



The Future Environment of Canada's Broadcasting System: Empty Pipes?

Broadcasting Public Notice CRTC 2006-72

**Submission by the Canadian Conference of the Arts
1 September, 2006**



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Diane Rhéaume
Secretary General
CRTC
Ottawa, Ontario K1A 0N2

Dear Ms. Rhéaume,

Re: Broadcasting Public Notice CRTC 2006-72

The Canadian Conference of the Arts (CCA) is Canada's oldest and largest arts advocacy and cultural policy development organization. In 2005, the CCA celebrated its 60th anniversary. It currently represents the interests of over 250,000 Canadian artists, creators and arts professionals in matters of cultural policy and cultural content.

The fundamental issue raised by this proceeding is the relationship between content and the pipes that deliver this content to audiences.

By building, maintaining and selling access to wire-based and wireless information transmission systems, Canada's telecommunications providers clearly play an important role in our economy. As the CRTC has noted, telecommunications services represented two percent of the country's gross domestic product in 1995, and approximately three percent in 2000.¹ Companies providing these services supply the 'pipes', so to speak, through which audiences receive content that informs, enlightens and entertains them. These pipes are critical to the transmission, distribution and reception of our culture and its values.

¹ CRTC, *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets – Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (September 2001) at 7.

Surprisingly, perhaps, culture is as important as telecommunications services to our economy. Since 1995 Canada's cultural sector has consistently accounted for almost four percent (3.8%) of the nation's Gross Domestic Product.² The men and women who work in this sector enable Canadians to see and hear themselves, their ideas, their stories and their values, through literature and the performing arts. The content provided by Canada's cultural sector attracts subscribers, audiences and revenues to Canada's distribution and programming undertakings. The content provided by the cultural sector is critical to the development of Canada's communications infrastructure. Without content, there would be no need for a communications infrastructure.

Another characteristic shared between the telecommunications and cultural sectors is competitiveness. Since the late 1980s more entrants have been allowed access to Canada's telecommunications sector. Meanwhile, those working in the country's cultural sector – many of whom provide the content transmitted through the telecommunications system – compete daily to create and produce the content desired and accessed by Canadians. In broadcasting, they compete for the attention and wallets of their prospective audiences, and for the financial support necessary to produce programming content. The highly competitive nature of this sector is evidenced by the fact that no one in the cultural sector enjoys the dominant position enjoyed by just a few of Canada's large telecommunications companies.

Yet where Canada's telecommunications service providers (Telecommunications service providers) have benefited from a strong and stable financial base supported by Canadian public policy over decades, Canada's cultural sector has not. Telecommunications companies' gross revenues increased on average by 9% per year from 1996 to 2000. In contrast, average weekly earnings in the arts, entertainment and recreation sector decreased from \$429 in 2001, to \$421 in 2005.³

Given the current financial strength of Canada's telecommunications sector, the CCA is driven to question the necessity for this proceeding. 'Change', surely, is insufficient justification. After all, Canada's telecommunications and broadcast legislation is neutral with respect to technology and changes in technology. In 1989 the federal Conservative government specifically noted that technological neutrality in the *Broadcasting Act, 1991* marked

... a fundamental shift in the government's approach to broadcasting legislation. It is an approach that will allow the legislation to maintain its legal authority over all aspects of broadcasting in the face of future technological development and is therefore critical to our over-all strategy.

In presenting the new legislation to the House of Commons in 1989, the government commented that its goal was to draft technologically-neutral legislation that would meet the challenges of the next one hundred years:

Given the rapid progress of broadcasting techniques in this country, Canadians were among the first in the world to experience the impact of [new technologies and globalization]

² Statistics Canada (Vik Singh), *Economic Contribution of Culture in Canada*, Culture, Tourism and the Centre for Educational Statistics: Research Papers (Minister of Industry: Ottawa, December 2004) Catalogue no. 81-595-MIE2004023

³ Statistics Canada, "Earnings, average weekly, by industry" CANSIM, table 281-027 and Catalogue no. 72-002-X.

Before drafting the new legislation, **we decided that our goal would be to** tack the paradox of modern broadcasting in the Canadian context. To put it another way, we would **draft a legislative policy and regulatory structure in such a way as to take into account and favour technological progress, while at the same time stressing the diversity and creation of Canadian programs.**

For Canada's broadcasting system, that is the challenge of the coming century.⁴

...

Our challenge is to equip our system with the means to generate Canadian programming which addresses the needs of Canadians to see themselves on our screens, to see our stories and our creators amid the sea of imported products. Meeting this challenge is of critical importance for Canadian creators, for Canadian culture and for Canadian audiences.⁵

It is striking, therefore, that since Canada's new broadcast legislation was enacted, how many reports and proceedings have studied different aspects of Canada's communications system over the last few years:

- | | |
|------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1993 | CRTC, <i>Structural Public Hearing</i> , Public Notice CRTC 1993-74 (Ottawa: 3 June 1993) [Structural hearing] |
| 1994 | CRTC, <i>The Production Fund</i> , Public Notice CRTC 1994-10 (Ottawa: 10 February 1994) |
| 1995 | CRTC, <i>Competition And Culture on Canada's Information Highway: Managing the Realities of Transition</i> , Response to Order in Council P.C. 1994-1689 (Ottawa: 19 May 1995) [Information Highway report] |
| 1996 | Mandate Review Committee, <i>Making Our Voices Heard: Canadian Broadcasting and Film for the 21st Century</i> (Minister of Supply and Services Canada: Hull, 1996) [Juneau Committee] |
| 1998 | CRTC, <i>Commercial Radio Policy 1998</i> , Public Notice CRTC 1998-41 (Ottawa, 30 April 1998) |
| 1999 | CRTC, <i>BUILDING ON SUCCESS - A POLICY FRAMEWORK FOR CANADIAN TELEVISION</i> , Public Notice CRTC 1999-97 (Ottawa, 11 June 1999) |
| 2000 | Canadian Heritage, Corporate Review Branch, <i>Report of the Review of the Canadian Television Fund</i> (Canadian Heritage: Ottawa, March 2000) |
| 2003 | Standing Committee on Canadian Heritage, <i>Our Cultural Sovereignty: The Second Century of Canadian Broadcasting</i> (Communication Canada: Ottawa, 2003) |
| | Trina McQueen, <i>Dramatic Choices: A report on Canadian English-language drama</i> (Ottawa: May 2003); Guy Fournier, <i>What About</i> |

⁴ *Ibid.*

⁵ Canada, *House of Commons Debates*, Hon. Jim Edwards (Parl. Sec'y to Minister of Comm's) (3 November 1989) at 1440.

Tomorrow? A report on Canadian French-language drama (Ottawa: May 2003)

2006

Telecom Policy Review Panel, *Final Report* (Ottawa: March 2006).

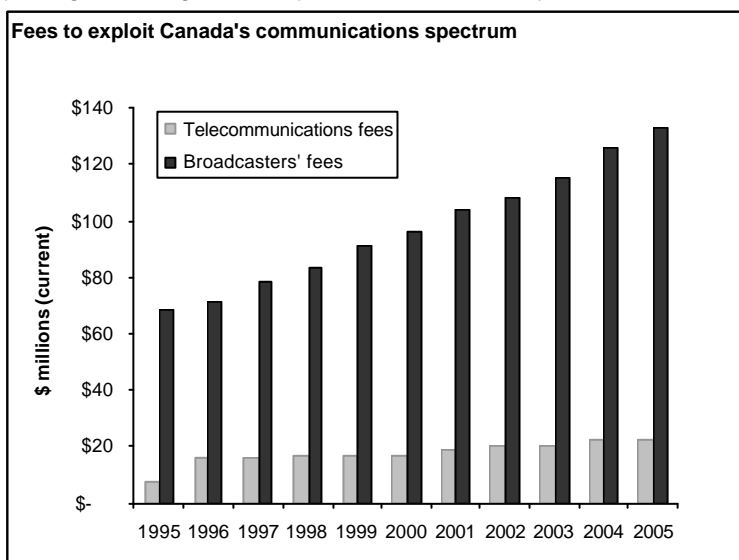
Almost all of these studies address the same problem: the inadequate and poorly-financed level of original Canadian audio-visual programming available to Canadians. Generally speaking, they conclude that without adequate amounts of well-financed original Canadian programming, Parliament's objectives for Canada's broadcasting system are not being met, and cannot be met.

The existence and importance of sporadic attempts to address the under funding of Canada's cultural sector cannot be denied. Perhaps the most effective of these in broadcasting was the CRTC's decision thirteen years ago to establish a mechanism to fund Canadian television programs using cable subscriber fees.⁶ Known originally as the Cable Production Fund, renamed the Canada Television and Cable Production Fund, it is now the Canadian Television Fund.

The impact of the Canadian Television Fund has been substantial. It has allowed new television productions to occur. Somewhat perversely, however, it has also reduced pressure on conventional broadcasters to put more money into Canadian content, since the fund's existence can always be raised to ask why yet more money is needed. Yet, when the Fund was established in 1994, private conventional television services spent 78% more on Canadian programming, than on foreign programming. In 2005 – despite the existence of the CTF – these services spent 5% more on foreign programming, than on Canadian programming.

The subscriber- and taxpayer-financed Canadian Television Fund cannot bear the entire burden of ensuring that Canadians obtain high-quality programming made by Canadians. Study after study after study has concluded that without high-quality Canadian programming, Canadians will naturally be drawn to high-quality foreign programming, delivered at low cost and with high audio-visual quality through the pipes of Canada's advanced telecommunications delivery system.

In the CCA's view, those who profit from their use of Canadian resources such as the broadcast spectrum or taxpayers' subsidization of broadband, must also bear some responsibility for financing Canadian programming. An efficient mechanism for this would be to increase



⁶ Cable subscriber fees have traditionally paid for cable companies' capital expenditures; the CRTC decided the late 1980s that these capital expenditure amounts should not be retained indefinitely by cable companies, but only until the capital expenditures had been made. Following its structural hearing in the early 1990s, the CRTC decided that cable companies could retain half the amount the companies would otherwise have to return to cable subscribers, provided the other half were allocated to a television programming fund. The CTF was born, since supplemented by funding from the federal government and new distribution systems, such as DBS/DTH.

the size of the telecommunications licence fee paid for the right to exploit and profit from the communications spectrum owned by Canadians as a natural resource. Over the past decade, broadcasters have paid roughly ten times the amount paid by telecommunications companies, even though telecommunications companies' revenues (and apparent benefits from use of the spectrum) have substantially exceeded those of broadcasters. In 2005, for instance, the broadcast sector's total revenues amounted to \$11.8 billion, while telecommunication companies' revenues were roughly three times larger – at \$34.5 billion.⁷

Change is in the offing – but this is nothing new. Change has been on the horizon in the past, and will be again in the future. The critical issue in this proceeding is not change, but Parliament's reaction to that change. Given the technological neutrality of Canada's communications legislation, the question the many past studies and this new request by the Governor in Council for additional research about changing technology raise for the CCA is very simple.

When will the content inside the delivery pipe receive as much regulatory and financial support as the pipe itself?

The CCA has therefore approached this opportunity to present submissions to the Commission and Governor in Council regarding changes in technology and their impact on Canadian broadcasting with mixed views. On the one hand, obtaining ever-more current data about the state of technology may be useful in future efforts to assess the impact of the Commission's policies on Canadian telecommunications, broadcasting and culture. But on the other hand, exercises such as this not only delay action in areas that are key to our nation and its sovereignty, but also absorb the scarce time and equally-scarce resources of those who participate.

In some ways, these exercises bring to mind the twelve-step procedure of the U.K.'s Sir Humphrey Appleby to delay initiatives until after an election. He advised his Minister, that the best way to delay taking action on a file was to initiate:

1. informal discussions
2. a draft proposal
3. preliminary study
4. a discussion document
5. in-depth study
6. a revised proposal
7. a policy statement
8. a strategy statement
9. discussion of a strategy
10. circulation of an implementation plan
11. revision of the implementation plan
12. Cabinet agreement.⁸

⁷ CRTC, *Statistical and Financial Summaries*, (by broadcast sector); CRTC, *Monitoring Report: Status of Competition in Canadian Telecommunications Markets Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (July 2006) at i.

⁸ Sir Humphrey Appleby K.C.B., *Diary 1988* (London: Two-Can Design Ltd.) at August 7th. (However astute his observations, Sir Humphrey Appleby was, of course, merely a fictional character in a popular British television series, *Yes, Minister*.)

Assuming the Telecommunications Policy Review Panel's *Final Report*⁹ was step 4, the CRTC's report to the Governor in Council seems to place us at step 5.

Whatever the purpose and outcome of this proceeding, the CCA believes that one fundamental objective must override all else: content. The pipes used to deliver content to audiences clearly matter – since, without the pipes, such audiences would be small – but the content in these pipes is vital. How many subscribers will willingly pay for empty pipes?

Ensuring that distributors that provide the pipes to thrive, while the creators, performers and producers in Canada's cultural sector merely survive, will not ensure Canada's continued survival as a sovereign nation state.

The CCA respectfully urges the Governor in Council and Parliament to increase support for the cultural sector, rather than continue to study and report on characteristics of Canada's communications system. This support must express the principles that found Canada's broadcast and telecommunications policies:

1. stable financial support
2. assured access
3. rational regulation, and
4. sovereign jurisdiction.

The CCA's comments concerning Public Notice CRTC 2006-72 address these four principles in greater detail. In particular, the CCA proposes that a simple, stable and efficient mechanism for funding Canadian communications programming content be established.

We look forward to the publication of the results from this review, and in particular to action by the federal government to address the longstanding and serious concerns of our members and Canadians regarding our country's cultural sovereignty.

Sincerely,



Alain Pineau
National Director
Canadian Conference of the Arts

⁹ Gerri Sinclair, Hank Invten & André Tremblay, *Final Report 2006* (Ottawa: March 2006).

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EXECUTIVE SUMMARY

1. Canada has been on the forefront of new developments in audio-visual technology since the beginning of the twentieth century. The federal government, the CRTC, publicly-funded and privately-owned broadcasters and telecommunications service providers all deserve credit for developing and implementing a variety of new technologies over the last several decades.
2. Although predictions are typically limited in accuracy, the CCA believes that technologies will continue to change to provide more content more efficiently and more inexpensively, that Canadians will adopt reasonably-priced technologies to choose the audiovisual content they want, and that nations will continue to regulate communications technology.
3. Canadians tend to adopt new audio-visual technologies as these become available, to access the content these technologies distribute. Regardless of their adoption of new technologies, the time Canadians' spend with conventional media such as radio and television, and the types of programming they enjoy, have remained stable for several decades.
4. A large majority of Canadians have adopted and use new technologies, and are likely to continue to do so. Increasing amounts of audio-visual broadcast content are likely to be made available online, providing additional tuning and revenue opportunities for companies. Communications technologies are no longer converging: they have converged.
5. Although comparisons with other countries may be interesting, they provide no support for Canada to alter its existing, technologically-neutral communications legislation, its billion-dollar commitments to fund research in technological innovation and support programs, and the expansion of broadband to communities the private sector is unable or unwilling to serve.
6. Neither international comparisons, nor efforts to replace revenues lost as telecommunications companies' subscriber growth rates decline, should be used to justify telecommunications service providers' attempts to charge discriminatory prices with respect to the content they carry.
7. Having benefited from Canadian taxpayers' investment of over \$800 million over the last several years to expand the availability of broadband, it is unclear why telecommunication service providers would now be permitted to reduce Canadian broadband users' ability to access and distribute certain content through discriminatory pricing regimes. Discrimination by telecommunications service providers over the prices charged for users to access or transmit certain types of content will reduce innovation, limit the development of new content, and – if distributors are held responsible for the content they carry – increase distributors' costs.
8. Rather than allowing telecommunications service providers to discriminate against certain types of content, purportedly to reduce broadband crowding, these providers should be encouraged to invest in research and development to increase speed and capacity.

9. A plethora of announcements in recent months about the distribution of conventional audio-visual broadcast content online suggests that convergence is no longer arriving, but has arrived. Since content is the main 'hook' to attract subscribers and telecommunications providers that profit from their use of the spectrum owned by Canadians, the licence fees now paid by these companies to use the spectrum should increase to provide Canada's cultural sector with long-promised, but never delivered stable financial support.
10. Though unsolicited by the Order in Council, the CCA has four recommendations for the Governor in Council.
11. Although the diversity of technologies available to Canadians has increased over time, Canadian programming content, publicly-oriented broadcasters and the cultural sector continue to lack the stable financial support enjoyed by other sectors of the economy. In the last several years, for example, the Business Development Bank of Canada and Export Development Canada have provided Canadian businesses with financial support, insurance and bonding of just over \$60 billion. Over roughly the same period, Canada's provincial and federal governments have allocated just over \$800 million to support the extension of broadband across Canada.
12. Canada's cultural sector requires the same stable support mechanisms that businesses require to operate. The CCA recommends that the licence fees now paid by telecommunications companies to exploit the communications spectrum owned by Canadians be raised, to provide a base of stable funding for Canada's cultural businesses.
13. In addition to stable funding, the CCA recommends that increased 'shelf space' be made available for the products of Canada's cultural sector. Reducing the existing regulatory requirements of Canada's licensed broadcasters effectively requires Canada's cultural businesses to subsidize privately-owned broadcasters' profitability.
14. The CCA recommends that the CRTC revisit its mobile television decision. If Parliament had intended that new technologies should only be regulated if they might at some point harm existing broadcasters, it would have said so expressly in the 1991 *Broadcasting Act*. Instead, Parliament expressly directed the CRTC to determine how new technologies would or would not contribute to the achievement of Parliament's broadcast policy. The CRTC's irrational failure to regulate mobile television services treats content distributors unequally, and establishes a troubling precedent. For the record, it is for similar reasons that the CCA keeps urging the CRTC to review its refusal to regulate audio-visual content distributed on the Internet and to review its aberrant decision concerning SSRs (satellite radio).
15. The CCA recommends that Canada maintain its sovereign jurisdiction over its communications infrastructure. However tempting the prospect of increased foreign investment in Canadian culture, the reality would be as disappointing as the outcome of decades of ownership consolidation allowed for the same reason: reduced expenditures on Canadian cultural content, and lower incomes for businesses in the cultural sector.

I CURRENT STATE OF AUDIO-VISUAL TECHNOLOGIES + PREDICTED EVOLUTION

1. Canada and Canadians have been on the forefront in developing new communications technologies. In 1901, after his facilities in the United States were destroyed by storms, the Canadian federal government granted Guglielmo Marconi space in an abandoned military hospital in Newfoundland from which he transmitted the first international wireless communication.¹⁰ In 1906, Canadian Reginald Fessenden made the world's first radio broadcast from the American East coast, carrying human voices and music to ships at sea.¹¹ In 1925, Canadian Edward S. Rogers invented radios that operated using ordinary household electrical current, rather than acid-based, wet batteries.¹² In 1962, Canada became the third nation in space to launch a satellite – the Alouette 1 – into space.¹³ In 1990, the CA*net was formed, linking Canadians coast-to-coast to the Internet,¹⁴ which was later followed by CA*net 3, the world's first national optical Internet.¹⁵
2. Like those who undertook the research and risks to develop these technologies, the CRTC must be given credit for the role it has played in encouraging new developments in audio-visual technology, and in inviting public discussion of its policies for these developments. In 1995, for instance, the Commission published a *Policy to Govern the Introduction of Digital Radio* (Public Notice CRTC 1995-184). In 2002, the Commission issued *A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting* (Broadcasting Public Notice CRTC 2002-31). The same year, it published a *New licensing framework for specialty audio programming services* (Broadcasting Public Notice CRTC 2002-53). In 2003 the Commission established *The regulatory framework for the distribution of digital television signals* (Broadcasting Public Notice CRTC 2003-61). In June 2006 the Commission issued its *Regulatory framework for the licensing and distribution of high definition pay and specialty services* (Broadcasting Public Notice CRTC 2006-74)
3. The CRTC also deserves credit for publishing, since the late 1990s, its reports on broadcasting and telecommunications. The data provided by these reports, as well as those published by Statistics Canada, are invaluable in evaluating the efficacy of Canada's current communications policies and regulations, particularly when they are presented consistently year to year.
4. These data suggest that thanks to creativity, ingenuity and business acumen, Canadians now enjoy a range of communications technologies to deliver audio and audio-visual content that was virtually non-existent just a decade ago:

¹⁰ Wade Rowland, *Spirit of the Web: The Age of Information from Telegraph to Internet* (Toronto: Key Porter Books, 1999), "Some Milestones in Communications Technology" (np.) at 121-122.

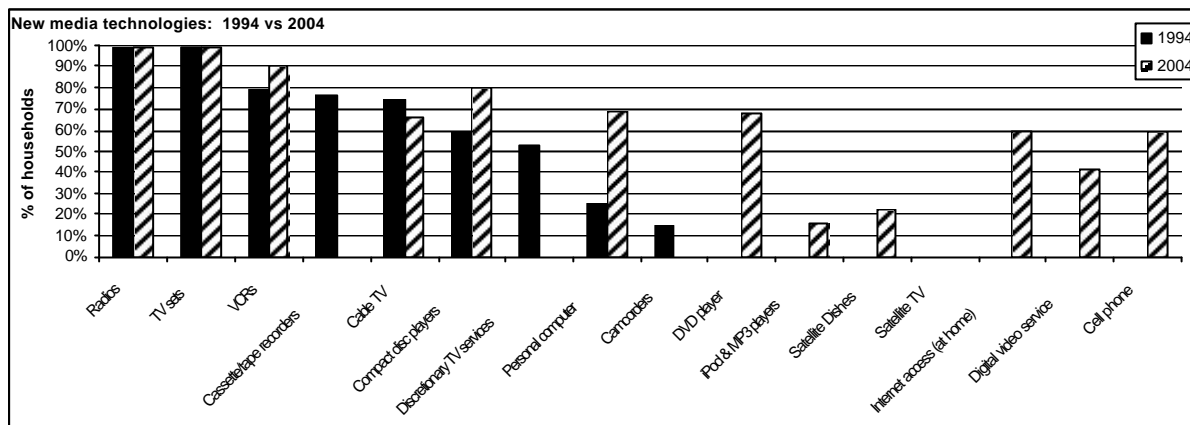
¹¹ Media Awareness "radio in Canada: a timeline" <<http://www.media-awareness.ca/eng/index/radio/timeline.htm#1800s>> (24 February 2003).

¹² Frank Foster, *Broadcasting Policy Development* (Frank Foster Communications, Ltd.: Ottawa, 1982) at 20.

¹³ "Friends of CRC" online <<http://friendsofrc.ca/Articles/Blevis-Pursuit%20of%20Equality/BertBlevis.html>>..

¹⁴ "CA*net" online: Canarie <<http://www.canarie.ca/advnet/history.html>>

¹⁵ Robert H'obbes' Zakon "Hobbes' Internet Timeline v6.0" online: <http://www.zakon.org/robert/internet/timeline/#1990s>



5. The CCA can offer only limited assistance regarding the predicted evolution of new technologies. Predictions are typically fraught with uncertainty, particularly as the time frame involved increases.¹⁶ Consider the fax machine. Would anyone have predicted this technology's current widespread in 1881, when it was invented?¹⁷ And with our current perspective, who would have predicted that a communications system involving a modified television screen, a keyboard, two-way transmission through telephone or cable lines, and access to data stored elsewhere – Telidon – would fail to gain the popular support necessary to sustain it?¹⁸
6. Nevertheless, the CCA suggests that three certainties exist about the evolution of audiovisual technologies.
- 1) Technologies will change to provide more content more efficiently and more inexpensively.
 - 2) Canadians will adopt new technologies that enable them to choose the audiovisual content they want, at a reasonable price.
 - 3) Nations, including Canada, will continue to regulate communications technology.
7. **Technological change is inevitable.** The major impetus for technological change lies in our very rational desire to prosper as individuals and as a society. The invention of the printing press in 1439 provides an example. By 1477, in what is now Italy, a scribe might have charged a florin to produce a copy of Ficino's translation of Plato's *Dialogues*. The Ripoli Press, in contrast, charged three times this amount to print the

¹⁶ Consider the 1888 science fiction novel by Edward Bellamy, *Looking Backward: 2000-1887*, which predicted that by the year 2000, any household could hear a variety of music, at any time of day, for a fee – through telephones connecting houses to a variety of concert halls where live musicians played.

¹⁷ It was invented by English scientist Shelford-Bedwell. *Spirit of the Web*, supranote 9 at 177.

¹⁸ "... many Telidon 'trials' ... took place throughout North America from 1979 to about 1987. After Brian Mulroney became Prime Minister in September 1984, his government cut funding for the Telidon project, which had limited commercial success up to that time. The problem was the high cost of the equipment, and the higher cost of the subscription -- Grassroots cost \$19.00/hr + a \$6.00/hr DATAPAC fee, among other charges." Jim Jaworski, "The Telidon History Project", <<http://www.telidonthistoryproject.ca/>>.

same work – but produced over a thousand copies.¹⁹ Creativity, innovation and an economic incentive led to lower marginal costs of production, and the potential for larger audiences for Plato's work.

8. **Adoption at a price.** Those who use technologies will determine the speed at which they are adopted. More expensive technologies will be discarded in favour of less expensive technologies, even if audio-visual quality is affected. Does anyone remember Betamax? Portability is also obviously highly appealing; those in the right age group may remember the ubiquity of transistor radios, while younger generations may recall the Sony Walkman.
9. **The necessity of regulation.** Three major reasons that governments have imposed legislative regimes on 'old' communications media in the past were: to limit the dissemination of ideas and information that attacked governments,²⁰ to protect these nations' domestic economies²¹ and to minimize harm towards the countries' subjects.²² The same general reasons continue to justify interfering with individuals' rights to communicate with others. Article 8.2 of the *European Convention on Human Rights*, for instance, provides that

... there shall be no interference by a public authority with the exercise of [Article 8.1's right to respect for his private life and correspondence] except such as in accordance with the law and is necessary in a democratic society *in the interests of national*

¹⁹ Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, (Cambridge: Cambridge University Press, 1983) at 16.

²⁰ Although the first Amendment to the new American Constitution was to prevent Congress from making laws that abridged the exercise of freedom of speech or of the press, for instance, within seven years the American government had passed the *Sedition Act*, making it a criminal offence to "write, print, utter or publish ... any false, scandalous, and malicious" statements against the government, Congress or president of the United States. "History of Censorship" <<http://mingo.info-science.uiowa.edu/mccarthy/infpol02historycensorshipclassnotes.html>>; Online <<http://www.freedomforum.org/templates/document.asp?documentID=15746>>.

²¹ The first non-experimental licences granted by the Canadian government were issued to pre-existing economic undertakings such as newspapers, department stores and distilleries. It was expected that, since advertising messages were prohibited, the stations' owners would recuperate their investments from the promotional value of using their company's name in the station identifications -- an early example of convergence. Foster, *supra* note 11 at 6-7.

In the United States, the federal government actively encouraged the formation of the Radio Corporation of America (RCA): RCA gave General Electric (GE) and Westinghouse the sole right to manufacture radios, gave AT&T the monopoly on making, leasing and selling radio broadcast transmitters, and kept to itself the exclusive right to sell radios. GE, Westinghouse and RCA were then allowed to set up their own radio stations -- for unless there were stations to air programs for audiences to hear, the nascent American broadcasting industry (and these large and growing companies) might have collapsed. Giraud Chester, Garnet R. Garrison and Edgar E. Willis, *Television and Radio*, (New York: Meredith Corporation, 1971) at 23-25.

²² In Babylon at around 2500 BCE, for instance, it was an offence to slander another's reputation while ancient Egypt's government also made it an offence to commit perjury or make false statements and accusations. (See Wolfgang Boochs, *Strafrechtliche Aspekte im altägyptischen Recht*, (Sank Augustin: Academia Verlag, 1993). By 450 the punishment for defamation in Rome was death.

Until telephone switching became automated, offensive language was also prohibited on American's telephone lines. An 1883 U.S. court upheld an Ohio telephone company's decision to terminate service to one of its subscribers because he had used "improper or vulgar" language on the telephone (When Old Technologies were New, at 89.)

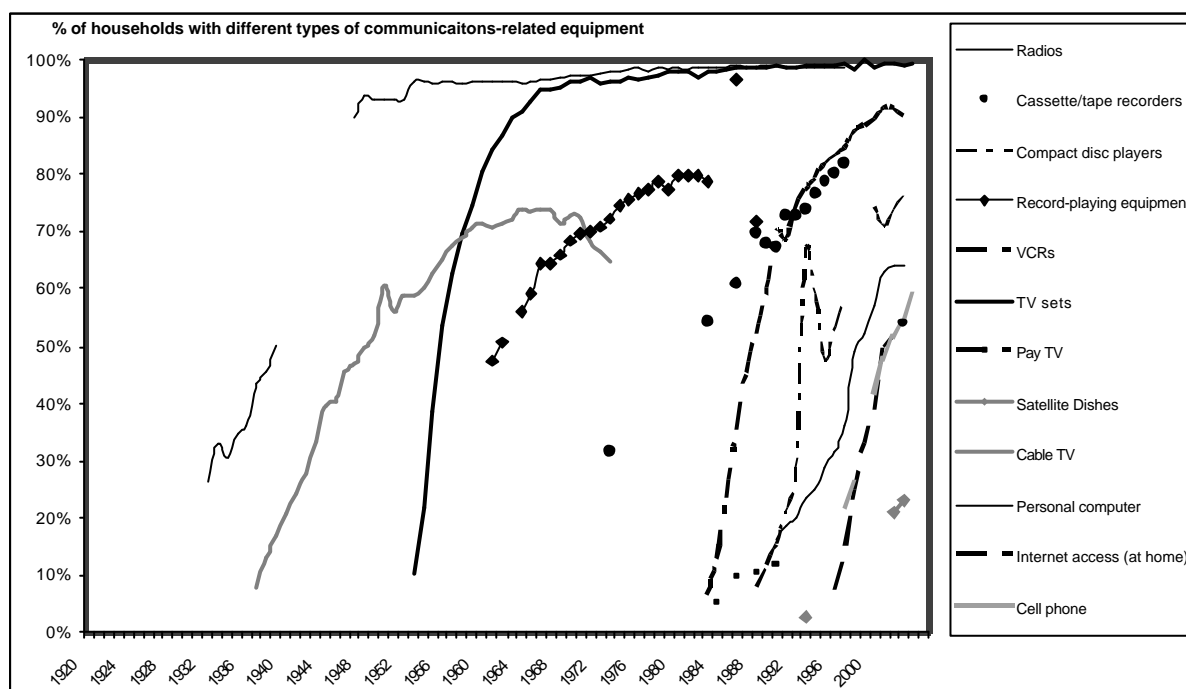
Section 372.2 of Canada's *Criminal Code*, S.C. 1985, c. C-46 currently makes it an indictable offence to use letters, telegrams, the telephone, cables, radio, "or otherwise" to convey information to another with intent to injure or alarm. Section 372.(2) makes it a summary offence to make indecent telephone calls with intent to alarm or annoy the recipient.

security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (italics added)

10. In brief, communications media have developed and will continue to be developed in response to audience demands, to pricing and to the regulation all nations exercise to protect national security, their economies and civil rights.

II CANADIANS' USE OF AUDIO-VISUAL TECHNOLOGIES

11. As noted above, Canadians are generally enthusiastic about new audio-visual technologies, adopting these as they become available. Historical data demonstrate the speed with which Canadian households acquire new technologies.



12. It should not have to be said, however, that audio-visual technology is acquired for one purpose: to acquire audio-visual content. As so many applicants to the CRTC for new broadcast licences have demonstrated through survey research, Canadians prize, above all else, programming content about their views, their interests, their weather and their stories. Yet what consistently lags behind the availability of communications technologies is the availability of well-funded Canadian content.

A Changes since 2000

13. As the CRTC and others have noted, diversity in the types of technologies available to Canadians has increased. Wireless technologies such as Wi-Fi, 3G, WiMax and

satellite improve the ability of telecom service providers (Telecommunications service providers) to offer not only conventional audio communications, but also video service.

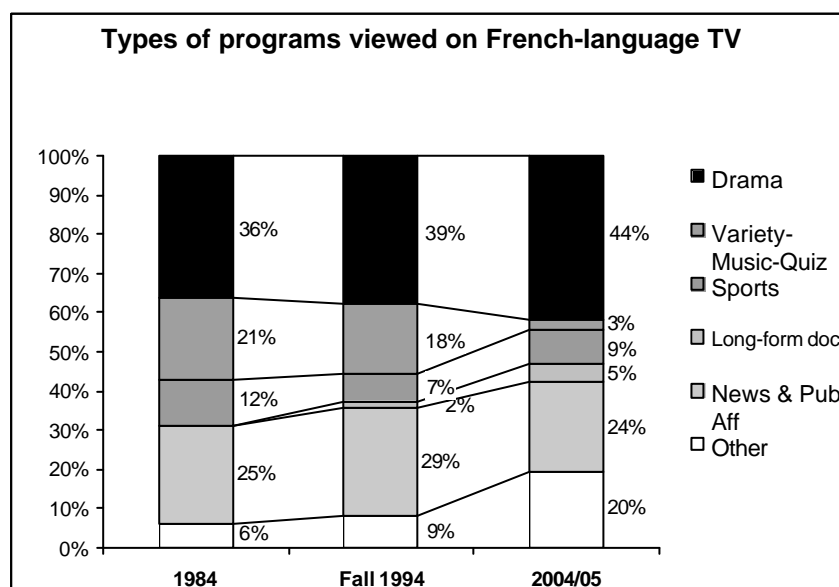
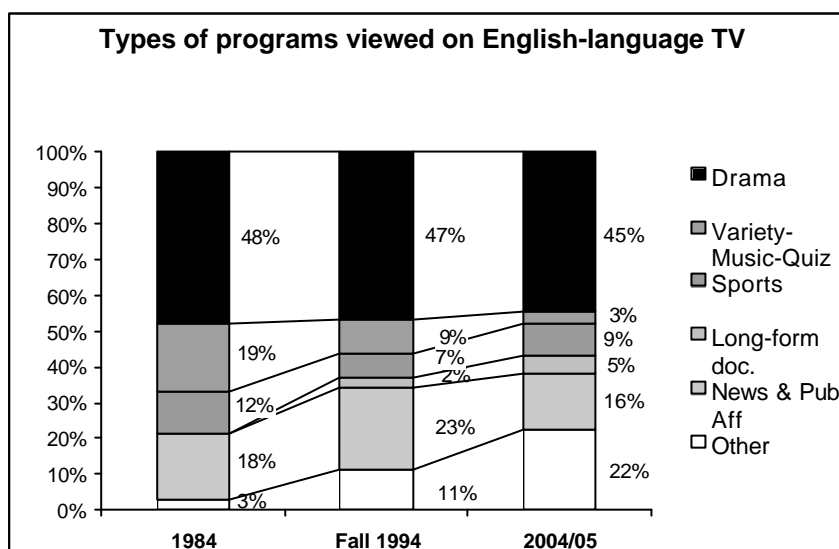
<p>Distribution technologies</p> <ul style="list-style-type: none"> Internet Next Generation Networks Peer-to-peer file sharing Integrated GPS WiFi/WiMAX Mesh Networks 3G systems Ultra Wide Band Powerband Power Line Software Defined Radio Satellite Radio
<p>Audiovisual reception technologies</p> <ul style="list-style-type: none"> Cellular telephones Digital iPod Digital audio broadcasting Digital TV HDTV Mobile TV Personal video recorders (PVRs) YouTube

New technologies offer consumers the ability to download and store programming for future access. Such technologies have diminished in size, and will diminish in price as the marginal cost to produce these items decreases, and unit volume sales increase. Similarly the availability of broadband delivery has improved dramatically since 2000.

14. What has not changed since January 1, 2000, is that Canadians continue to lack access to the level of Canadian audio and audio-visual programming content they are entitled to expect from our communications system.
15. The central issue that Parliament and the federal government must address is not the availability of new technologies: for the most part, the competitive marketplace will make these decisions. It is not the acquisition and use of these technologies: Canadians will make these purchasing decisions. It is not the savings offered by new technologies: businesses providing the technologies will make these decisions.
16. What Parliament and the federal government must address is how such technologies are used to deliver programming content to Canadians, whether these technologies meet the requirements of Parliament's programming policy in Canada's broadcast legislation, and whether they provide an appropriate level of support to the content that attracts subscribers to these services. Services that offer broadcast-type content must continue to be regulated in the best interest of Canadians and their broadcasting system.

B Changes in demand for program types and program services since 2000

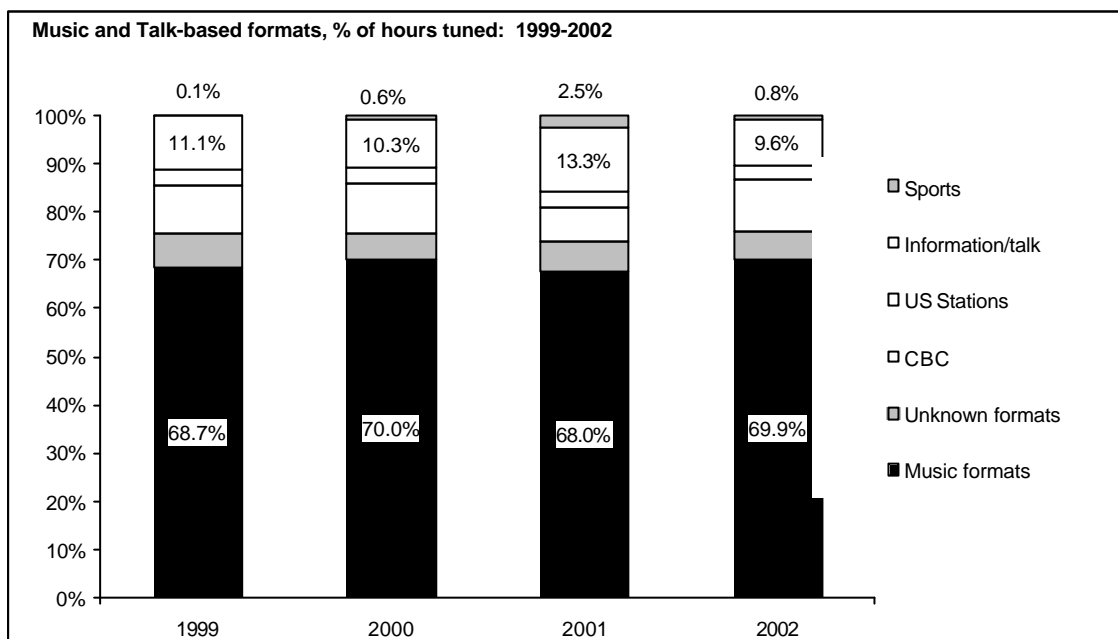
17. Canadians seek entertainment, information and enlightenment: they watch drama, listen to music, and follow current events.
18. The CRTC's audience data demonstrate that in television, Canadians have wanted and continue to want to watch drama, and news.



Source

- 1984 *Report of the Task Force on Broadcasting Policy* (Minister of Supply and Services Canada: 1986, Hull) at 91-92
- 1994 Statistics Canada, *Canada's Culture, Heritage and Identity: A Statistical Perspective* 1995 ed. (Minister of Industry: 1995) Catalogue No. 87-211 at 84-85.
- 2004/05 CRTC, *Broadcasting Policy Monitoring Report 2006* at 45 and 49.

19. In radio, Canadians have wanted, and continue to want to listen to music, and news.

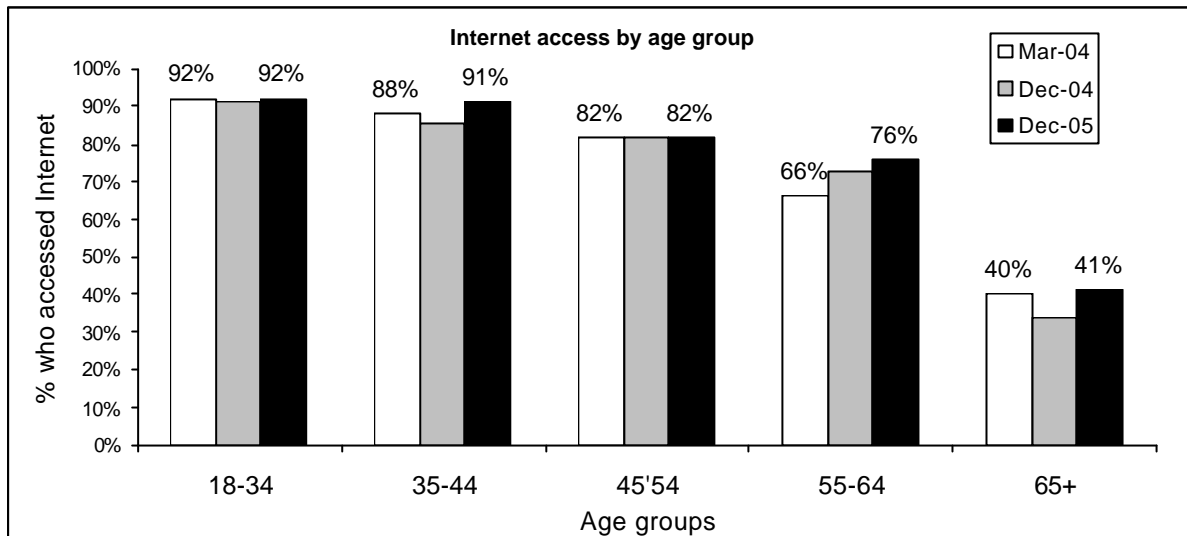


Source: CRTC *Broadcast Policy Monitoring Report* (various years).

C Generational use of technology and its impact

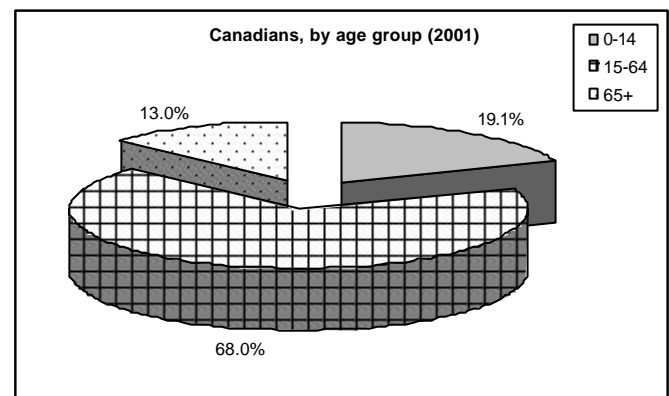
20. A survey undertaken by Statistics Canada in 2000 found that well over a third (42%) of Canada's adults had never used the Internet. Of those who had never used the medium, almost three-quarters were forty or more years old.²³ The CRTC's own data show that more people under 65 years of age access the Internet than those aged 65 and over:

²³ Statistics Canada, "Internet dropouts and infrequent users", *The Daily* (Tuesday, June 11, 2002).



Source: CRTC, *Broadcast Policy Monitoring Report 2006*, at 126

21. Even if a third of Canadian adults had not used the Internet in 2000, the majority of Canadians have done so, and will continue to adopt new technologies. This is because those under 65 years of age, who have adopted new audio-visual technologies, pre-dominate and now represent more than four-fifths of Canada's population:



22. Younger Canadians have grown accustomed to more portable audio-visual technology. Regrettably, they have not grown accustomed to well-financed and frequently-scheduled audio-visual content from Canada, due to the inadequate funding and inadequate supply of this programming.
23. Recent decisions of the CRTC with respect to mobile television and satellite-delivered radio services will contribute to this gap in young Canadians' perception of their own society.

D International rates of adopting technology

24. The Organization for Economic Cooperation and Development (OECD) has published several comparative reports describing the availability of different types of telecommunications services internationally. The CRTC's most recent report on telecommunications summarized a number of results presented in these studies, noting

that Canada is a leader among industrialized countries with respect to the adoption of communications technologies.

25. These international comparisons have occasionally raised alarming predictions, as recently as 2005:

Over the years, Canada has been an important force within the global telecommunications revolution. We are proud to say that Canada today ranks among world leaders in such vital areas as broadband Internet access and e-government.

The sobering truth, however, is that our global position is slipping. ... Canada's capacity to create and apply [information and communications technologies] in our businesses and in our daily lives has simply not kept pace.

This has dire consequences for our productivity

Thus, there can be no room for complacency. With South Korea, China and India striving to seize the global lead in telecommunications and ICT adoption, Canada must display an equal level of determination and urgency. We need to fight hard to strengthen our position in the world.

Our much-envied standard of living is at stake.

...

A key national priority for Canada, therefore, must be to modernize the way we think about, promote, regulate, develop and use ICT. And we must do so quickly.²⁴

26. While the CCA certainly agrees that the pipes delivering communications are important to Canadians – as too, are the pipes that deliver clean water and stable electricity – the language used by this major telecommunications company would be dismissed as mere hyperbole, if representatives from the cultural sector were to employ it:

Slipping !

Sobering !

Dire consequences !

No room for complacency !

Determination !

Urgency !

Fight hard !

National priority !

Quickly !

²⁴ Bell Canada, *Canadian Connection: Strengthening Canada's Leadership in Telecommunications A summary of Bell Canada's submission to the Telecommunications Policy Review Panel*(15 August 2005) at 6.

27. In light of the profit levels enjoyed by Canada's telecommunications sector, the CCA suggests that Canadians need not, in the words of American philosopher Bartholomew Simpson, have a cow. Let us consider some of the statistics about broadband presented by the CRTC and the OECD. One OECD report showed the numbers of broadband subscribers per 100 inhabitants from 2001-2005.²⁵ From 2001 to 2003, Canada ranked second in terms of this statistic. In 2005, however, Canada ranked in 8th place – with 21.9 broadband subscribers per 100 inhabitants, and a total of 6.7 million broadband subscribers.
28. Distressing as this lower ranking might seem – if Canada were engaged in a broadband race – it should be noted that the country now in first place is Iceland. Of Iceland's entire population of just under one million people, there were a total of 78,017 broadband subscribers in December 2005 – approximately 1% of Canada's 6.7 million subscribers, who are scattered over a somewhat larger area. In fact, the seven countries whose broadband subscriber levels exceed that of Canada altogether occupy an area just smaller than the province of Ontario. Conceivably it is easier to increase the availability of broadband (necessary to obtain subscribers), when dealing with a landmass that is substantially smaller than that of Canada. Perhaps installing broadband is less expensive overall, if there is less area to cover? These nations may also feature different constitutional arrangements that facilitate the availability and takeup of broadband: in Iceland, for instance, it appears that builders are required to ensure that all new buildings are at least equipped with fibre to the curb, while older buildings are similarly equipped with coaxial cable.²⁶
29. Canada should not be stampeded into changing its legislative and regulatory approach to the country's communications systems based on statistics presented without context, or hyperbolic language. This country has pursued its own mixed, public-private course in making broadband available: in addition to distributors' expenditures, Canadian taxpayers have invested over \$800 million in the last several years to extend broadband to areas that distributors cannot or will not serve. In addition to the \$3.65 billion provided to date for the federal Canada Foundation for Innovation, and the \$260 million for the Indirect Costs of Research program, the federal government has announced it will continue to support scientific research and development, with an additional \$100 million

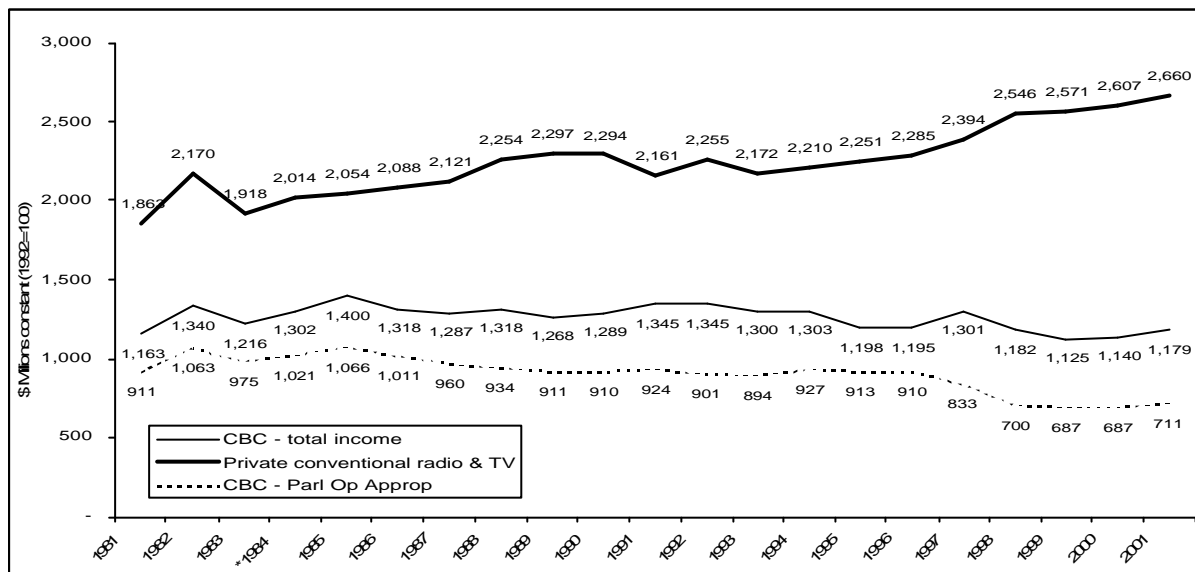
²⁵ OECD, "Broadband subscribers per 100 inhabitants, by technology, December 2005" and "Broadband subscribers per 100 inhabitants, 2001-2005", online: OECD
<http://www.oecd.org/documents/39/0,2340,en_2825_495656_36459431_1_1_1_1,00.html>.

²⁶ Lara Srivastava, ITU, *Promoting Broadband: The Case of Iceland*, Workshop on Promoting Broadband (Geneva: 7 April 2003) PB/08. The report states that 18 that "Since 1995, all new buildings in Iceland are being equipped with, at a minimum, fibre to the curb (FTTC). Older buildings with six or more apartments are equipped with FTTB (building) supplemented by coaxial cable between floors and individual apartments. Buildings with less than six apartments are being equipped with FTTC with coaxial cable covering the last few metres to the building and the connection between floors. In 2003, the threshold was changed from buildings containing nine apartments to buildings containing only six apartments. Typically, all corporate customers with more than 2 Mbit/s connectivity have fibre to their premises (FTTB)."

At 23: "The definition of universal service has been quick to evolve in Iceland. In 1999, a policy decision was made to extend the concept of universal service to data transmission lines. On 10 August 2000, Regulation 641/2000 under the Telecommunications Act, also known as the ISDN regulation, was passed by the Icelandic parliament. Under this regulation, data transmission at a minimum speed of 128 kbit/s must be guaranteed to all households in Iceland. As of February 2003, 98 per cent of Icelandic households had access to ISDN."

annually.²⁷ In total, the federal government plans to spend \$6.8 billion on industrial, regional, and scientific-technological support programs in 2006-2007.²⁸ Given that broadband is apparently accessible to 92% of Canada's households, it is difficult to know what more could be done to improve broadband coverage, beyond the current tax-payer supported programs that governments have introduced, and perhaps standard business practices of reducing prices and/or improving products or service quality and/or quantity.

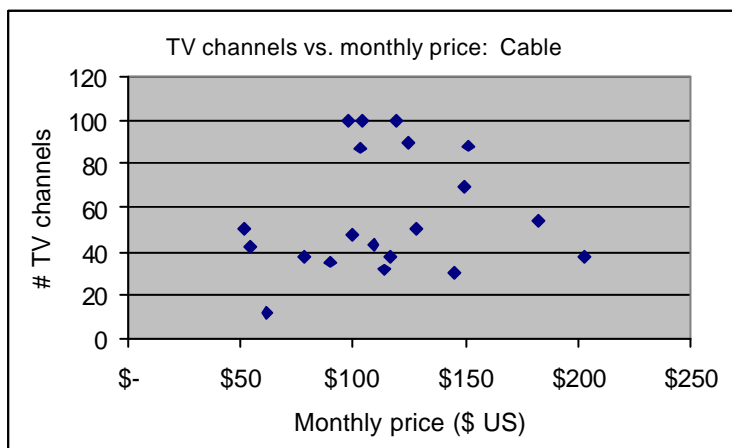
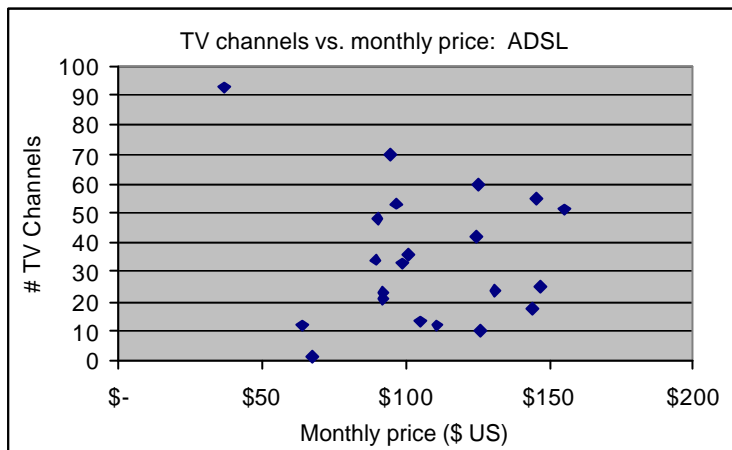
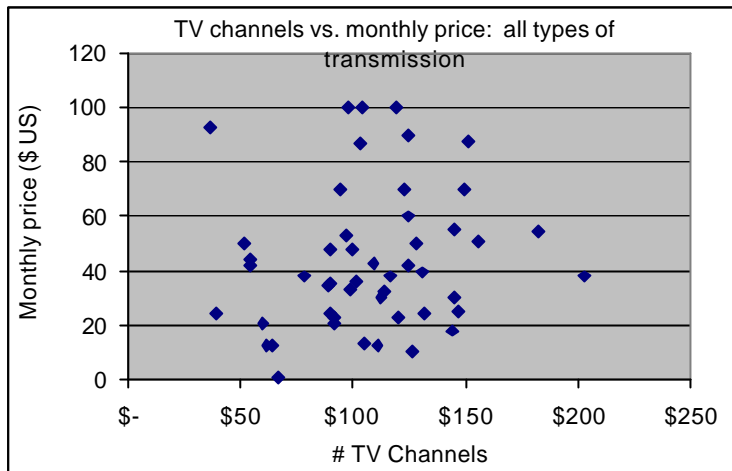
30. While telecommunications companies have benefited from publicly-funded support to extend broadband availability, Parliamentary appropriations for Canadian's national broadcasting network, the CBC, has meanwhile declined:

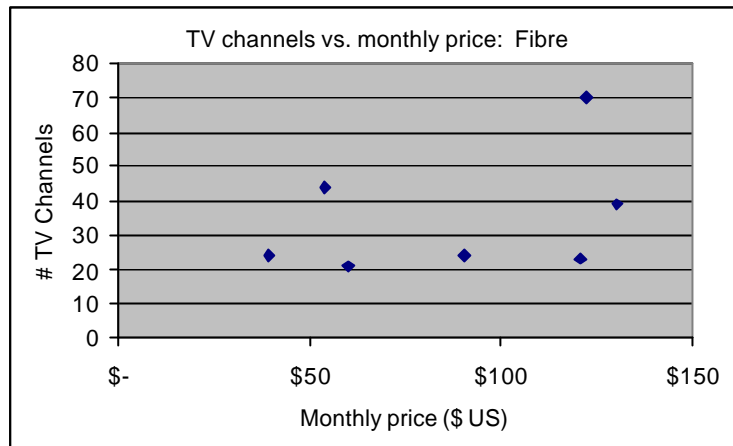


31. Despite their potential for misuse, the OECD data nevertheless warrant scrutiny. For one thing, they demonstrate an unusual relationship between price and the television services offered by Telecommunications service providers: in brief, there does not appear to be one. According to the OECD, prices of the services made available by telecommunications service providers are determined not by technology, but by competition within a given market.

²⁷ Canada, Department of Finance, *Budget 2006: Focussing on priorities*, Chapter 3 – Building a Better Canada: Opportunity (“Investing in Research and Development”) online: [fin.gc.ca](http://www.fin.gc.ca) <<http://www.fin.gc.ca/budget06/bp/bpc3be.htm>>.

²⁸ Canada, Treasury Board of Canada, Secretariat, *2006-2007 Part I – The Government Expenditure Plan – Part I – The Government Expense Plan* online <http://www.tbs-sct.gc.ca/estpre/20062007/part1/ME-010_e.asp>.





Source: OECD, Directorate for Science, Technology and Industry, *Multiple Play: pricing and Policy Trends Online*: OECD (7 April 2006) DSTI/ICCP/TISP(2005)12/FINAL.

32. These data demonstrate that the availability of television channels offered by Telecommunications service providers is not related to price, but by competition. Arguments that regulation of communications distributors will impose higher prices on consumers and limit access to channels, are therefore not supported by the international evidence.
33. The OECD data also suggest that low prices can co-exist with government regulations and, dare one say it, less competition. Specifically, the OECD report mentions that broadband connections in Japan, France and Korea are the least expensive among the countries studied.²⁹ Japan limits access cross-media ownership, however: its telcos are not allowed to enter broadcasting, while its public broadcaster is not allowed to offer telecommunications services.³⁰ Korean telecommunication firms must obtain broadcasting licences and acquire programming content from their potential competitors before the telecommunication firms may sell video.³¹ Should Canada pursue these strategies, or follow the course set by the representatives whom Canadians have elected to Parliament?
34. Canadian legislators should not be stampeded into amending Canada's communications legislation based on the latest 'change' in technology, the latest data from other countries, or cries that the sky has fallen, is falling, will fall or might sometime fall.

E Demand for program types and programming services

35. As noted earlier, the most popular types of TV programming are drama and news. Surveys over the last twenty years have demonstrated that three-quarters of the time of Canadian audiences spend watching television is devoted to drama and news.

²⁹ OECD report at 24.

³⁰ *Ibid.*, at 26.

³¹ *Ibid.*, at 31.

36. As with the transistor radio in the 1960s, demand for programming services available while users are mobile, is likely to increase.

F Future use of content, programming and programming services

37. Since empty pipes attract little interest (except, perhaps, from other pipe connoisseurs), the CCA considers that programming content will continue to be the 'hook', so to speak, for distribution services to attract subscribers and monthly subscription revenue.
38. Interest in digital video broadcasting by Internet will increase, thanks to agreements such as the one announced in August 2006 between Viacom Inc. and Google Inc.: the two companies announced they would distribute VIACOM's MTV Networks over the Internet.³²
39. The CCA has concerns, however, that left to a relatively uncompetitive marketplace, agreements reached between privately-owned companies, such as the one noted above, will restrict the diversity of information and entertainment available to audiences, by express intention or not.
40. Privately-owned companies and corporations cannot be held responsible for ensuring diversity in the marketplace of ideas, since their function is, quite properly, to maximize returns to their investors and shareholders. Similarly, the role of the competitive marketplace is to minimize costs to consumers, while maximizing economic incentives for producers and suppliers. Responsibility for protecting the public interest lies solely with elected members of Parliament, and the federal government.
41. Parliament, the Governor in Council, and the CRTC must ensure that in the future, Canadians remain free to access the information and entertainment they seek, including well-funded, and therefore attractive, Canadian content. It is worth mentioning that despite predictions of the negative impact of regulatory changes that increased the percentage of musical selections that conventional, over-the-air radio stations must carry (from 30%, to 35%), privately-owned commercial radio stations have enjoyed healthy revenue increases. Meanwhile, as noted earlier, average salaries in Canada's cultural sector have declined.

G Impact of technology on content and programming choices

42. New distribution technologies have been introduced more than once in Canada:

Technology	Year invented	Year adopted by 50% of Canadian households
Visual telegraph ³³	1793	Not typically adopted by households
Telegraph ³⁴	1837	Not typically adopted by households

³² Kevin J. Delaney, "Google pushes to make nice with suppliers: Woos them with deals to share revenue" *The Globe and Mail* (14 August 2006) at B6.

³³ Invented by Claude Chappe in France in 1793, visual telegraphy consisted of a mechanical system that used two semaphore arms that were moved with ropes and pulleys. When messages were passed successfully in both directions, the device was "hailed as miraculous". The visual telegraph was installed from Annapolis Valley through to Quebec City in 1799. By 1844, in France, visual telegraph was transmitting messages from Paris to Calais in 4 minutes; (*Spirit of the Web*, *supra* note 9 at 43 and 47).

Technology	Year invented	Year adopted by 50% of Canadian households
Harmonic telegraph – aka telephones	1875	n.d.
Radio	1906	1939
Pocket-sized radios	1954	n.d.
Television	1923	1956
Cable television	1949	1979
Satellite television	1963	Not yet
Cellular telephones	1973	2001
Internet	1974	2001
Personal computers	1975	1999
DBS/DTH	1982	Not yet

43. Governments have stepped in to regulate the content carried by each of these new media. Criminal laws exist to limit the dissemination of offensive content by telephone, for instance, as well as by Internet. Distribution and programming companies themselves have limited the content they have delivered to audiences. In 1895, for instance, the American Bell Company by policy forbade private individuals or companies from sending news by telephone wire.³⁵
44. Businesses have also stepped in to regulate themselves. From 1974 to 1994, Britain's television broadcasters themselves decided not to interview members of the Irish Republican Army.³⁶ In 1996 Information Gateway Services removed a web page that was critical of Quebec's Premier ("I Hate Lucien Bouchard"), after receiving several complaints.³⁷ More recently, in 2002, Google.fr and Google.de dropped the listings for over one hundred web sites that were anti-Semitic, pro-Nazi or related to white supremacy groups.³⁸ In 2003, satellite-delivered television discussions about the conflict in the Middle East were disrupted.³⁹

³⁴ In 1830 in St. Petersburg, Baron Schilling developed a working electromagnetic telegraph; mention of the device was forbidden by Czar Nicholas (Spirit of the Web, supra note 2.at 61). In 1832, American Joseph Henry built a working electric telegraph in Albany and published his work (Spirit of the Web, supra note 2.at 62). Several years later, in 1835, NYU professor of arts and design Samuel Morse proved that signals can be transmitted by wire, using pulses of current to deflect an electromagnet that moves a marker and produces written codes on a strip of paper (FCC, "May 1993: History of Wire and Broadcast Communication", online: FCC <<http://www.fcc.gov/cgb/evol.htm> l>).

³⁵ Carolyn Marvin, *When Old Technologies were New: Thinking About Electric Communication in the Late Nineteenth Century*, (New York: Oxford University Press, 1988) at 221

³⁶ <<http://staff.stir.ac.uk/david.miller/teaching/7613-NI.html>>.

³⁷ Internet Censorship Project, "The Challenges for Free Expression on-line" <<http://www.cjfe.org/specials/internet/ch1.html>>.

³⁸ Laura Rohde, "Google Quietly blocks Controversial Sites" online: PCWorld.com (24 October 2002) <<http://www.pcworld.com/resource/printable/article/0,aid,106283,00.asp>>

³⁹ Tom Shales "President Bush's Ultimatum and a Return to 'Fear Factor'" Online: Washington Post <<http://www.washingtonpost.com/wp-dyn/articles/A42694-2003Mar17.html>> (17 March 2003):

[w]hile the commercial networks aired their evening newscasts, C-SPAN, cable's invaluable Network of Record, was airing live debate about Iraq from the Canadian Parliament. C-SPAN had been bringing viewers thoughtful discussions of the issue all weekend, though not without dismaying mishaps. At a seminar Saturday night in Los Angeles, journalist Robert Scheer was ticking off succinct and persuasive arguments against going to war when the picture began to break up. Suddenly a C-SPAN announcer declared that technical difficulties made the telecast impossible (in fact, the audio could still be heard) and so the seminar was yanked and replaced -- by Army -supplied footage of military manoeuvres.

An antiwar speech from the British House of Commons yesterday afternoon was also abruptly interrupted. Parliamentarian Robin Cook was giving reasons to avoid the war when he was replaced suddenly on the screen by a color test pattern and the words "Fox News Qatar." C-SPAN deserves credit for putting this programming on the air but might try a little harder to keep it there

45. Changing communications technology will give Canadian users new methods of receiving audiovisual content, and new control over the places and times they can access this content. YouTube Inc. announced in August 2006 that it was “talking with record labels to post thousands of music videos online, aiming to move beyond being a site for sharing home videos to a provider of mainstream entertainment like Yahoo and others.”⁴⁰ YouTube’s co-founder said the service “is almost an exact parallel of MTV but viewed through a web browser.” Statements and agreements such as these demonstrate that we need no longer discuss the movement towards convergence, but how convergent technologies that now exist are to be regulated.
46. Combining popular content with inexpensive mobility means that the time users spend with audiovisual content may increase. It seems clear, however, that legislators will always set limits on the content that may be disseminated.⁴¹ What is unclear at this point is whether Canadians will continue to have access to Canadian content, as previously provided by licensed broadcasting undertakings. It is trite to note that Canada is small, relative to the populations of the United States and the United Kingdom, and that as a result, Canadian audio-visual programs are more expensive to produce, than to import. This is why measures have been taken to guarantee certain levels of “shelf space”, so to speak.
47. Specifically, section 6(2) of the CRTC’s *Broadcasting Distribution Regulations* requires that distribution services ensure that “a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services, other than the programming distributed on program repeat channels. To address the concerns related to increased media cross-ownership, the CRTC introduced a non-preferential treatment provision in relation to pay audio services (section 41 of the *Broadcasting Distribution Regulations*).
48. It is therefore interesting to consider the television services now carried by Bell and Rogers using MobiTV:

Wireless carrier	Bell	Rogers
Domestic channels	CBC Newsworld G4techTV <u>MuchMusic</u> <u>MuchMoreRetro</u> <u>MuchVibe</u> RDI <u>Star!</u>	CBC Newsworld G4techTV MuchMusic MuchMoreRetro MuchVibe RDI Star!

⁴⁰ “Youtube courting record labels” online: news.com.au
 <<http://www.news.com.au/entertainment/story/0,23663,20146827-7484,00.html>> (16 August 2006).

⁴¹ S. 13 of the *Canadian Human Rights Act*, for instance, establishes that
 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication.....

In *Canadian Human Rights Commission v. Winnicki*, 2005 FC 1493 (CanLII), the Federal Court, Trial Division, granted a motion for an interlocutory injunction to prevent continued dissemination of hatred through Internet sites.

	The Shopping Channel Treehouse Weather network/ MétéoMédia YTV 11	The Shopping Channel Treehouse Weather network/ MétéoMédia YTV 12
US channels	Bloomberg Television Comedy Time Fox News Channel Fox Sports Maxx Look Maxx Sports Speed TLC ToonWorld TV Classics 9	Comedy Time CNBC Fox News Channel Fox Sports Maxx Look Maxx Sports MSNBC Speed TLC ToonWorld TV Classics 10

49. Canadian services outnumber foreign services for both Bell and Rogers, similar to the CRTC's requirement for conventional BDUs. Both distributors carry two CBC services, similar to the conventional BDU requirement that CBC services be carried. This is where the similarities begin to end. Bell, for instance, includes four services formerly licensed to CHUM Limited, a company Bell has acquired. The current regulations prohibit DTH BDUs from granting their own programming services preferential treatment (this was to address the concern that Shaw might carry its pay audio service, but decline to carry competitors' pay audio services.) These rules do not apply to Bell, obviously, any more than the CRTC's rules for choosing and carrying satellite services.
50. Rather than deciding to exempt mobile television services from regulation, the CRTC should have developed a regulatory framework to address these and other concerns.⁴² An unlevel playing field now exists with respect to regulatory requirements for DTH and mobile television distributors, that will create unnecessary tensions within the broadcast sector and distract attention from what is to the cultural sector, somewhat more important, such as decreasing expenditures on Canadian television programming in the face of increasing expenditures on foreign programming.
51. In addition to concerns about the unequal regulatory 'playing field' that has been created by the CRTC's decision to forbear from regulating convergent technologies such as mobile television, the CCA shares the serious concerns that others have expressed in the past about network neutrality, an issue affecting Canadians' continuing access to the Internet.
52. The concerns arise because large telecommunications service providers are actively seeking new revenue sources. News reports suggest that telephone companies "envision a system whereby Internet companies would agree to pay a fee for their content to receive priority treatment as it moves across increasingly crowded networks."⁴³ Examples of some of Canada and the United States' largest Internet and

⁴² In the case of MATV, for instance, the Commission forbore from regulation provided MATV providers drew no profit from the undertakings. This went some way to eliminating concerns regarding preferential treatment.

⁴³ Dionne Searcy & Amy Schatz, "Phone Companies Set Off a Battle over Internet Fees" *Wall Street Journal* (6 January 2006) <<http://www.freepress.net/news/13218>>.

telecommunications service providers' views and actions regarding network neutrality are shown below:

AOL (US)	In April 2006 stopped e-mail sent to AOL subscribers which included a link to a site opposing AOL's proposed e-mail tax; those sending the e-mails received a bounceback message stating that their e-mail had "failed permanently" ⁴⁴
AT&T Corp (US) Bell	In January 2006 "expressed support for charging companies to ensure that their content gets priority delivery" ⁴⁵ Beginning late in 2003, Bell offers icarriers, ISPs, CLECs, Telcos and other service providers a Dynamic Traffic Shaping Service to enable them to "efficiently manage their individual customers' traffic, maintaining consistency of service, reducing churn and opening up new service revenue opportunities." ⁴⁶
BellSouth Corp. (US)	In January 2006 "said it is in early talks with Internet movie companies and at least one gaming company with the aim of striking agreements on fees to guarantee fast content delivery over the Internet." ⁴⁷ Bellsouth's chief technology officer said in January 2006 that "he envisions charging content providers a fee based on the volume of material they send over BellSouth's network, as well as the bandwidth the content takes up." ⁴⁸ In December 2005, BellSouth's chief technology officer said that "an Internet service provider such as his firm should be able, for example, to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc. [H]e said his company wants to be able to assure vendors such as online-gaming firms that their subscribers will get top performance even when there is heavy network traffic, which can slow a system." ⁴⁹
Eastlink	In early 2006, apparently limited access to the BitTorrent protocol by reducing upload speeds from 80 kB/s, to 22 kB/s ⁵⁰
Rogers	In 2005 acknowledged that it uses "traffic shaping" to grant priority to some online activities; customers of activities that the company considers to be lower in priority may gain access to these services with more difficulty; one effect may be to block access to BitTorrent and the downloading of podcasts from iTunes ⁵¹ .
SBC Telecommunicaitons (US)	CEO of SBC Telecommunications (that acquired Pacific Telsis, Ameritech and AT&T Wireless) said in October 2005 that companies such as Google, MSN, Vonage and others will have to pay for using SBC's infrastructure. "The Internet can't be free in that sense, because we and the cable companies have made an

⁴⁴ Timothy Karr, "AOL Censors Opposition Site" *MediaCitizen* (14 April 2006)

<<http://www.freepress.net/news/14960>>.

⁴⁵ Searcy & Schatz, *supra* note 41.

⁴⁶ Bell Canada, "Bell Wholesale Internet Connect Internet Connect Service" online

<<http://www.wholesale.bell.ca/pdfs/internetconnect.pdf>>.

⁴⁷ Searcy & Schatz, *supra* note 41.

⁴⁸ *Ibid.*

⁴⁹ Jonathan Krim, "Executive Wants to Charge for Web Speed" online: Washingtonpost.com

<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30AR2005113002109_plaintiff.html> (1 December 2005) at D05.

⁵⁰ "New Azureus Upgrade Bypasses Eastlink Traffic shaping" online: halifaxlive.com

<<http://www.halifaxlive.com/content/view/537/2/>> (18 February 2006).

⁵¹ BBC News, "Towards a two-tier Internet" online: BBC News <<http://newsvote.bbc.co>> (22 December 2005); Jack Kapica, "The new shape of broadband" online: globeandmail.com (08/12/05).

	investment and for a Google or Yahoo! Or Vonage or anybody to expect to use these pipes free is nuts!" ⁵²
Shaw	The service it offers to customers of third-party VoIP services such as Vonage is alleged to be subject to packet delays and other limitations, while its own VoIP service is not; ⁵³ beginning in March 2005 Show invites subscribers to pay a \$10/month "enhancement fee" to improve VoIP service ⁵⁴
Telus	Telus blocked customers from visiting the "Voices For Change" web site, along with 600 other websites hosted at the same IP address, during a labor dispute ⁵⁵
Time Warner Cable (US)	In 2000, prevented its 3.5 million customers from accessing Walt Disney's television programs ⁵⁶
Time Warner AOL (US)	In April, Time Warner's AOL blocked all emails that mentioned www.dearaol.com — an advocacy campaign opposing the company's pay-to-send e-mail scheme.
Madison River (US)	In 2004, blocked its DSL customers from using any rival Web-based phone service.
Verizon (US)	Has entered into agreements with content owners, such as the Disney company, and has bypassed cable companies that refuse to license content ⁵⁷
Vodafone (Germany)	In 2005 there were reports that in Europe, some ISPs have similarly begun to block VoIP traffic, treating the popular Skype program as "inappropriate content." ⁵⁸

53. Several arguments are being raised to support telecommunications' service providers' plans to treat content discriminatorily. These range from claims that crowded distribution networks will collapse unless subscribers agree to limit their use of the networks, to distributors' claims of ownership over distribution pipes and consequent right to control use and maximize profits.
54. Arguments that distributors must discriminate against certain types of content because distribution networks are crowded, lack weight. The solution to 'crowding' online is to increase speed and carriage capacity, not to limit users. This solution has been and continues to be pursued.⁵⁹ For some time, for example, mesh-enabled access points

⁵² "At SBC, It's All About 'Scale and Scope'" online: [freepress.net BusinessWeek](http://www.freepress.net/news/14959) (7 October 2005) <<http://www.freepress.net/news/14959>>. "Shaw files lawsuit and denies traffic shaping allegations" online: Digital Home Canada <<http://www.digitalhomecanada.com/content/view/1331/51/>> (19 June 2006).

⁵³ Jeff Baumgartner, "Shaw defends 'QoS enhancement' package" online: CED Magazine (19 June 2006) <<http://www.cedmagazine.com>>.

⁵⁴ Joseph Wilson, "Troubles over tiered net: Internet service providers might charge more for certain sites" online: nowtoronto.com <http://nowtoronto.com/issues/2006-08-03/goods_next.php> (3-9 August 2006).

⁵⁵ BBC News, *supra* note 49.

⁵⁶ Drew Clark, "A Tangled net: An In-Depth Look At The Network Neutrality Debate" online: National Journal <<http://www.njtelecomupdate.com/lenya/telco/live/tb-GMDB1152648438194.html>> (7 July 2006).

⁵⁷ OECD, Directorate for Science, Technology and Industry, *The Future of the Internet: DSTI/ICCP(2006)17* (Workshop Proceedings: 8 March 2006) at paras. 78-79.

⁵⁸ BBC News, *supra* note 49.

⁵⁹ In 1929, the Manager of the Trans-Canada Broadcasting Company "complained that sardines had a better time in a tin than most broadcasters had in Canada's share of the broadcast band. Seventy-four Canadian stations were jammed on seventeen channels, eleven of which were shared with the United States." Foster, *supra* note 11 at 25.

have balanced loads by choosing the most efficient paths for content. Similarly, in August 2006, Sprint Nextel (the third-largest cellular carrier in the United States, with over 52 million subscribers), announced that it would use Intel's WiMax technology to build a high-speed wireless data network with connection speeds approximately five times faster than those currently available, allowing users to access the Internet while in motion.⁶⁰ Nothing prevents distributors from investing in technological research, or from funding university researchers, to address crowding concerns. Canadian public policy makers have even established programs that support this research financially, and such expenditures also receive preferential tax treatment.

55. Arguments that “network operators must be free to control the type and quality of service on the system in which they have invested heavily”⁶¹ also lack weight, particularly in this country. Canada’s telecommunications infrastructure has not been paid for entirely by the private sector: subscribers and taxpayers (often the same person) financed the capital installations and upgrades of this infrastructure, in whole or in part. (Subscribers, through the monthly fees paid to telcos, and taxpayers, through the taxes they were required to pay since telcos may deduct a portion of their capital expenditures from their taxes). Canadian public policy has encouraged and funded the expansion of broadband across the country – ‘real estate’, so to speak, that Internet service providers are now able to use to attract new subscribers and new subscriber revenues. Finally, the OECD report on TSP convergence has pointed out the dangers from a “walled garden” approach, in which only the TSP’s own services are available, are easily available, or are more inexpensively available to subscribers.⁶²
56. Rather than maximizing network efficiency, the pay-for-performance system advocated by distributors will reduce users’ access to the Internet, limit the development of the new content that draws people online, and reduce innovation overall. Canadian search engines that cannot afford to pay for faster service may not attract the users they need to survive. Canadian startups and entrepreneurs may be unable to pay the amounts paid by larger companies for dominant placement on the Internet. Canadians’ subscribers’ access to content sites such as iTunes has been and may continue to be slowed, to encourage users to pay more for service quality, or to divert users to content sites owned or controlled by the ISP or TSP. Not-for-profit websites may find the online contributions they need to survive slowing down, if they are unable to pay for access to higher-speed service. The costs for so-called citizen journalists – bloggers – to post and share audio-visual clips may rise, silencing an alternative source of information and creativity.⁶³
57. Another unexpected consequence of allowing content distributors to discriminate when they distribute now-neutral packets of data, may be increased costs, rather than increased revenues alone. Currently distributors are not liable for the content they distribute, because they exercise no control over it. If distributors decide to impose

⁶⁰ John Markoff & Ken Belson, “Sprint Will Build an Intel-Backed Network” *The New York Times* (9 August 2006).

⁶¹ Krim, *supra* note 47.

⁶² Source: OECD, Directorate for Science, Technology and Industry, Multiple Play: pricing and Policy Trends Online: OECD (7 April 2006) DSTI/ICCP/TISP(2005)12/FINAL at 7.

⁶³ In 2006, the BBC reported on the existence of more than 27 million blogs, with 75,000 new blogs being created daily. BBC News, “Locking down our digital future” <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4690188.stm>> (2006/02/08).

controls on the content they distribute, should they remain free from liability for choosing to carry this content? If not, distributors' costs may rise. Yet if they control content, telecommunications service providers move closer to becoming broadcasters who make programming decisions.

58. The CCA does not purport to have extensive expertise in this area. Early in 2006, however, experts at an OECD workshop on the future of the Internet drew the following conclusions:
- The Internet's basic features of interoperability and scalability must be preserved
 - The Internet's basic premise of openness and transparency should be maintained
 - The Internet must be user-oriented, "with a special focus on active users creating new content. This will stimulate innovation and new business models."
 - Privacy and security are fundamental to the future internet
 - Traditional ideas of intellectual property will be challenged by the new technologies
 - "Identifying a business model that pays for this essential infrastructure is elusive, presenting a paradox."
 - "... the Internet has important impacts on employment that need to be better understood and handled in a policy context."⁶⁴
59. Contrary to somewhat overblown rhetoric that Canadians must act quickly to address some parties' urgent concerns, the CCA believes it is impossible to conclude that any new, and time-limited crisis exists that requires Canadian legislators and regulators to modify the existing, technologically-neutral legislative and regulatory framework for Canada's communications systems. If taken, such a step would have to be viewed for what it truly is: an attempt to grant preferential treatment to privately-owned and operated services, thereby artificially increasing their revenues at the expense of Canada's cultural sector and Canadian subscribers.⁶⁵
60. Canada's essential telecommunications infrastructure has developed as a joint venture, so to speak, between Canadians and the private sector. At times the private sector has been granted near monopoly control and revenue in certain regions and over certain services, in exchange for a commitment to invest in the infrastructure needed to 'wire' Canada and ensure Canadians benefited from the use of their communications spectrum.
61. No current crisis exists to revamp legislation that was designed to last more than a decade.

⁶⁴ OECD, Directorate for Science, Technology and Industry, *Workshop "The Future of the Internet": Proceedings* (8 March 2006) DSTI/ICCP(2006)17 at ¶121.

⁶⁵ In early 2006, the director of the University of California's Cooperative Association of Internet Data Analysis commented that telecommunications companies no longer earn their traditional profit margins— although "society has decided IP is like water", the telecommunications industry is "structuring itself to sell wine." Telecommunications companies are therefore adding functions to the network's core, since they may earn more income from services than merely providing access. "The Future of the Internet" *Red Herring* (10 April 2006).

62. An ongoing challenge that continues to exist, however, is the lack of adequate and stable funding to support the availability of Canadian content. The CCA urges the federal government and Parliament to remedy this situation.

III IMPACT OF AUDIO-VISUAL TECHNOLOGIES ON BROADCASTING SYSTEM

63. While it is fair to say that the introduction of new audio-visual technologies affects the broadcasting system, it is more accurate to say that audio-visual content drives technologies. Without audio-visual content of some form, there would be no demand for new technologies.
64. Similarly, broadcast regulation also affects the new technologies' impact on the system.
65. In 1969, for instance, the CRTC established a policy for supervising Community Antenna Television based on the view these services were "complementary rather than ... competitive ... to those already provided by other broadcasting services."⁶⁶ The Commission's "first concern is with programming": it was "aware of the importance of American signals to the success of cable systems", but at the same time wished "to be assured their carriage will not deprive the subscriber of the various priorities of Canadian signal sources" as it had listed them.⁶⁷ Cable television gave Canadians greater access to more Canadian programming, as extra-local television signals from other parts of the country were received.
66. Some years later, in 1993, the CRTC also ensured that satellite distribution services would not adversely affect existing Canadian broadcasters. It
- ... noted that pending developments in the communications environment, in particular the advances in new delivery systems such as high-powered Direct Broadcast Satellites (DBS) and the implementation of the cable industry of digital video compression (DVC), were generating new challenges for the broadcasting system. The Commission concluded that prompt action was necessary to ensure a strong Canadian presence in the multi-channel universe. This included the provision of a diverse and attractive package of Canadian conventional, specialty, pay television and pay-per-view services offering high quality Canadian programming.⁶⁸
67. Canada's broadcast regulator has recognized, and should continue to recognize, the importance of regulation in ensuring the availability of Canadian program content to Canadians. Had the CRTC decided in the late 1960s to forbear from regulating cable television, many Canadian over-the-air broadcasters that currently operate might not exist. Had the government decided to exempt radio stations created to serve transistor radios, Canada's currently profitable radio sector also might not exist.

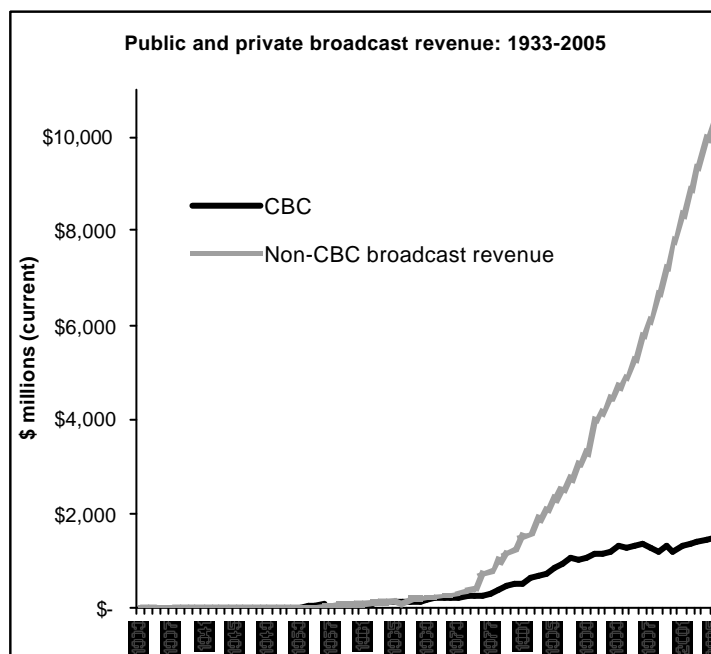
⁶⁶ CRTC, *Community Antenna Television*, Public Announcement (Ottawa: 13 May 1969).

⁶⁷ CRTC Chairman, Pierre Juneau, *Address*, Canadian Cable Television Association (Quebec City: 14 May 1969) at 5.

⁶⁸ CRTC, *Introductory Statement – Licensing of New Specialty and Pay Television Services*, Public Notice CRTC 1994-59 (Ottawa: 6 June 1994), "The Structural Policy Statement".

A Broadcasters' adoption of audio-visual technologies

68. Most broadcasters will adapt as consumers adopt new audiovisual technologies, either by offering new services themselves, by acquiring control over companies that provide such services and/or by entering into partnerships with Telecommunications service providers and web-based content providers. In August 2006, for instance, CBS announced that it will stream television programs such as *CSI: Miami* and *Survivor* without charge, online,⁶⁹ as well as its *Evening News with Katie Couric*.⁷⁰ AOL also announced that following agreements with News Corp.'s 20th Century Fox, Sony Corp.'s Sony Pictures Home Entertainment, NBC Universal's Universal Pictures, and Time Warner Inc.'s Warner Bros. Home Entertainment Group, it would sell movies and television programs, including *24* and *Buffy the Vampire Slayer* in a new Internet video portal, for prices ranging from \$1.99 to \$19.99.⁷¹ Broadcasters such as CHUM Limited have also decided to consider partnerships with web-based video-sharing sites.⁷²
69. Convergence has increased content distributors' opportunities to earn income. In 2002, for instance, although the number of cable subscribers had declined since 1999, Canadian cable operators' revenues increased by 7%. This increase was due to the companies' willingness to offer high-speed Internet and digital cable service.⁷³ Rogers, Bell, Shaw and Telus are examples of companies that have adapted to new opportunities offered by new technologies.
70. Clearly we are no longer converging, but have converged, as the Internet is concerned.
71. The CCA is concerned that Canada's national broadcaster, the CBC, and some provincial broadcasters may be unable to adapt as quickly as their privately-owned counterparts, even though private broadcasters' have benefited from the CBC's early research into digital broadcasting, and due to their ability to borrow, are likely to adapt to these new technologies. Public broadcasters' inability to adapt is due entirely to legislative limitations on these companies' ability to borrow to



⁶⁹ Associated Press, "CBS to offer shows free on Internet" online < <http://www.post-gazette.com/pg/06229/714089-237.stm> > (17 August 2006).

⁷⁰ Caroline McCarthy, "CBS to Webcast Couric news program" online [cnet news.com](http://news.com.com/2102-1038_3-6106744.html?tag=st.util.print) < http://news.com.com/2102-1038_3-6106744.html?tag=st.util.print > (17 August 2006).

⁷¹ "AOL to sell movies, shows through video portal" Online: Silicon Valley.com

< <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/15351880.htm> > (24 August 2006).

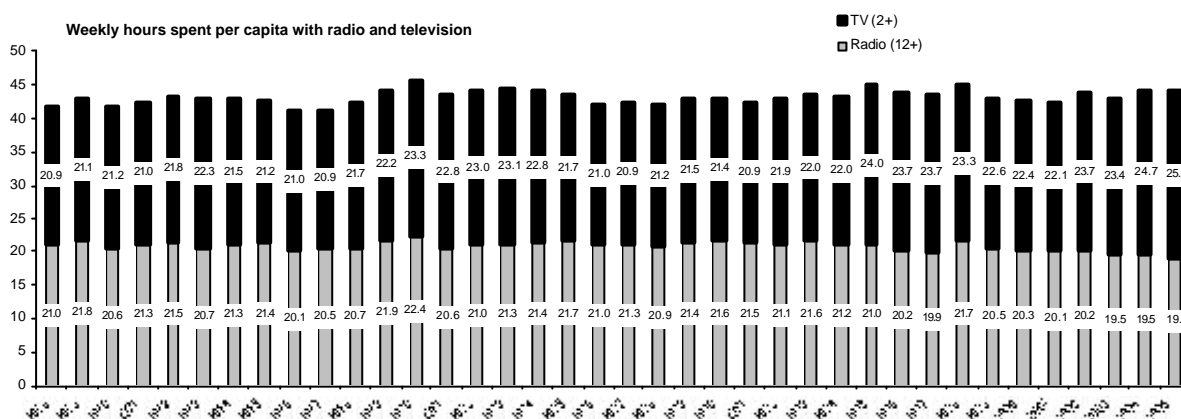
⁷² Grant Robertson, "Networks playing nice with Web foes", *Globe and Mail* (17 August 2006) at B5.

⁷³ Statistics Canada, "Cable and satellite television", *The Daily* (Friday, October 24, 2003).

finance the large capital investments needed to introduce these technologies. The CCA urges Parliament to provide companies that serve the public interest, with the resources they require to meet this role.

B Economic and regulatory impact of audio-visual technologies on broadcasting system

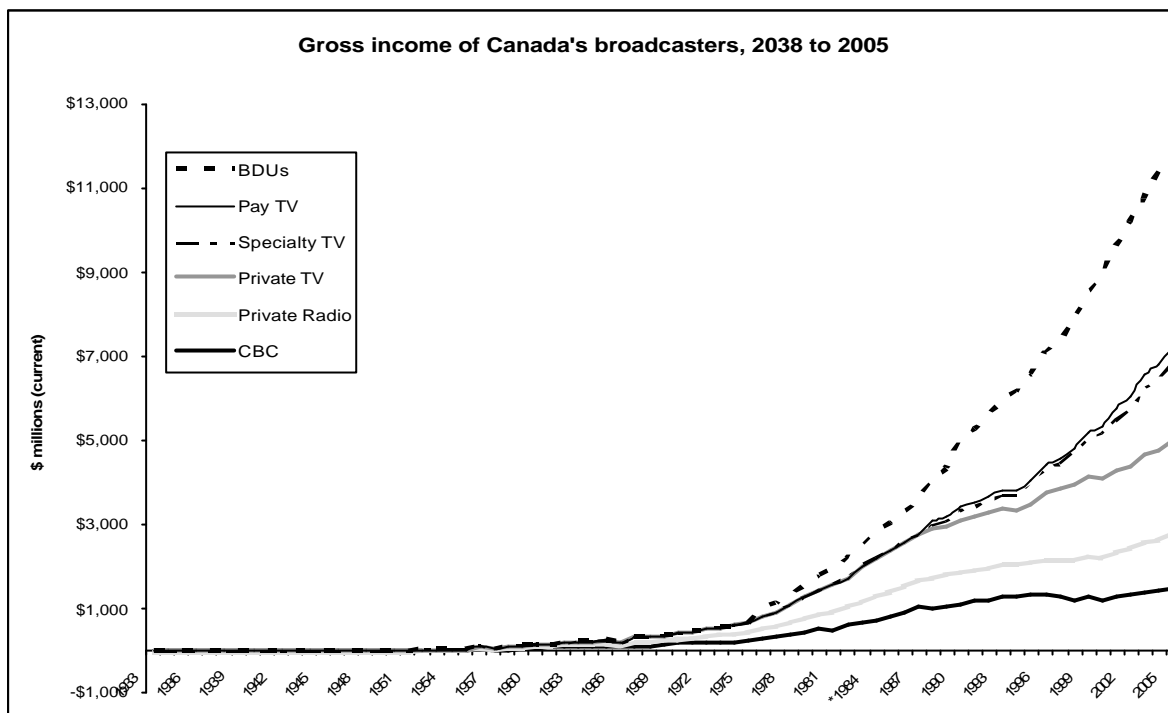
72. Neither changes in the demographic structure of Canada, nor Canadians' adoption of new technologies over the last several decades have dramatically affected the time they spend with radio and television:



Sources

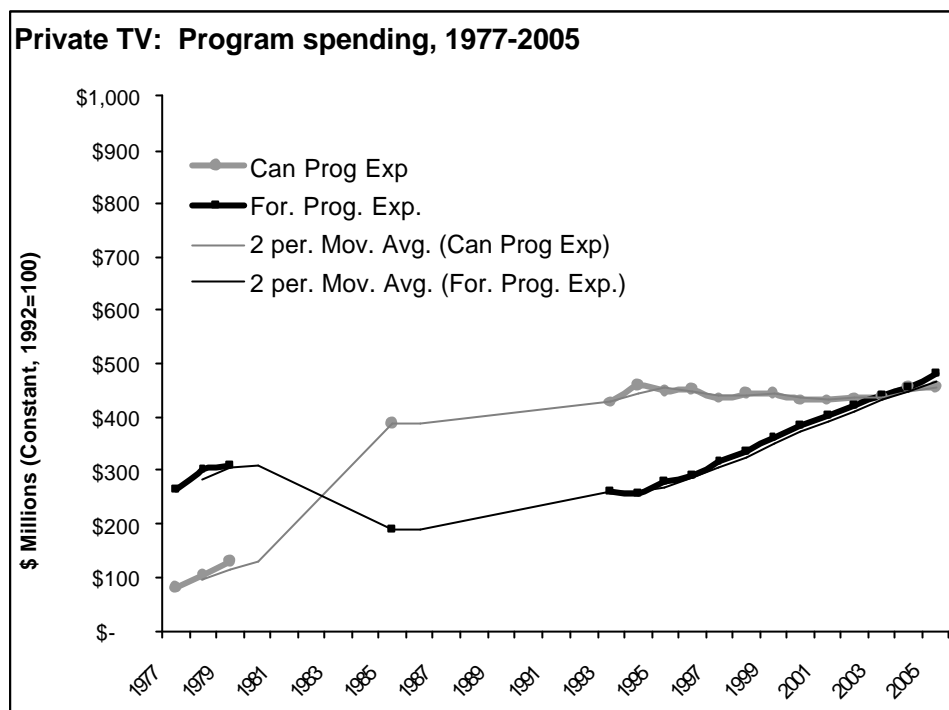
- 1968-1995/1999 (TV/Radio): Barry Kiefl (6 June 2000) *50 Years of Canadian Radio and TV: Do Canadians Still Hear and See Themselves?* (using BBM and AC Nielsen data)
- 1970-1979: TV (Fall BBM) CRTC, *Broadcasting and Telecommunications Macro-Statistics*
- 1995-2001: TV (BBM) CRTC *Broadcast Policy Monitoring Report 2003* at 39
- 2002-2005: TV (BBM) CRTC *Broadcast Policy Monitoring Report 2006* at 41
- 1999-2005: Radio (MicroBBM) CRTC *Broadcasting Policy Monitoring Report 2006* at 11

73. Canadians' continued tuning to conventional radio and television may explain why the adoption of new technologies in the past also does not appear to have seriously affected the financial success of Canadian broadcasters. Among these broadcasters, only the CBC – whose finances are controlled by Parliament and whose additional sources of revenue are largely in the hands of the CRTC through its licensing decisions – has not prospered from Canada's changing audio-visual landscape: (see table, next page)



74. Canadian privately-owned broadcasters' ability to thrive financially may be attributed to their acumen in diversifying their ownership interests, to the CRTC's decision to encourage concentrated and cross-media ownership over the last two decades, and to 'streamline' regulatory treatment of its licensee clientele.
75. Until the 1990s, the CRTC also appeared to focus on programming content. It encouraged 'new' entrants to Canada's broadcast system to support Canadian communities by financing Canadian program production, in some cases tying income to minimum program expenditures. The larger the entrant, the greater the entrant's capacity to support program production. The rationale for this was because, as the CRTC pointed out in early 1994, "[a]t this point, the only sure thing about the 'brave new world' of the multichannel universe is that few of the choices it offers will reflect Canada, our culture or our values unless we invest a great deal more money in Canadian programming."⁷⁴
76. If the CRTC is still interested in programming content, its methods to encourage spending on Canadian content have been counter-productive. In fact, its recent policies have reversed the results of preceding years' of policy. Although spending on Canadian television programming generally exceeded spending on foreign content in the 1990s, the reverse is now true. Privately-owned conventional television broadcasters spent 5% more on foreign content, than on Canadian content:

⁷⁴ CRTC, News Release, at 1 (issued in relation to in PN CRTC 1994-10).



77. The CCA considers that the CRTC's diminished regulatory oversight, not changing technologies, has had a negative effect on Canadian content, and in turn, on the broadcasting system as a whole. Canadian culture has not prospered under the CRTC's supervision of the broadcasting system, merely survived.

C Content and content delivery through the regulated and non-regulated aspects of the broadcasting system

78. Parliament has allowed the CRTC to allocate its regulatory resources efficiently for several decades. In the case of telecommunications, it requires the CRTC to forbear from regulation, if regulation "would be likely to impair unduly the establishment or continuance of a competitive market".⁷⁵ In the case of broadcasting, it has granted the CRTC the power to forbear from licensing services that do not pose a threat to existing broadcast services.
79. The CRTC has used its ability to forbear in two ways. In telecommunications, it has adopted "a policy of technological neutrality that is designed to ensure that regulatory interventions in the market do not inadvertently incent or disincent [sic] the choice of a particular technology."⁷⁶ In broadcasting, the CRTC determined in its 1999 *New Media*

⁷⁵ *Telecommunications Act*, S.C. 1993, c. 38, s. 34(3).

⁷⁶ CRTC, *Canadian Telecommunications Policy Review: Discussion Paper* (17 August 2005) <http://www.crtc.gc.ca/eng/publications/reports/t_review05.htm> at ¶130.

notice⁷⁷ that it had jurisdiction to regulate broadcast content delivered by the Internet, but forbore from regulating this content because it did not pose a threat to Canadian broadcasters.

80. In April 2006, on the basis of its *New Media* notice, the CRTC decided to exempt from regulation those distribution undertakings that deliver broadcast services in part using the Internet, in *Regulatory framework for mobile television broadcasting services*.⁷⁸ The CCA believes this decision was incorrect.

81. The CRTC concluded that mobile television services “fall under the New Media Exemption Order”.⁷⁹ It decided parties to the mobile television proceeding “provided no evidence ... to indicate that new media broadcasters have been responsible for any significant loss in television audiences for licensed Canadian broadcasters.”⁸⁰ The CRTC therefore concluded that,

Given the current technical challenges associated with the wireless technology noted above, the mobile television broadcasting services are unlikely in the near future to become substitutes for conventional broadcasting services or to impede the ability of traditional broadcasters to fulfill their obligations under the Act.

82. With respect, this “no-harm” test is not the test described by the CRTC in its *New media* notice. There, the Commission’s focus was on section 9(4) of the *Broadcasting Act*, which is effectively a “benefits” test:

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

Section 9(4) requires the CRTC to determine whether a broadcaster’s compliance with the requirements of Part II of the *Act* will or will not contribute materially to achieving Parliament’s broadcasting policy. The main issue raised by distributors’ use of MobiTV to attract subscribers and subscriber revenues is, therefore, not significant loss for existing Canadian broadcasters, but the manner in which these distributors contribute or do not contribute materially to the implementation of Parliament’s broadcasting policy. The question to be asked is, how would the broadcasting system benefit – or not benefit – from application of the CRTC’s licensing and regulatory authority. The Commission

⁷⁷ CRTC, Broadcasting Public Notice CRTC 1999-84, Telecom Public Notice CRTC 99-14 (17 May 1999).

⁷⁸ CRTC, *Regulatory framework for mobile television broadcasting services*, Broadcasting Public Notice CRTC 2006-47 (Ottawa, 12 April 2006) at ¶30:

Based on the descriptions of the technology filed as part of the record of this proceeding, the Commission is of the view that the mobile broadcasting services in question are delivered and accessed over the Internet. The Commission concludes that the television signals are sent by MobiTV via the public Internet to the Internet gateway of the mobile carrier in question. From there, they are routed to the appropriate tower and transmitted wirelessly for the last mile to the user’s handset. To access the signals, the user must connect to the Internet using a web browser. The wireless carrier may provide the user with a separate icon to facilitate activation of the service rather than requiring it to type in a URL.

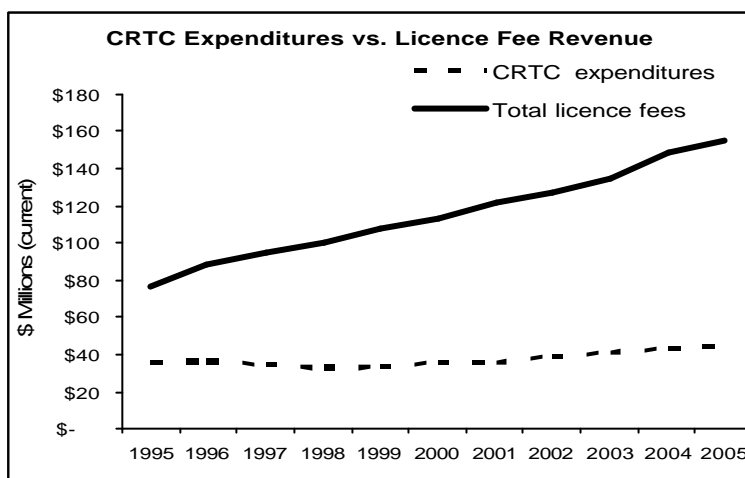
⁷⁹ *Ibid.*, at ¶34.

⁸⁰ *Ibid.*, at ¶40.

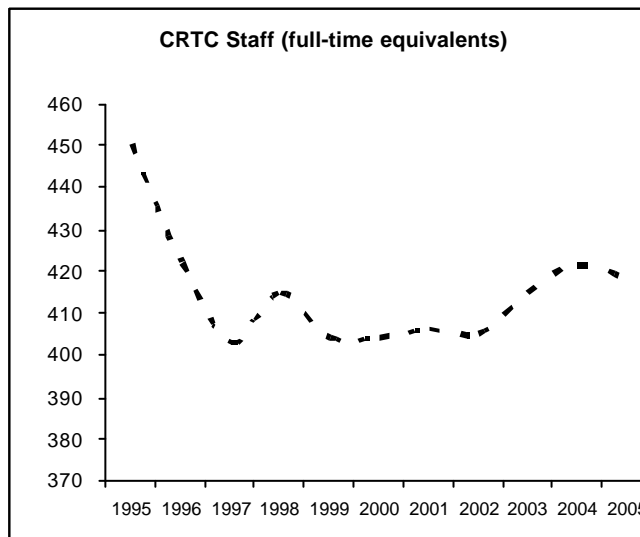
appears to be introducing competition law concerns to its supervision of the broadcasting system.

83. The 2006 decision has created a two-tiered regulatory system that has implications for existing 'conventional' distributors, as well as the broadcasting system's financial capacity.⁸¹ In the particular case of the mobile television decision, very little – that is, nothing – has been demanded of a particularly large and important 'entrant': BCE. The CCA believes that the CRTC's decision in this area, as well as its satellite radio decision, not only fail to achieve the objects of Parliament's broadcasting policy, but in the medium term, threaten the financial viability of Canadian program production.

84. It is difficult – perhaps impossible – to reconcile the CRTC's *New media* policy with its past decisions. One explanation for the policy, however, may be that the CRTC is no longer properly resourced to meet the role delegated to it by Parliament. The CCA notes that while the licence fees paid by broadcasters and telecommunications companies for their use of the spectrum owned by all Canadians has grown steadily over the last decade (by 104% between 1995 and 2005), the CRTC's budget has not (26%):



85. Although it is difficult to say with certainty – since the Part III Main Estimates that the CRTC submits to Parliament do not explicitly identify actual full-time staff equivalents, but only forecast FTEs – the CRTC also appears to have lost staff relative to the mid-1990s:



⁸¹ *Ibid.*, at ¶30:

86. Parliament must not allow the CRTC to relinquish its responsibilities under Canada's communications legislation because it lacks staff, equipment, management or other resources necessary for efficient and effective regulation.

IV CONCLUSIONS AND RECOMMENDATIONS

A Conclusions

87. Prognostications suffer from inaccuracy. Predicted events may arrive sooner than expected, later than expected, or not at all. Prognosticators are sometimes safest when they leave dates open-ended. In 1869, for instance, one report of a United States Senate committee confidently predicted that Americans' launch "of a Northern Pacific railroad seals the destiny of the British possessions west of the ninety-first meridian [i.e., Canada]. They will become so Americanised in interests and feelings that they will be in effect severed from the new Dominion, and the question of their annexation will be but a question of time."⁸²
88. Given medium- and long-term predictions' uncertainty, change is a constant challenge for companies and regulators alike. The CRTC has referred to this challenge from time to time in the past:

1997	<p>As technologies evolve, industry consolidates, globalization advances and new services are developed, the CRTC is changing how it carries out its role. In an environment transforming from monopoly to competition, the CRTC has a unique opportunity to facilitate the transition. The CRTC will help shape the future communications environment, world-class quality communications, with a distinct Canadian presence, in the public interest.</p> <p>....</p> <p>In response to the changing communications landscape, the CRTC also undertook an exercise to develop a new Vision to take the CRTC into the information age. The Vision articulates our mission, key thrusts, goals and values which reaffirm the pertinence of the objectives set out in the Broadcasting Act and the Telecommunications Act. It articulates the strategies and actions we have begun to undertake to make our Vision a reality, with a three-year action plan. The Vision promotes a framework to support both maximum choice and maximum access to Canadian content and services.</p> <p>CRTC, <i>Performance Report for the Period ending March 31, 1997</i>, "The Chairperson's message"</p>
1998	<p>The convergence of communications technologies is rapidly changing the way Canadians interact with each other and quickly increasing the choice of programming and delivery options available to them. As regulator of the telecommunications and broadcasting systems in this country, we are in the enviable position of helping to shape the communications environment for the future.</p> <p>CRTC, <i>1997-98 Estimates Part III Expenditure Plan</i>, at 3.</p>
1999	<p>In 1996-97, the CRTC developed a Vision for the information age of the new millennium. The Vision articulates the CRTC's mission, and key thrusts and components, which stem directly from the objectives set out in the <i>Broadcasting Act</i> and the <i>Telecommunications Act</i>. The</p>

⁸² Pierre Berton, *The National Dream: The Great Railway, 1871-1881* (McClelland and Stewart Limited: Toronto, 1970) at 10.

	<p>Vision is also shaped by the changing communications environment, which is characterized by rapidly evolving technologies, and an increasing rate of domestic and international competition. The Vision framework helps the CRTC focus on how it carries out its mandate, achieve its objectives, improve its operations and measure its results in this increasingly competitive environment</p> <p>CRTC, <i>1998-99 Estimates A Report on Plans and Priorities Approved</i>, “Mission and Vision Statements”.</p>
2000	<p>We will continue to create a climate that stimulates competition, convergence and the emergence of new technology platforms. Recent advances and innovations in communication technologies, the public’s appetite for greater choice and diversity, along with international agreements among governments, have contributed to the redefinition of the communications landscape. To respond to the new reality, we have begun to implement changes to the <i>Telecommunications Act</i>. One of the major issues still before us is ensuring that prices of core telephone services continue to be affordable and reasonable, especially in high cost areas.</p> <p>CRTC, <i>1999-2000 Estimates A Report on Plans and Priorities Approved</i>, “The Chairperson’s Message”.</p>
2001	<p>From 2000 to 2003, the Canadian Radio-television and Telecommunications Commission will continue to face the challenge of balancing cultural and social objectives with economic objectives in an increasingly competitive and converging world.</p> <p>Technology is altering every aspect of our lives with knowledge and creativity now the driving force of the new economy. New competitors and technological innovations are transforming communication markets while technology-driven services are blurring the traditional boundaries between different sectors of the communications industry. Canadians are increasingly able to choose from a variety of suppliers of services and programming.</p> <p>CRTC, <i>2000-2001 Estimates Part III – Report on Plans and Priorities</i> at 3.</p>
2003	<p>As we begin the 21st century, there are many challenges on our horizon. Technology waits for no person – or institution. Communications technologies are advancing rapidly and it is our challenge to keep pace with, and even anticipate, those changes. Today we are committed to enabling the roll-out of digital technology; tomorrow’s technological advances are limited only by the imagination.</p> <p>CRTC, <i>2002-2003 Estimates Part III – Report on Plans and Priorities</i> at 7</p>
2005	<p>We at the CRTC are always conscious of what a challenge and responsibility it is to regulate two key industries that so directly affect the daily lives of all Canadians. Today’s rapid developments in digital technology are opening up exciting new possibilities in both broadcasting and telecommunications, making our role even more challenging.</p> <p>CRTC, <i>2004-2005 Estimates Part III – Report on Plans and Priorities</i> at 7.</p>
2006	<p>Since 1928, when the Government of Canada created the first Royal Commission on Broadcasting, the government has sought to develop policies to keep pace with changing technology. This has been the government’s central goal from the early days of radio and television, to our current information highway era characterized by rapid technological change.</p> <p>CRTC, <i>2005-2006 Estimates Part III – Report on Plans and Priorities</i>, at 9.</p>

89. The CCA believes that Canada’s broadcasting legislation was well-designed by Parliament to address the importance of content over distribution. As Parliament’s delegate, the CRTC must ensure that Parliament’s objectives for the broadcasting

system are met. The Commission must not shrink from regulating new technologies. It must not allow itself to be stampeded into forbearance based on specious arguments that regulation will somehow “unduly” impair competition in a communications marketplace in which a very limited number of large companies dominate and earn most of the sector’s income.

90. The CRTC must ensure that the public’s interests – not merely private interests – are served as Parliament intended.
91. The CCA considers that constant focus on the nature of the pipes through which content is delivered is misplaced. Rather, the focus of the government and the CRTC must be on the content these pipes transmit and deliver. Control of communications delivery systems must not be allowed to control their content, to the detriment of Canadian audiences and Canadians employed in Canada’s cultural sector.

B Recommendations

92. Based on its observations regarding Canada’s communications technology, the CCA has four – admittedly, unsolicited – recommendations for the Commission and federal government.
93. Briefly, these relate to the support offered to Canada’s cultural sector, the ‘space’ available to Canadian cultural products, the need for rational regulation in the public interest, and the importance of ensuring sovereign jurisdiction over Canada’s communications system.

I STABLE FINANCIAL SUPPORT

94. Stable financial support benefits those who enjoy it. To that end, the Canadian government has provided critical support for many sectors of the Canadian economy for decades. In the last few years, entities such as Export Development Canada and the Business Development Bank of Canada have offered Canadian business financial support worth more than \$60 billion.
95. Export Development Canada was established in 1969. Its mandate is to “support and develop, directly or indirectly, Canada’s export trade and Canadian capacity to engage in that trade as well as respond to international business opportunities.”⁸³ As Canada’s official export credit agency,⁸⁴ in 2004 it offered \$54.9 billion⁸⁵ worth of insurance, financing and bonding⁸⁶ to small, medium and large exporters.
96. The Canadian government also established a business development bank in 1974, “to promote and assist in the establishment of and development of business enterprises in Canada”.⁸⁷ The Business Development Bank of Canada now offers businesses “a wide range of lending, investment and consulting services complementary to those of

⁸³ Export Development Corporation, *2004-2008 Corporate Plan Summary* (Ottawa: 2004) at 2.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, at 4.

⁸⁶ *Ibid.*, at 42-44.

⁸⁷ Business Development Bank of Canada, *Annual report April 2005-March 2006*, at 57.

commercial financial institutions”.⁸⁸ A “financially self-sustaining, commercial Crown corporation”,⁸⁹ the Bank’s support “leverages investments from the private sector, over \$4 for every dollar BDC invests.”⁹⁰ In 2006 it offered 25,802 clients financing of \$9.7 billion.⁹¹

97. Canada's telecommunications sector has also benefited from the Canadian government's support for these companies' development and financial strength. The CRTC, for instance, has forborne from regulating over two-thirds (70%) of revenues earned by Canadian telecommunications companies. Taxpayers' have helped extend the availability of broadband to new, potential subscribers for companies in this sector. In 2005, broadband access became available to 74% of Canada's rural households, a six percentage point increase from the previous year.⁹² This growth was made possible in part through \$301 million worth of taxpayer-supported activities undertaken by the federal government, such as
- the commissioning of a National Broadband Task Force in 2001,
 - the establishment of a \$105 million Broadband for Rural and Northern Development Pilot Program that began in late 2002,
 - the \$155 million National Satellite Initiative of late 2003,
 - the \$28.4 million Canadian Strategic Infrastructure Fund ,
 - the \$2.8 million Municipal Rural Infrastructure Fund, and
 - the \$10 million FedNor program.
98. The *Report of the tax-payer funded Telecommunications Policy Review Panel* in 2006 recommended the federal government continue to fund the expansion of broadband across Canada. Provincial governments have also invested in broadband deployment, for a total of \$546 million between 2002 and 2005.⁹³
99. The government has clearly determined that long-standing agencies such as the EDC and BDC, and new projects such as broadband infrastructure, are necessary to provide Canadian businesses with stable financial support and assistance. Indeed, the government has established a variety of other business-related programs and services to support Canadian business. Industry Canada's Strategis website lists over 800 programs that may assist Canadian administrative, support, waste management and remediation services alone.⁹⁴

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 28.

⁹⁰ *Ibid.*, at 19.

⁹¹ *Ibid.*, at 23.

⁹² CRTC, *Monitoring Report: Status of Competition in Canadian Telecommunications Markets Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (July 2006) at 56 and Appendix 5, Table 8.5.2.

⁹³ *Ibid.*, at Table A.5.1, Appendix 5.

⁹⁴ Industry Canada, “Canada Business Services for entrepreneurs” online: http://www.cbcs.org/servlet/ContentServer?bissector=Administrative+and+Support%2C+Waste+Management+and+Remediation+Services&pagename=CBSC_FE%2FCBSC_WebPage%2FCBSC_WebPage_Temp&lang=en&cid=1091019988349&c=CBSC_WebPage>. Several links relate to the cultural sector.

100. The CCA has also welcomed previous government support for Canada's cultural sector. Examples are found on Industry Canada's website, where six programs are described that provide financial assistance for "Canadian-owned-and-controlled cultural industries to produce, distribute and market their products."⁹⁵ The programs are

- The Book Publishing Industry Development Program
- Canadian Film or Video Production Tax Credit
- Publications Assistance Program
- Sound Recording Development Program
- Telefilm Canada
- Canadian Television Fund, and
- Canada Council for the Arts.

Although there are clearly other programs that support Canadian culture, these appear to be the ones Industry Canada considers relevant for the cultural sector.

101. Although other cultural support programs clearly exist, it seems fair to say that the total financial support directed – at times grudgingly – towards the cultural sector has never approached \$10 billion, let alone the \$60 billion that the federal government directs towards business undertakings through the EDC and BDC, in a single year.

102. As the BDC has noted with respect to businesses, however, "[t]urning ideas into competitive companies Takes several years, millions of dollars and a sequenced range of separate, sophisticated skills."⁹⁶ There are risks. In 2005, for instance, it allocated \$502 million – more than half the CBC's Parliamentary appropriation in 2005 – to account for losses attributable to defaulting clients.⁹⁷

103. As with the traditional business sector, making Canada's cultural sector financially secure has no magic, quick-fix solution:

... there is no silver bullet prescription to make Canada a more successful incubator of innovative, globally successful companies. The long-term solution will require several changes, starting with a culture of "serial" entrepreneurs, people who have previously been successful at creating a profitable company around an innovation and who are ready to do so again. It will also require a greater number of knowledgeable venture capital fund managers to provide the expertise and experience needed to nurture the growth of innovations. Additionally, Canada needs a more efficient process that targets, finances and nurtures innovations destined to be world-class market technologies.⁹⁸

104. Canada's cultural sector requires the same stable support mechanisms available to other business sectors of the economy. This support need not be drawn directly from taxpayers. Those who profit from their use of Canada's broadcast spectrum must support

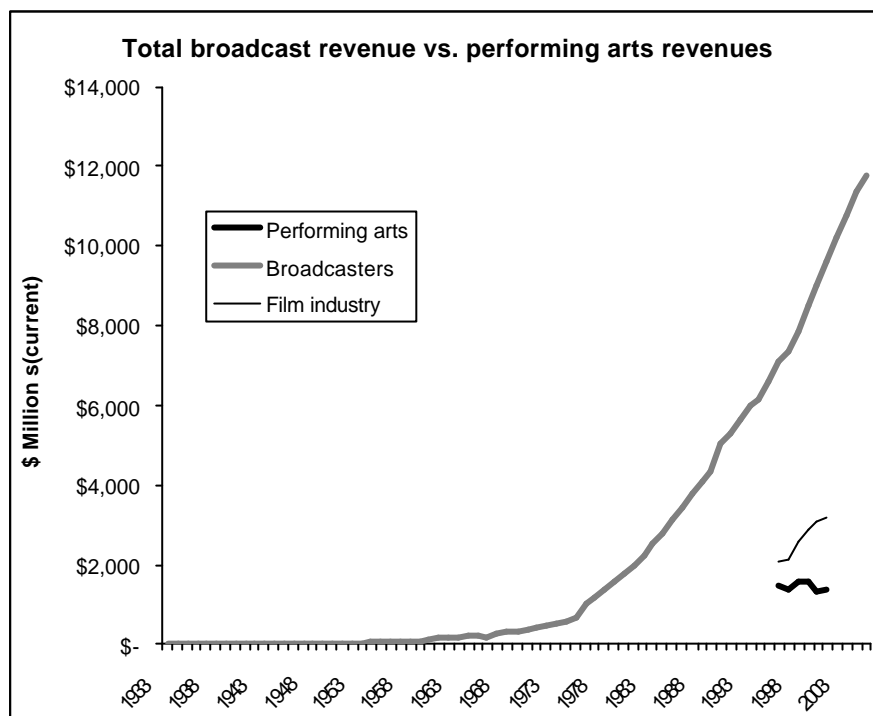
⁹⁵ Industry Canada, "Your Guide to Government Services and Support for Small Business" online: [strategis.gc.ca <http://strategis.ic.gc.ca/SSG/me00043e.html>](http://strategis.ic.gc.ca/SSG/me00043e.html).

⁹⁶ Business Development Bank of Canada, *Annual report April 2005-March 2006*, at 19.

⁹⁷ *Ibid.* at 34-35 and 57.

⁹⁸ *Ibid.*

Canada's cultural sector. The CCA notes that while broadcasters and telecommunications companies alike have thrived, those providing the content these companies transmit and distribute, have not:



Source: CRTC, *Statistical and Financial Summaries* (various years); Statistics Canada (various years); Dominion Bureau of Statistics (various years).

105. Although it is true that access to broadband networks and services supports communities' vitality,⁹⁹ it is surely also true that content also supports the vitality of broadband networks and services that benefit when they obtain new customers from those communities. The 'hook', so to speak, that attracts new customers to telecommunications services such as broadband, is the content they deliver.
106. Canada's telecommunications companies (and broadcast distribution undertakings) now support physical infrastructure: since 2001 all telecommunications service providers are required to contribute to the cost of local service in rural and remote areas. This contribution is based on revenues. In February 2006 the CRTC announced that deferral accounts established in relation to the application of the price cap formula will be used to expand broadband services to rural and remote communities, and to improve access of telecommunications services to the disabled.
107. Telecommunications service providers should also be required to support the creation, production and distribution of Canadian programming content, for three reasons. First – sound business practice suggests that attractive content in turn attracts subscribers. Second – Canadians, not private companies, own the spectrum used by

⁹⁹

As the CRTC noted in its 2006 Telecommunications monitoring report, at 1 of Appendix 5.

telecommunications distributors to earn revenues; Canadians deserve a higher return on their investment than the diminutive licence fees now paid by telecommunications providers for the opportunity to exploit and profit from this resource. Third – Canadian taxpayers have subsidized and continue to subsidize the installation and development of telecommunications infrastructure across the land; taxpayers deserve a higher return on this investment than the mere right to generate a monthly income stream for telecommunications companies.

108. A simple and efficient mechanism for supporting Canadian programming content lies with the licence fees now paid by telecommunications service providers. These fees should be increased, and this increase should be used to fund Canadian content production.
109. In addition to supporting programming content financially, Canada's telecommunications service providers must be regulated to ensure that they do not impose new costs on the cultural sector. As growth in Internet access and applications continues to decline – as it must, since at some point most Canadians will have subscribed to these services – it is reasonable that telecommunications service providers will seek new revenues.
110. The highly-controversial issue of net neutrality centres around new revenue streams for telecommunications service providers. Charging either audiovisual providers to access subscribers, and charging users to access audiovisual content are simple mechanisms that Telecommunications service providers are adopting to replace income lost as subscription growth decreases. Canadians' access to Canadian culture, and the availability of Canadian culture to Canadians, must not subsidize telecommunications service providers. The CRTC must continue to ensure that telecommunications service providers carry content on a non-discriminatory basis.

2 *INCREASED SHELF SPACE*

111. Many communications technologies have come and gone. Since the invention of paper and the printing press,¹⁰⁰ books are rarely printed on animal hides¹⁰¹ and business orders are usually recorded without clay.¹⁰² Governments' demand for men with loud voices to shout messages across the countryside,¹⁰³ and for horse-drawn carts to deliver

¹⁰⁰ Although Johann Gutenberg is credited with inventing the printing press in 1450, he may have done so earlier. In 1439, after one of his investors died, Johann Gutenberg succeeded in a law suit brought by the remaining partners to either refund their investment or taken them on as partners; court records filed in Mr. Gutenberg's defence referred to a press, related tools and implements, and "materials pertaining to printing. David Pottinger, *Printers and Printing*, (Books for Libraries Press: Freeport, New York, 1941) at 7.

¹⁰¹ Scrolls of animal hides were used as writing materials as early as 2500 BCE; by 100, multi-leaved tablets of parchment begin to replace the continuous rolls of papyrus formerly used for text. Although paper was invented in China in 105, by 1500 two to three hundred sheep or calves' hides were required to print a large bible by hand in England. W. Turner Berry and H. Edmund Poole, *Annals of Printing: A chronological encyclopaedia from the earliest times to 1950*, (Blandford Press: London, 1966) at 1; *Spirit of the Web*, *supra* note 9 at 369

¹⁰² In 2000 BCE, Assyrian merchants sent orders, credits and bills for goods between towns using foot couriers who carried clay tablets incised with cuneiform characters on clay tablets, "signed" with cylinder seals and sometimes baked inside clay envelopes for security. Online: <<http://www.nalc.org/news/precord/0101-mailmillennia1.html>>.

¹⁰³ In 59 BCE, Caesar described the use of calling posts to communicate; news was announced by loud calls across the fields and plains and could be delivered over 150 miles within 12 hours. "Watchmen and Stentors", Online <http://vww.it.kth.se/docs/early_net/ch-2-1.4.html>.

public notices has completely fallen off.¹⁰⁴ Carrier pigeons have lost their appeal as a communications medium in the shipping industry.¹⁰⁵ Electric telegraphs replaced visual telegraphs,¹⁰⁶ and were in turn followed by the development of a new and exciting wireless medium – radio. The popularity of that promising new medium in which subscribers dialled each other directly to deliver their messages – TELEX – has waned.¹⁰⁷ AT&T sent its last telegraph in 1981.¹⁰⁸

112. What remains from these forms of technology, is content. Content matters, not only because it employs people in the cultural sector, but because competition in the discourse of civil societies is critical to democracy. A cornerstone of democracy is the right to speech: in ancient Athens, for instance, a slogan of the early democratic movement was *isegoria* – equality of speech. Athenians' view of democracy included the concept that each citizen had the right to have their opinion heard, and the right to speak in court.¹⁰⁹ As technology advances, and facilitates our ability to speak out, and share our views, technology must not be allowed to make some voices more equal than others.
113. The CCA believes that telecommunications service providers that benefit from access to Canada's communications spectrum and taxpayers' financial support of telecommunications infrastructure must maximize the Canadian cultural sector's access to Canadians. If content distributors are permitted to aggregate audiences through concentrated ownership, it seems only reasonable that Canadians should benefit from increased access to more and higher-quality Canadian content.
114. Moreover, given the high and growing level of consolidated ownership among telecommunications service providers,¹¹⁰ they must not be allowed to restrict users' access to telecommunications service providers' favoured content. The OECD report on convergence pointed out the dangers from a "walled garden" approach, in which only the

¹⁰⁴ In 59 BCE Julius Caesar's government postal service used horse-drawn carts. Dr. T. Matthew Ciolek, "Global Networking: a Timeline 30,000 BCE-999 CE" <<http://www.ciolet.com/PAPERS/ GLOBAL/early.html>> ["Global Networking Timeline"].

¹⁰⁵ Egypt's Pharaohs may have used carrier pigeons to announce incoming ships as early as 2900 BCE, the United States Navy used homing pigeons until 1901, while as recently as 1918, Britain's Air Force used 20,000 homing pigeons to communicate. The Early History of Data Networks, "How It Began" <http://vvv.it.kth.se/docs/early_net/ch-2-1.1.html>; FCC, "May 1993: History of Wire and Broadcast Communication", <<http://www.fcc.gov/cgb/evol.html>>. In 1981, however, Lockheed engineers were using homing pigeons to transmit negatives to test stations 25 miles away: the birds worked for birdseed and were cheaper than a car. The Early History of Data Networks, "How It Began" <http://vvv.it.kth.se/docs/early_net/ch-2-1.1.html>.

¹⁰⁶ In 1793, Claude Chappe conducted the first experiment of visual telegraphy, a mechanical system that used two semaphore arms moved with ropes and pulleys, for long-distance communications; when messages are passed successfully in both directions, the device was "hailed as miraculous". *Spirit of the Web*, *supra* note 9 at 42-43.

¹⁰⁷ Western Union inaugurated TELEX in the United States in 1959. FCC, "May 1993: History of Wire and Broadcast Communication", online: FCC <http://www.fcc.gov/cgb/e_vol.html>.

¹⁰⁸ Simon Romero, "Web Calling Roils the Telecom World" *The New York Times* (16 December 2002) <<http://www.nytimes.com/2002/12/16/technology/16TELE.html>>.

¹⁰⁹ Sian Lewis, "Tyrants, spies and the general's dilemma: the ideology of information in the Greek polis" in Hiram Morgan, ed., *Information, Media and Power Through the ages* (Dublin: University College Dublin Press, 2001) 13 at 16.

¹¹⁰ As the CRTC has noted, incumbent telecommunications and cable companies obtained 85% of residential Internet access revenues in 2003 and 91% in 2005. CRTC, *Monitoring Report: Status of Competition in Canadian Telecommunications Markets Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (July 2006) at 59.

telecommunications service providers' own services are available, are easily available, or are more inexpensively available to subscribers.¹¹¹

3 *RATIONAL REGULATION*

115. In 1969 the newly-formed CRTC began to consider the role of technology that allowed Canadians to obtain additional television services, with greater clarity. The technology was limited, by today's standards, capably only of delivering a dozen or so channels. Nevertheless, the Commission took the initiative to develop a licensing and regulatory framework for cable television, one that gave Canadians' greater programming choice, without simultaneously harming the finances of local broadcast services. At the time, the CRTC commented that

[t]he Canadian broadcasting system is worth safeguarding only if it provides the Canadian population with essential services which could not be provided otherwise. It would not make sense to protect a Canadian system based essentially on the retailing of programs "using predominantly non-Canadian creatives and other resources."¹¹²

116. In its constant efforts to streamline its regulatory processes, the CRTC must regulate in the public interest, not the private interest. One would expect that the CRTC's Commissioners, as they make their decisions ask themselves two questions. Is Parliament's will being met? How will the public's interest be served?
117. Benefits to the Canadian public must not be measured solely in economic terms, but must take into account social impacts as well. The CRTC must regulate converging telecommunications service providers that benefit from access to Canada's telecommunications infrastructure, to ensure that Canada's cultural sector thrives. It must ensure that telecommunications service providers do not exceed their role as distributors, by seeking to control the content they distribute.
118. With all this in mind, the CCA urges the CRTC to reconsider its decision on mobile television. It also urges the Commission to resist siren calls to reduce regulatory requirements previously agreed to and accepted. Broadcasters must not be allowed to reduce their Canadian content levels so as to raise their profits. The CRTC's decision to allow the Discovery Health Channel to reduce its Canadian content from 65%, to 35%, in August 2006, is merely the most recent example of the Commission allowing the private sector to sacrifice the employment and income of Canadian cultural employees.¹¹³

4 *SOVEREIGN JURISDICTION*

119. Recent press reports suggest that the Federal Minister of Industry agrees that foreign ownership levels should be permitted to increase in Canada in broadcasting and telecommunications.¹¹⁴ The CCA disagrees. Foreign ownership has not been permitted

¹¹¹ Source: OECD, Directorate for Science, Technology and Industry, Multiple Play: pricing and Policy Trends Online: OECD (7 April 2006) DSTI/ICCP/TISP(2005)12/FINAL at 7.

¹¹² CRTC, *The Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada by CATV*, Public Announcement (Ottawa, 3 December 1969) at 2.

¹¹³ Barbara Shecter, "Regulator grants cuts in CanCon to Discovery health" *National Post* (22 August 2006).

¹¹⁴ Simon Tuck, "Ottawa urged to push foreign takeovers", *Globe and Mail* (25 August 2006) at B1.

in these sectors of our economy, for the same reasons adopted by nations such as the United States to prevent foreign ownership of companies in these sectors: cultural sovereignty, economic benefits, and national security.

120. Insofar as cultural sovereignty is concerned Canadians do not currently seem to lack access to foreign broadcast content. In terms of overall hours aired, the programming offered by Canada's licensed radio, television, pay television, specialty television, pay audio and specialty audio services is predominantly non-Canadian. Distributors may offer their subscribers selections from at least a hundred foreign television services from around the world.¹¹⁵
121. Allowing greater foreign investment in Canadian broadcast services is unlikely to increase either the spending on or quality of Canadian programming, given that several decades of allowing greater concentration of ownership by Canadians for the same reason, have yet to pay off. As noted earlier, Canadian conventional television services now spend more on foreign programming, than on Canadian programming.
122. Arguments that Canada will benefit economically if foreign ownership of Canadian telecommunications and broadcast infrastructure is allowed to grow also bear little scrutiny. Domestic ownership of any economic sector not only maximizes domestic employment levels, but ensures that profits – as well as taxes on those profits – remain within Canada. It is unlikely that Canada and Canadians will enjoy higher domestic employment levels and increased revenues from broadcasting and telecommunications, if the profits now generated by these services are simply exported outside Canadian borders.
123. Finally, arguments that Canada can continue to protect Canadians' security interests even if its telecommunications and broadcast services are owned or controlled by non-Canadians, also lack foundation. Consider Canadians' current rights to privacy, now enshrined in the 1982 *Charter of Rights and Freedoms*¹¹⁶ and legislation such as the 2001 *Personal Information Protection and Electronic Documents Act (PIPEDA)*, which applies to federally-regulated broadcasters and telecommunication carriers. Despite this legislative protection, *Maclean's* reported in 2005 that a U.S.-based Internet data broker supplied one of its reporters with detailed records of the home telephone and Blackberry cellphone belonging to Canada's privacy commissioner.
124. The degree to which Canadian laws protect Canadians' constitutional rights to privacy was pursued by Professor Michael Geist and Ms. Milana Homsy in "Outsourcing our Privacy", in which they assess the effects of extra-territorial law on Canada's privacy legislation.¹¹⁷ Geist and Homsy conclude that serious concerns exist about foreign access to Canadian's personal information, thanks to bilateral treaties and extra-territorial legislation. Foreign courts may not consider themselves bound by Canadian privacy legislation, or may believe their own nation's interests outweigh those of

¹¹⁵ See CRTC, *Revised lists of eligible satellite services* (Ottawa, 21 August 2006).

¹¹⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canadian Act 1982* (U.K.), 1982, c. 11

[*Charter*].

¹¹⁷ (2005) 54 U.N.B.L.J..

Canadians. Foreign courts may not even be involved in decisions to access Canadians' information.¹¹⁸

125. Most Canadians would probably agree that Parliament has the right – and the responsibility – to implement legislation to protect this country's national security. Should foreign countries have the same right to monitor Canadians' communications, to access their business records and to review their Internet activities – through ownership structures? As Geist and Homsy write,

... in *Re Grand Jury Subpoena*,^[119] an international bribery charge case, a U.S. District Court considered whether a grand jury subpoena could compel production of documents abroad where local law prohibited production. The Court held that the U.S. interest in criminal laws enforcement outweighed any difficulties that the corporation may face in complying with the subpoena in contravention of the other state's law.¹²⁰ Similarly, in *Ssangyong v. Vida Shoes Int'l, Inc.*, a New York branch of a Hong Kong bank was ordered to produce records from its head office even though that violated Hong Kong's banking secrecy laws.¹²¹ The same U.S. District Court held that control did not require legal ownership or actual physical possession, rather only the ability to obtain the documents.¹²²

Domestic legislative attempts to protect Canadians' privacy rights may therefore become entirely irrelevant if foreign interests own or control Canada's communications companies. Geist and Homsy note a U.S. Seventh Circuit Court decision holding that foreign states' criminal sanctions concerning the disclosure of foreign information do not automatically bar U.S. courts from compelling production of such information.¹²³

126. A second aspect that must concern Canadians is the actual control and use of Canadian communications infrastructure. Section 2(b) of the *Charter* provides that everyone has the "fundamental ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".⁵⁶ Subsequent decisions of the Court have developed the importance of freedom of expression – as forming "the basis for the historical development of the political, social and educational institutions of western society" as well as representative democracy,¹²⁴ as a way of protecting not just

¹¹⁸ it was reported in late 2005 that after September 2001, U.S. President George W. Bush ordered the National Security Agency to intercept private communications of Americans, without a court warrant, bypassing the process established in the 1978 U.S. *Foreign Intelligence Surveillance Act*. Office of the Communications Security Establishment Commissioner, *2005-2006 Annual Report*, "The Review Environment".

¹¹⁹ *Re Grand Jury Subpoena dated August 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002).

¹²⁰ See also *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158 (C.D. Cal. 1983) (Where the court enforced a court order directed to the parent company in Japan but served in the U.S. to the subsidiary).

¹²¹ 2004 U.S. Dist. LEXIS 9101 (S.D.N.Y. 2004).

¹²² *Ibid.*, at 10.

¹²³ *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983). The same results may obtain in other countries. On 25 February 2003, for example, "Ireland's Data Protection Commissioner ... revealed that the Irish cabinet secretly ordered telecommunications companies to store traffic information about every phone, fax and mobile call for three years. The details emerged during a Department of Justice consultation on data retention legislation." *BNA Highlights*, (25 February 2003).

¹²⁴ *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583 (per McIntyre J. for the majority).

- speakers' right to express their views, but also listeners' ability to access such information;¹²⁵ and as 'permeating' "all truly democratic societies and institutions."¹²⁶
127. By subjecting Canadian communications infrastructure to foreign ownership or control, a real and substantial risk also exists that foreign national interests may dictate Canadians' use of this infrastructure. Historical examples illustrate this concern. In 1917, for instance, when the United States declared war on Germany, it not only limited freedom of the press,¹²⁷ but also assumed control over all radio-telegraphic transmitters¹²⁸ – threatening to imprison those who failed to comply in internment camps.¹²⁹ For much of 1918, U.S. naval radio operators monitored all radio-telegraphic broadcasts, tracing unknown transmissions to their origin.¹³⁰ Halfway through 1919 the U.S. government pressured the British Marconi Company, owner of over half of American radio stations, to sell its interests to domestic companies, and finally expropriated the government expropriates the company on the ground that, as a matter of national importance, radio ought to be locally controlled.¹³¹ In the 1930s, NBC cancelled radio programs that might "undermine the public confidence".¹³² In the 1950s, the U.S. Signal Security Agency obtained International Telephone and Telegraph, and obtained copies of all foreign government cables that ITT carried, in direct breach of a 1934 U.S. law banning the interception of domestic communications.¹³³
128. The United States has not been alone in its desire to protect its own national interests. During World War One, Reuters' telegraph-based service delivered¹³⁴ information tailored to the needs of the British government during the war. The owner of the *Daily Express*, Lord Beaverbrook (Max Aitken), "...inaugurated the ... [British] Ministry of Information and asked [Reuters' Managing Director] to be chief executive as well as Director of Propaganda."¹³⁵ Accepting the position, Reuters' Managing Director operated "a service of some 10,000 words a day taking a profit on each word of propaganda transmitted by his own, supposedly independent news agency. ...".¹³⁶
129. More recent examples also exist. In the European Union, for example, increased access to foreign broadcasters has resulted in what has been termed "abusive delocalisation": a broadcaster's establishment in one national territory, to evade the laws of the territory

¹²⁵ *Ford v. Quebec (Attorney General)*, [1988] 2scr 712 at 767. "... as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role."

¹²⁶ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (per Cory J. for Dickson CJ and Lamer J.)

¹²⁷ <<http://www.bartleby.com/65/pr/press-fr.html>>. The US prosecuted the socialist journal, *The Masses*, a socialist journal, under the *Espionage Act* for publishing articles that undermined America's war effort; it subsequently closed. <<http://www.spartacus.schoolnet.co.uk/FWWespionage.htm>>.

¹²⁸ <<http://www.ipass.net/~whitetho/speclnd1.htm>>.

¹²⁹ <<http://www.angelfire.com/nc/whitetho/1919spy.htm>>.

¹³⁰ *Ibid.*

¹³¹ Brian Winston, *Media Technology and Society A history: from the telegraph to the Internet* (London: Routledge, 1998) at 77.

¹³² *Spirit of the Web*, *supra* note 9 at 170.

¹³³ Shane Harris & Tim Naftali, "Tinker, Tailor, Miner, Spy" online: slate.com (3 January 2006).

¹³⁴ By 1883, Reuters was using transmitting stories by telegraph to London newspapers in a format that allowed their editors to simply cut and paste stories from the Reuters' material. *Global Communication*, at 146.

¹³⁵ *Price of Truth*, at 34.

¹³⁶ *Price of Truth*, at 45. The managing director was knighted the following year. *Ibid.*, at 34. In July 1938, the British government began to subsidize and have influence over the appointment of the next Chief General Manager of the Reuters News Agency. *Ibid.*, at 56.

in which the broadcaster's signal is received. Notwithstanding the desire by member nations of the European Union to create a "European audiovisual area' governed by a common legal framework", members of the EU now perceive a growing need to promote their own national media policies.¹³⁷

130. International trade and competitive marketplaces clearly yield many advantages, along with certain disadvantages. Legislation and regulation are typically concerned with addressing the disadvantages of the marketplace, not with constraining or limiting innovative entrepreneurs. Just as companies act to protect their investors' interests, it is entirely rational for legislatures act to protect their nation's interests.
131. Even Adam Smith, the well-known English economist, supported legislation that limited access to Great Britain's transportation service sector to British nationals and their vessels – even though such rules raised the cost of foreign goods to the British. He wrote,

[t]here seem, however, to be two cases, in which it will generally be advantageous to lay some burden upon foreign, for the encouragement of domestic industry.

The first is, when some particular sort of industry is necessary for the defence of the country. The defence of Great Britain, for example, depends very much upon the number of its sailors and shipping. The act of navigation, therefore, very properly endeavours to give the sailors and shipping of Great Britain the monopoly of the trade of their own country, in some cases, by absolute prohibitions, and in others, by heavy burdens upon the shipping of foreign countries. The following are the principal dispositions of this act.

..... The act of navigation, it is true, lays no burden upon foreign ships that come to export the produce of British industry. Even the ancient aliens duty, which used to be paid upon all goods, exported as well as imported, has, by several subsequent acts, been taken off from the greater part of the articles of exportation. But if foreigners, either by prohibitions or high duties, are hindered from coming to sell, they cannot always afford to come to buy ; because, coming without a cargo, they must lose the freight from their own country to Great Britain. By diminishing the number of sellers, therefore, we necessarily diminish that of buyers, and are thus likely not only to buy foreign goods dearer, but to sell our own cheaper, than if there was a more perfect freedom of trade.

As defence, however, is of much more importance than opulence, the act of navigation is, perhaps, the wisest of all the commercial regulations of England.¹³⁸

¹³⁷ European Union, Standing Committee On Transfrontier Television, *Discussion document prepared by the Delegate of Poland on questions concerning the scope of the Convention, jurisdiction, freedom of reception and retransmission, the duties of the Parties of the Convention, advertising directed at a single Party and the abuse of rights granted by the Convention*(Strasbourg, 28 February 2005) T-TT(2005)003

¹³⁸ Adam Smith, *The Wealth of Nations* , Book IV: Chapter 2 [bold font added].

132. Yesterday's navigation industry may easily be compared to today's telecommunications systems. The waterways in Smith's time, are today's information highway. Indeed, allocating use of the spectrum has become a strategic international issue.¹³⁹

133. The importance of communications systems to Canada has been reiterated virtually every year since broadcasting began in Canada. Conservative Prime Minister Bennett perhaps set the standard, however, by setting down three fundamental principles for Canadian broadcasting in 1932:

First of all, this country must be assured of complete control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control, radio broadcasting can never become a great agency for communication of matters of national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which national consciousness may be fostered and sustained and national unity still further strengthened ...;

Secondly, no other scheme than that of public ownership can ensure to the people of this country, without regard to class or place, equal enjoyment of the benefits and pleasures of radio listening ...;

Then there is a third principle ... The use of the air ... that lies over the soil or land of Canada is a natural resource over which we have complete jurisdiction under the recent decision of the Privy Council [and] I cannot think that any government would be warranted in leaving the air to private exploitation and not reserving it for development for the use of the people.

134. Canadians currently enjoy both the right to bring disputes before the courts, and to elect representatives to their legislatures. These mechanisms provide necessary checks and balances to ensure that communications companies comply with Canadian legislation. Allowing foreign interests to own or control Canadian communications jeopardizes these rights. Canadians do not typically vote for legislators in foreign jurisdictions, and may not be able to bear the costs of pursuing litigation against non-resident corporations.

135. Parliament must therefore continue to assert its jurisdiction over Canadians' rights to privacy and other *Charter*-protected interests, as Canadians have elected them to do. Canadians must retain their sovereign jurisdiction over Canada's communications systems. They must have the right to send and receive content, and to use applications and service, without interference – particularly from non-Canadian firms and governments.

¹³⁹ OECD, Directorate for Science, Technology and Industry, *Workshop "The Future of the Internet": Proceedings* (8 March 2006) DSTI/ICCP(2006)17 at ¶¶36-37.