

Dr. Gregory Taylor, “Change without a New Act: Canadian Spectrum Policy”, Remarks, Rebooting Canada’s Communications Legislation, A conference to examine changes to Canada’s broadcasting and communications legislation (Ottawa: May22-23, 2015), Session 1: Technology and sovereign jurisdiction

One of the questions put forth for this panel: Does Canada need to consider new communications legislation? The answer is unequivocally yes. However, the pragmatist in me recognizes that neither the current government nor the opposition appears to have any stomach to begin the process. So what is the way forward? This panel also asks if the medium makes the legislation – I argue that the 100 year old medium of the national radio frequencies is clearly in need of legislative revision due, at least in part, to changes brought on by new technology.

Introduction:

Canadian media has been witness to extensive technological and corporate convergence between previously separate communication sectors, however, the Canadian regulatory system remains stubbornly mired in the previous century. This fact is most evident in the Canadian wireless industry. The management of the publicly owned spectrum is a site of political maneuvering and institutional uncertainty that currently serves neither industry nor the Canadian public.

Case in point: this past year Industry Canada announced the Consultation on Repurposing the 600 MHz band with a deadline for submitting comments of January 26 2015. This later had to be changed by a month to February 26. The official reason was “based on the merits of several requests for additional time” but everyone knew the

real reason was that the CRTC had yet to announce the early results of its “Let’s Talk TV” hearings, the implications of which would clearly be felt by incumbent broadcasters on the 600 MHz band.

When it came to essential matters of the future of Canadian spectrum allocation, under Canada’s current binary regulatory oversight, one regulatory hand was not clear what the other was doing. The same can be said of the 700 MHz transition to digital television, where the auction, under the auspices of Industry Canada faced seemingly endless delays while the CRTC went about the essential business of getting the television broadcasters off the spectrum.

There is no shortage of calls for change. It was in the 2007 Telecom Policy review, and repeatedly mentioned by the former CRTC chair. A 2014 study out of the CD Howe Institute Competition Policy Council noted

“The Council’s consensus view is that the separation of the legislation governing the relevant sectors under three acts, the *Telecommunications Act*, the *Radiocommunications Act*, and the *Broadcasting Act*, is incompatible with current technology.”

There is consensus we have a problem. So what do we do? This paper offers a roadmap to a new approach to Canadian media policy that can further Canadian policy objectives while respecting the unique public interest elements that must be considered when charting a course for Canadian wireless media. I propose a path that offers opportunity for change without requiring time-consuming reworking of major legislation. I argue the place of the CRTC, or a new public arm’s length regulator, in the wireless sector must be clarified and strengthened. I would like to acknowledge the contributions of former CRTC Chair Konrad von Finckenstein, who added his thoughts to the development of this paper.

The Current Dilemma:

There are currently three different institutions in charge of the wider wireless industry in Canada: Industry Canada, responsible for the overall management of spectrum; the Department of Canadian Heritage fosters and finances Canadian content – a process which often includes radio and television airwaves; and the CRTC, whose position remains cloudy and subject to government interference. The US and UK have combined spectrum management under their national regulators. There are key differences between a regulator like the CRTC and a branch of government (IC), which are significant in relation to recent communication developments.

1. Too much Power in One Minister (subject to political gamesmanship)

The Minister may “do any other thing necessary for the effective administration of this Act” (Radiocommunication Act 5.1.n).

At the 2013 Spectrum Summit hosted by Ryerson University, a former high ranking official with Industry Canada noted the “godlike powers” of the Industry Minister.

There is nothing arm’s length here. The Industry Minister is the government and as such is often focused upon elections, not long term communication strategy.

2. No transparency

Von Finckensteign: "How do you get to the Minister? How do you explain your issue to him? When he makes a decision there's usually either no explanation or you get a political explanation"

The decisions of a true public regulator are under much more public scrutiny. The question of how do you get to him? Raises another key issue

3. No Due Process

Much of what happens at Industry Canada happens behind closed doors.

Ken Englehart (recently departed from Rogers): "...the CRTC is very good at operating as a quasi-judicial regulatory body. ..You get an opportunity to state your case and, more or less, they base their decision on the evidence. Dealing with Industry Canada is more like bargaining at a flea market for a used stereo. ...you don't know quite what they're thinking about, you don't know quite who they are talking to, you don't know quite what the evidence is that's influencing them."

For something as increasingly essential to our communication infrastructure as the publicly-owned airwaves, it is important that the process of administering these airwaves be subject to clear public scrutiny.

The CRTC is better suited to oversee the regulation of spectrum than the more closed-door political world of Industry Canada.

What is needed

The same rules must apply to all digital signals - there is no more telecom and television, only digital data.

There should be one responsible minister and one responsible regulator, not the current maze of departments and officials.

This government has shown a disinterest in larger scale approaches such as Royal Commissions and major revamping of existing legislation. I'm not convinced a change of government will result in a speedy change of direction.

At an institutional level, the Canadian government can undertake a departmental reorganization allowed under the *Public Service Rearrangement and Transfer of Duties Act*. This could allow for spectrum oversight to be transferred from Industry Canada to the CRTC. These changes can reflect the priorities of a government that is far more engaged with the direction of digital media in Canada.

2. The Governor in Council may

(a) transfer any powers, duties or functions or the control or supervision of any portion of the federal public administration from one minister to another, or from one department in, or portion of, the federal public administration to another; or

(b) amalgamate and combine any two or more departments under one minister and under one deputy minister.

This law offers a potential avenue for substantial change without the painstaking process of new legislation.

Conclusion

Canada cannot afford to do nothing. From a legislative standpoint, that has essentially been the strategy of the last decade and it has simply not worked for industry or Canadian citizens.

Since a new Communications Act is a long and laborious process, the government should do what can be done without a major revamp of current legislation; however, I believe the time has come for a larger vision and not the piecemeal approach the government has taken over the last decade.