if culture raises too much of a red flag perhaps a way to start is to limit foreign ownership for new wireless operators.

So number ONE let's look at our foreign ownership rules!

Another issue I am concerned about is related to competition and that is CONCENTRATION.

We are moving from the 500 channel universe to the ONE channel universe, the internet for all our communications, information and entertainment needs. As a step in that direction BDUs are beginning to move to a pick and pay format for program services to satisfy consumer demands. (Eastlink started 2 years ago.)

I think it is interesting that the general public and I think even the regulators see the BDUs as the roadblock to pick and pay. In fact it is largely the program owners, the broadcasters and owners of specialty channels who are that roadblock. Bell and Rogers (and for example Disney in the US) insist that their program services may not be sold on a standalone basis and even will require that some of their services be sold as part of the basic or a high penetration tier. They are able to do this because of their stranglehold over the most popular cable channels.

I do not have an issue with distributors owning program services but I have a major concern with the level of concentration we have in the ownership of program services in Canada.

I would have opposed the Bell acquisition of Astral as the CRTC did the first time it considered the application. I am not as sanguine as Jean-Pierre Blais that codes of conduct and regulation can overcome the negatives of this level of concentration.

We have too many services in the hands of too few players. In short, not enough competition. I believe we need more application of competition principles to our broadcasting services.

This leads me to suggest we need to look at is the relative roles of the CRTC and the Competition Bureau.

Going back to the question of what I might have thought in 1990 the situation might be 25 years later, NOW, I would have guessed there would be such competition that Competition Law would govern the behavior of the players in the marketplace rather than the CRTC.

When I was vice chair and Francoise Bertrand was Chair of the CRTC, and, by the way while Konrad Von Finkenstein was head of the Competition Bureau we developed with Konrad a memorandum of understanding on the relative roles of each organization. I thought this would lead ultimately to some sort of transition of regulation from the CRTC to the Bureau as competition took hold. However when Charles Dalfen became chair he basically trashed this MOU and when Konrad replaced Charles (after his unexpected and sad passing) nothing happened as far as I know.

I guess no matter where you are one wants to protect your turf. As indicated above I think the principles of competition policy need to prevail and apply more than they do in the communications industry both telecom and broadcasting or carriage and content. I note that just this past week in the US two child advocacy groups have lodged a complaint about children's programming on YouTube with the regulator - not the FCC but the FTC the Federal Trade Commission.

Having said that I think the Competition Bureau needs to be more effective than it appears to be to me. Many times when

cases of anticompetitive behavior are investigated the complainant is a corpse by the time the issue is decided.

So, my second suggestion for change is: we need to look at the application of competition principles to our communications industry and examine the relative roles of the CRTC and the Competition Bureau and whether they should work closer together or whether some of the responsibilities of one should move to the other.

I think program rights – copyright, and competition rules, should and will govern behavior in this industry.

Finally, for my third point let me turn to the structure of the Commission itself and more particularly the decision making aspect of it. The seventh floor!!!

When I arrived at the Commission in late 1990 there were two types of Commissioners, full time Commissioners who formed the Executive Committee and Part-time Commissioners.

Part-timers were just that, part time. They had other full time jobs but did participate from time to time in public hearings and provided “advice” during Commission deliberations.

My very first hearing involved Rogers purchase of Skyline cable here in Ottawa. Following the hearing which I chaired as Keith Spicer was off with the Forum on National Unity the Commissioners met to decide the issue, all the full time members as well as the part time ones. I felt strongly we should approve the purchase but some members did not agree and we had quite a debate around the table.

It came time to call the vote. I thought I had the votes to win the day until I remembered, at the last minute, that the two part time members who were on the panel that heard the issue could not vote but all the full time members, including those not on the hearing panel could vote. I was going to lose! I suggested we needed more staff research before we voted and adjourned the meeting.

I used the time to convince some full time members that approving the purchase would build a stronger cable industry more able to compete with the phone companies.

Clearly from a natural justice point of view this was not a very good situation. Also we found over time that it was difficult for the part time members to keep up with the advances in the industry. Regardless of their desire they simply did not have the time from their other jobs to keep up.

We convinced the government of this and while they did not amend the Act to deal with the issue they simply did not appoint new part-time members until there were none.

At this time the government was working on new communications legislation and as well on the telecom side we were witnessing the transition from provincial to federal jurisdiction for the Atlantic and Prairie phone companies. To address and accommodate provincial concerns over this change in jurisdiction the government decided to establish regional offices of the CRTC and the position of regional commissioner. Now there would be 13 fulltime Commissioners, 7 “national” ones and 6 “regional” ones.

When I was with the Nova Scotia government I was one of those advocating regional commissioners never guessing I would be one. In fact I was the first regional commissioner appointed.

I recall when this issue was debated in the late '80's CRTC chair Andre Bureau was opposed to it arguing that there would be a loss of collegiality at the Commission. I thought Andre was wrong and argued we needed more regional reflection in Commission decisions.

In retrospect in my opinion Andre was right and I was wrong!

I worked with this situation from its inception for fourteen years and I grew to oppose it.

First of all I think there are too many commissioners at 13. It was and I presume is still difficult to get consensus on when to take the lunch break let alone on major telecom or broadcast issues. Even if all Commissioners get together from time to time to take decisions the fact six of them are not there most of the time makes arriving at consensus and resolving differences very difficult.

I actually found the absence fostered a sense of frustration and even animosity among members and between the regional and national members.

I remember clearly on many occasions when we had disagreements on issues with one or more commissioners I would go to their office and talk it over. What is your concern? What if we changed the wording to this? Could we accommodate your concern this way? Invariably we were able to resolve the difference. It just does not seem to work the same at a distance even with emails and voice and video conferencing.

While there may be some benefits to having regional commissioners in terms of regional perspective I believe on balance the negatives outweigh the benefits.

My view has nothing to do with the current public fuss brought about by a regional commissioner. I felt this way while I was at the Commission and I still do. I wrote a short paper on the issue while I was still vice-chair and I discussed it with Jean-Pierre Blais when he was first appointed.

Simply put, I think the Commission should be shrunk to 9, or even better ,7 commissioners. (I would note the FCC in the US has 5 Commissioners.) These commissioners should be chosen from across the country and should reflect linguistic, gender and ethnic diversity but I would not use quotas. These

commissioners must live and work in Ottawa or wherever the CRTC headquarters is. The concept of regional commissioner should be done away with.

The notion of Regional Commissioner comes under the heading “it seemed like a good idea at the time!”

Some might argue why bother with this change since the CRTC's days are numbered but I think it will be around for a while to work through the current transition and this change should be made to allow it to be more effective.

So there you have a few of my “gut feel” suggestions.

- Amend the foreign ownership rules.
- Adopt competition principles in communications regulation including a review of the relative roles of the CRTC and the Competition Bureau.
- Make changes to the decision body at the CRTC by reducing the number of Commissioners to 7 and eliminating the regional commissioners.

There is one other issue I would love to discuss - the CBC - but perhaps in the later CRTC panel session I can touch on it.

I thank you (Mr./Madam) Chair for the invitation and I thank you for your attention. I hope I have left some small food for thought.