

**What Works**  
Some practical considerations for the  
role of the state in broadcasting

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## Introduction

The question posed in Florian Sauvageau's invitation to write this paper is, at first glance, deceptively simple: "If one could reinvent a national broadcasting system in 2005, what would be the ideal role of the state?" Yet, the more one ponders that question, the more complicated it becomes. At one extreme, some would argue that the role of the state should be reduced and limited to laws of general applicability, along with some oversight of technical issues related to the management of the radio frequency spectrum. At the other extreme, some would argue that regulation should encompass far more specific performance requirements than is currently the case and/or that the government should vastly increase public funding in this area. One could use those extremes to frame an interesting debate about whether it is appropriate for the state to intervene at all in broadcasting, with special rules that exist over and above laws of general applicability, given today's technological and economic realities.

That debate is a valid one, but it is not the issue that will be the primary focus of this paper. Instead, this paper will focus on a different aspect of the original question: Once the decision to intervene has been made (debatable though it may be in some cases), how can we craft the form of the intervention in the most effective manner? In other words, if we set out to define the ideal role of the state in broadcasting in 2005, the tools the state will use in that role must receive at least as much debate and discussion as the debate over whether the state should intervene. If we make finding the most efficient and effective tools part of the debate, we may also find that we have modified the debate over intervention itself.

This is not a new or original concept, but it is one that deserves more attention today, at a time when the interplay of technology and economics are setting up rapid and profound changes in the broadcasting industries. In 1977, for example, in a book titled *The Public Use of Private Interest*, economist Charles L. Schultze noted:

Once a political battle to intervene has been won in some broad area ... the extent and scope of the resulting social controls are seldom grounded in an analysis of where and to what extent the private market has failed to meet acceptable standards.<sup>1</sup>

Schultze went on to say:

... in any except a completely stagnant society, an efficient use of resources means constant change. From the standpoint of static efficiency the more completely and rapidly the economy shifts

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<sup>1</sup> Charles L. Schultze, *The Public Use of Private Interest*, 1977, pp. 14-15. The 1977 book, published by the Brookings Institution, was based on the 1976 Godkin Lectures delivered by Schultze at Harvard University. In 1977, Schultze became Chairman of the Council of Economic Advisors under President Carter.

production to meet changes in consumer tastes, production technologies, resource availability, or locational advantages, the greater the efficiency. From a dynamic standpoint the greater the advances in technology and the faster they are adopted, the greater the efficiency.<sup>2</sup>

A decade earlier, another economist, R.H. Coase, made this observation about regulatory commissions:

What I have in mind is a feature which, with the best will in the world, it seems to me very difficult to eliminate. However fluid an organization may be in its beginning, it must inevitably adopt certain policies and organizational forms which condition its thinking and limit the range of its policies.<sup>3</sup>

I believe it can be argued that Coase's observation may be equally applicable to other government institutions set up to compensate for perceived market failure. In making this observation, I am not commenting on any specific policies of current regulatory commissions in Canada or elsewhere. Rather, I am suggesting that Coase's comments about the evolution of organizations should be read in the context of Schultze's comments about the need to find more effective tools in areas where there is a perceived need to intervene.

There is, of course, at least one further point that should be noted about the creation of institutions, which must also be part of the balancing act of public policy. Institutions, by their very nature, tend to act in the interest of their own self-preservation. For an institution set up to serve a public interest role, that can, in theory, create a valuable permanent advocate. The problem arises when the advocacy and the tools are "out of sync" with new industry realities.

There may come a point at which the rationale for intervention changes, or the operating characteristics of the regulated industry change, or both. When such a point is reached, there is a need to reexamine the tools of intervention as well as the rationale. As will become evident in the analysis that follows, I believe we are rapidly approaching such a point.

### **Assumptions of scarcity**

In terms that are relevant to the current discussion, the role of the state in broadcasting in Canada dates back to the 1920s. It is easy to remember Graham Spry's famous comment in support of public broadcasting -- according to Spry, Canadians had to choose between "the State or the United States."<sup>4</sup> But the

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<sup>2</sup> *Ibid.*, p. 21.

<sup>3</sup> R.H. Coase, "The Economics of Broadcasting and Government Policy," *American Economic Review, Papers and Proceedings* (1966), p. 442. Coase was awarded the Nobel Prize in Economics in 1991.

<sup>4</sup> As quoted in Frank W. Peers, *The Politics of Canadian Broadcasting 1920-1951* (1969), p. 91.

evolution of broadcasting policy was not a straight line of research and development; rather, it was an untidy series of twists and turns played out against what must be regarded, with the benefit of hindsight, as limited knowledge of the capacity of the radio frequency spectrum.

From 1929 to 1933, beginning with the Aird Commission, many influences contributed to the decision to adopt a public broadcasting model for Canada. Those influences ranged from hopes that the new medium of radio would be a tool for education and culture, to fears by some newspaper publishers that radio, if left in private hands, would be a stronger competitor for advertising. Another recurring theme in the ongoing debate was the fear that, without the proposed national public broadcaster, Canada's proximity to the U.S., the difference in size between the two markets, and the nature of radio itself, would result in Canadians being overwhelmed by U.S. radio content.

In the context of what was known at that time, a publicly-owned broadcast corporation was seen as the appropriate vehicle for both the production and distribution of programs and as the regulator of broadcasting. But the decision to intervene, and the form of intervention that was chosen, were heavily influenced by the idea that radio could only be considered in the context of very small numbers of potential participants, or, indeed, that radio was a "natural monopoly." The limited number of potential participants became one of the framing propositions within which the future of radio was debated in the early 1930s.

Indeed, the proceedings of the 1932 House of Commons Special Committee on Radio Broadcasting, which led to the legislation creating the CRBC<sup>5</sup>, provide a graphic example of public policy being made in the context of that same framing proposition. On April 20, 1932, the committee heard from Edward W. Beatty, the president of the Canadian Pacific Railway. Beatty argued for private ownership with government regulation. Beatty's appearance before the committee was reported in *The Globe* on April 21, 1932, in an article headlined "Private Monopoly, State Regulation, Advised For Radio." The article went on to report on an exchange between Beatty and E.J. Garland, the United Farmers of Alberta MP for Bow River, Alberta: "[Beatty] admitted to Mr. Garland that radio was a natural monopoly."<sup>6</sup> While it was not the only reason the government ultimately decided in favour of public broadcasting, it is a fact that many of the decision-makers of the day saw the essential policy option as a choice between public and private monopoly.

As late as 1960, *The Toronto Star* carried an editorial about television that stated:

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<sup>5</sup> The Canadian Radio Broadcasting Commission (CRBC) was replaced by the Canadian Broadcasting Corporation (CBC) in 1936.

<sup>6</sup> William Marchington, "Private Monopoly, State Regulation, Advised For Radio," *The Globe*, April 21, 1932, p. 3.

The Star for years has maintained that broadcasting is a semi-monopoly and therefore should be treated as a public utility rather than a private commercial enterprise.<sup>7</sup>

In the context of choosing the appropriate tools with which to intervene, the arguments about monopoly, semi-monopoly or natural monopoly represented an important modification of the broader argument about "spectrum scarcity." A "scarcity" that simply means there may be more potential participants than available spectrum might lead to one type of intervention (for example, regulation or auctioning the spectrum), but the assumption of monopoly may lead to another form of intervention (a public broadcaster or a "utility" approach, as the *Star* advocated in 1960).

Today, we have moved well past the idea that radio -- or broadcasting generally -- is some kind of "natural monopoly." In fact, history is full of examples of industries that were once believed to be natural monopolies, but are no longer regarded in that way, as technology enabled competition either within those industries or from alternatives.

In 1997, Gary S. Becker, Nobel Laureate in Economics, wrote:

Although claims about natural monopoly continue to influence public policies and academic discussions, the concept has become largely irrelevant to modern dynamic economies. ... Old concepts in economics die slowly, but the concept of natural monopoly is no longer of much relevance to economic policy. The sooner we get rid of this dated idea, the better off the average consumer and producer will be.<sup>8</sup>

In other words, we have moved beyond the original framing proposition for the role of the state in broadcasting, a framing proposition that was not only used to justify state intervention, but was also influential in determining the tools that would be used to intervene. In 2005, certainly, it is time to recognize the parameters for a new framing proposition, and to discuss the public policy tools that make the most sense in that new context.

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<sup>7</sup> "Principles for Private TV," *The Toronto Star*, March 26, 1960, p. 6. The Star editorial was a comment on the 1960 licensing process by the Board of Broadcast Governors that led to the creation of the stations that became part of CTV. In that process, *The Toronto Star*, *The Telegram* and *The Globe and Mail* were each applicants for the first private television station licence for Toronto. On March 26, 1960, after *The Telegram* was awarded the licence (for what became CFTO-TV), the *Star* editorial made the comment noted above. The editorial also stated: "The linking of the earning power of a television station to that of a newspaper could radically worsen the competitive position of the two other newspapers in Toronto." With the benefit of hindsight, we can see that the *Star* was wrong on both counts. The television market now is fragmented and highly competitive. And the fact that the TV licence was awarded to *The Telegram* did not prevent that newspaper from going out of business in 1971.

<sup>8</sup> Gary S. Becker, "There's Nothing Natural About 'Natural' Monopolies," *Business Week*, October 6, 1997, p. 26.

## **The new reality -- fragmentation and the erosion of borders**

What if the next 10 years bring with them so many profound changes in broadcasting, that we will be forced to rethink many of the business models, public policies and regulatory tools that have evolved to this point? Let me suggest that we are closer to those kinds of changes than many would like to think. And that means we have to face an important choice: We can tinker around the edges -- a few more dollars here, a new regulation there -- or we can face the hard reality that truly fundamental changes might be required.

The changes that broadcasting now faces are enabled by technology and driven by economics. And the two most fundamental issues are fragmentation and the erosion of borders. The facts of fragmentation are clear -- more content from more places than ever before. But it is important to remember that fragmentation also profoundly changes the underlying economic nature of the market that is being fragmented. The reason -- fragmentation puts downward pressure on unit costs.

In 1950, Canada's great economic historian, Harold Innis, made an important observation in his book, *Empire and Communications*. Referring to the economic development of the North American continent, Innis wrote:

As the costs of navigation declined, less valuable commodities emerged as staples -- precious metals ... timber ... and finally wheat ...<sup>9</sup>

In other words, Innis saw a relationship between the cost of transportation and the value of the staples that were being transported. We moved from limited and high-cost transportation that could only be justified if the staples were also high in cost, to modern transportation carrying low-cost staples in high volumes.

There is a lesson here for the media. Technology now allows us to lower the cost of "transporting" channels. And that is already putting pressure on the staple those channels carry -- programming. By simply modifying and replacing some of the words in the quote from Innis, one can see how the sheer volume of channels has an impact on content:

As the costs of channels declined, less costly programs emerged as staples -- long-form drama ... variety programs ... and finally reality-based shows ...

All media are facing this pressure on unit costs, because fragmentation can be seen as a phenomenon both within and across the various media. In television, for example, one of the consequences of the downward pressure on unit costs is the fact that fragmentation makes it more difficult -- and more risky -- to invest in high-quality drama programs. Another consequence for broadcasting is that

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<sup>9</sup> Harold A. Innis, *Empire and Communications* (1972), p. 6 (originally published in 1950).

fragmentation also makes it more difficult to do local programming. That is further compounded when the new, fragmented services are also specialized services, which take audiences and revenues away from the local general services that previously offered some of the same types of programs.

And what about media consolidation? That, too, is a response to fragmentation, as media seek to maintain economies of scale by attempting to re-aggregate fragments. However, those re-aggregated combinations rarely achieve the market shares that single services had before the market was fragmented.<sup>10</sup>

And it is fragmentation, not consolidation, which is at the root of the current public concern about "indecent" or risqué content. When there were only a few outlets in the media market, profitability was more certain, so there was little incentive to stretch the boundaries of taste. Fragmentation has changed that equation. It has also contributed to the fulfillment of Andy Warhol's prediction that everyone would be famous for 15 minutes, because one of the other effects of fragmentation is to lower the threshold for celebrity.

All of the consequences of fragmentation described to this point would represent a fundamental change even if the fragmentation were occurring entirely within a closed system. But it is not. The system is no longer closed. Borders are eroding. And that erosion of traditional borders compounds the problem.

When we talk about borders, we have to remember that we are not only talking about the geographic borders that define countries or markets. While new communications technologies play havoc with geography, they also play havoc with the business borders between broadcasters and advertisers and the content borders between broadcasters and consumers.

Today's teens and 20-somethings represent our first look at tomorrow's consumers, and they approach media in a very different way than previous generations. They don't respect or conform to someone else's ideas of scheduling -- they want to hear or see or read what they want and when they want it. They often consume multiple media at the same time. And they are comfortable with the tools of today's new media, and with peer-to-peer file-sharing in particular.

In fact, peer-to-peer file-sharing represents another profound change in the way we relate to the media, as citizens and consumers. For the first time in history, on a mass scale, the means of production and distribution of information and entertainment products are finding their way into the hands of the consumers.

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<sup>10</sup> The Toronto radio market is a good example. In 1975, one station, CFRB, had a 28.5 per cent share of tuning. By 2003, no single station had a tuning share greater than 9 per cent, and no commonly owned group of Toronto radio stations had a combined tuning share greater than 20 per cent. For television, based on tuning shares by owners, the Canadian market is actually less concentrated today than it was in 1970. (Based on data from Statistics Canada, BBM and Nielsen.)

## **Framing propositions -- old and new**

The original framing proposition for state intervention in broadcasting in Canada included these elements:

1. A radio frequency spectrum with interference characteristics;
2. An assumption that the spectrum and/or the market would allow only a very limited number of players, or even just a monopoly; and
3. A concern about the size of the Canadian market in relation to the adjacent U.S. market, and the fear that Canada would be overrun with U.S. content.

From that framing proposition came much of the institutional and regulatory structure we have today. While borders were not airtight, they were sufficiently defined to allow for the development of a distinct Canadian copyright market for broadcast content. In television, attempts to blur the borders were met with regulatory responses such as the "simultaneous substitution" rule for cable television, and amendments to the Income Tax Act that limited the ability of advertisers to deduct the cost of advertising placed on U.S. border broadcasters. Within that framing proposition, Canada created a mixed public-private oligopoly in broadcasting, in which cross-subsidies made possible the production and distribution of Canadian content.<sup>11</sup>

It can be argued that only the second assumption in that list has changed. But that change is fundamental. We have learned more about using the radio frequency spectrum, and we have created alternative means of transmitting information and entertainment (cable, the Internet) that do not use the spectrum at all. While there may still be a theoretical idea of "scarcity," and a need for the state to manage the resource effectively, broadcasting today is an increasingly competitive marketplace operating within gradually eroding borders. But if the nature of competition has changed dramatically, the issue of the relative size of the Canadian market, and its proximity to the U.S., has not.

So here is the outline of a new framing proposition for 2005:<sup>12</sup>

1. A broadcasting marketplace that is fragmented and competitive;
2. Borders that are eroding; and
3. A Canadian market that is still relatively small compared to the adjacent U.S. market, and when compared to a number of other markets from which content may be accessed using new technologies.

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<sup>11</sup> The Canadian Broadcasting Corporation is, of course, subsidized by tax dollars. Private broadcasting, in television in particular, has been able to use the margins earned on U.S. programs to cross-subsidize the cost of Canadian programs.

<sup>12</sup> In addition to the ongoing need for spectrum management.



Within that context, what is the ideal role of the state? Before attempting to answer, it is necessary to ask an additional question: What is the role of the citizen? The citizen has many roles in relation to broadcasting -- as consumer, as possible producer, as possible complainant in relation to certain types of content. Public policy has responded with a number of tools, including self-regulation, CRTC regulation of content, laws of defamation, and legislation on hate speech. But do we have the balance right? Should we place more or less reliance on the broadcast regulator, or more or less reliance on the other tools that are available to citizens? When broadcasting was an oligopoly, it was convenient simply to ask the regulator to add rules and conditions on some of these issues. But how effective can any of those rules be, if porous borders create an uneven playing field between those who are captured by the rules and non-Canadian signals that are not?

### **Some difficult questions**

As noted above, Canada is a large country, but a relatively small market. So, for many years, public policy in broadcasting has been based on two major premises -- regulation, and a crown corporation that would deliver programs and services that the marketplace would not allow the private sector to do. Other funding mechanisms were also used to help prime the pump for certain types of content.

Because of fragmentation, we may be approaching the point at which some of those techniques may become far less effective. When the television market was essentially an oligopoly, it was reasonable to expect most players to be profitable, and at levels of profitability that allowed them to fulfill regulatory obligations. But if fragmented markets put downward pressure on unit costs, the regulatory approach of the past may become a smaller part of the process. And that, of course, leads us to the other part of the process -- the expenditure of public funds by government. Because of fragmentation, it may be necessary in the future to place less reliance on regulation, and more on government spending.

And that brings us to a key issue: In a fragmented marketplace, are the current public institutions -- the CBC, Telefilm, the Canadian Television Fund -- the best ways to achieve that goal? That is a difficult question to answer. And one of the reasons it is a difficult question to answer is because we seem too often to be afraid in Canada to let that question be asked. If one questions such hallowed institutions as the CBC, one is often accused of being unpatriotic, or of being against public broadcasting, or of being against public intervention at all.

But if we believe, as a society, that public intervention has a place, surely we have an obligation to craft the form of that intervention in the most efficient and effective manner. So we have to pose the following three sets of questions:

1. **First:** Given the realities of today's broadcast marketplace, if those public institutions did not exist, what would be missing? Sports? News? Documentaries? Drama? Local programming? The answers to this question

need not only be quantitative; questions of quality, although more difficult to measure, might also be considered.

2. **Second:** As a society, to what extent are we prepared to use government spending to supply what would be missing? The federal government currently spends about \$1.4 billion per year on broadcasting,<sup>13</sup> of which about two-thirds goes to the CBC. Should we spend more? Should we spend less?
3. **Third:** What is the best way of spending that money to achieve the goals we have set?

### **The Canadian Broadcasting Corporation**

Because it represents the largest single expenditure of public funds in this area, it is impossible to consider these questions without dealing with the role of the Canadian Broadcasting Corporation. In fact, the CBC has many roles, and views about the CBC vary, depending on which of those roles is being considered. It is generally acknowledged that the CBC has been more successful in adapting to a fragmented market in radio than in television. And it is generally acknowledged that the CBC's greatest problem is in English-language television.

In the public-private oligopoly that was Canadian television from the 1950s to the 1980s, a hybrid CBC television that mixed government funding, a broad range of programming and competition for advertising might have been justified. But is that still the case today? Does CBC television, as currently constituted, represent the best way of spending government funds (tax dollars) in the context of the emerging realities of broadcasting?

Some would argue that the real problem is that the CBC is underfunded. But, in the view of the CBC, it has always been underfunded. For example, on May 19, 1947, the CBC made its annual appearance before a House of Commons committee. The CBC was 11 years old at the time; Canadian television was more than five years in the future; and the CBC both regulated its private radio competitors and supplied many of them with network programming. In its appearance before the committee, the CBC asked that the federal government free the CBC of the cost of collecting the annual licence fee then paid by Canadians with radio receivers.

According to a report in *The Globe and Mail*:

A. Davidson Dunton, chairman of the CBC, and Dr. Augustin Frigon, general manager of the corporation, presented briefs which in the main were appeals for more funds for the corporation.<sup>14</sup>

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<sup>13</sup> Statistics Canada, *The Daily*, January 7, 2004, "Government Expenditures on Culture 2001/02."

<sup>14</sup> Harvey Hickey, "CBC Asks Taxpayers Bear Costs Of Radio License Fee Collections," *The Globe and Mail*, May 20, 1947, p. 17.

The *Globe* report then quoted Mr. Dunton:

"Unless further funds come in," he said, "it will be impossible to keep the present level of service. It will be impossible to produce as much broadcasting by Canadian artists as is being done at present. And this is apart from the question of needed improvements."<sup>15</sup>

It is clear from the 1947 report that the question of more funds for the CBC is not a new one; indeed, it is a perennial argument. But in the current context, it is appropriate for us to respond to that argument by asking another question: More funds for what? When it had a monopoly in Canadian television in the 1950s, or even when it was one of a small number of television services into the 1980s, an argument could be made that the CBC should be all things to all people. Today, however, we must question whether or not that concept is still necessary, and whether it stands in the way of focusing resources on program genres -- like Canadian drama -- that will continue to be underrepresented because of the small size of the Canadian market.

So the first part of the response to a request for more funds for the CBC should be a requirement that the CBC demonstrate that the funding will be the most efficient and effective way of meeting the issue of underrepresented programming. The second part of the response is closely related to the first -- any increase in funding for the CBC must be quantifiable, in terms of both inputs and goals for the outputs. To be specific, if the CBC believes it should have, say, an additional \$100 million, then it should be required to demonstrate that the \$100 million would be best spent in its hands, and it should also be required to agree to goals for the results (so many hours broadcast and, in some cases, so much audience achieved).

### **Possible alternatives**

We have created in Canada competing institutions through which we spend public funds to produce and distribute some kinds of desirable programming that will not be produced in sufficient quantity or quality, because of the relatively small size of the Canadian market and/or adjacency to the world's largest entertainment economy. The CBC is one such institution. Telefilm and the Canadian Television Fund are another type of institution -- "pump-primers" whose contributions help to bridge the gap between production costs for quality programs and the amount of those costs that can be generated in the domestic market. In the view of many in the production sector, those institutions are also underfunded. One might observe that, in the current environment, the real scarcity is not one of spectrum, it is one of money. But regardless of the level of funding, if funds are being spent in the public interest, all of us, as citizens, consumers and taxpayers, have the right to demand that the money is being spent in the most effective way.

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<sup>15</sup> *Ibid.*

One of the first steps in that exercise should be to ask whether, today, any incremental grant of funds is best spent within a public broadcaster or whether it is best spent in priming the pump of private production for programming that falls within the funding priorities. And as we ask that question, we should also be open to different forms of intervention, either in place of, or in addition to, the current structures.

In the United Kingdom, the broadcast regulator, Ofcom, is currently coming to the end of a major review of public service broadcasting. In consultation documents produced for that review, Ofcom has suggested the creation of a "public service publisher" that would function in addition to the BBC and Channel 4. According to Ofcom, the public service publisher would not be a granting body that responds to production proposals for programs, nor would it be another "channel" or broadcaster in the conventional sense. Rather, the public service publisher would itself commission programs, and could use a wide range of distribution techniques (including current broadcasters). Of particular importance in the Ofcom proposal is the concept of periodic competitions to see who would run the public service publisher.

I am not suggesting that Canada should immediately adopt Ofcom's idea, either as an addition to, or a replacement for, any of our current public institutions. But the lesson I take from the Ofcom analysis is the value of introducing a competitive framework for deciding on the best way to spend public funds to meet perceived market shortfalls. The process of subjecting the spending of public funds to a competitive analysis of how they might be spent most effectively is, I think, the best way to compensate for Coase's observation about how institutions function over time. The fact that the CBC or a public funding agency were created in the public interest does not mean that they will always be the best solution to a given problem. This has little to do with any lack of effort or dedication on the part of executives or staff in those organizations; it has everything to do with institutional dynamics and the difficulty of adapting to a changing environment. By creating a form of "competition" for any incremental spending of public funds, I believe we can help to compensate for those institutional realities.

### **The changing role of the regulator**

Over time, it appears inevitable that regulation will be less effective, particularly as borders erode even further. Canadian licensees will face increasing pressure from unregulated competitors that don't have the same obligations of spending and exhibition. As noted above, ultimately, that will put more pressure on government spending to meet public policy goals that will be harder to meet through regulation. But the borders have not yet eroded completely. One of the tasks of the regulator, then, should be to regulate in such a way that Canadian licensees will have the best chance of making the transition to that more competitive environment. To be fair, Canada's broadcast regulator, the CRTC,

has taken some initial steps toward the use of incentives, and to recognize that diversity of content should be measured across the whole system. But that is just the beginning.

In that context, it is time to discuss what might become a useful regulatory concept -- trading the regulatory obligations of broadcasters. The concept is important as a general idea, but it is also important because the CRTC is currently being asked to adopt a version of trading regulatory obligations, in the absence of a broader discussion of how this might impact on the overall system.

The fragmentation of media and the erosion of traditional borders are prompting a fundamental reexamination of public policies in many countries. In Australia, for example, in October 2003, the Australian Broadcasting Authority (ABA) published a discussion paper titled "Trading the Regulatory Obligations of Broadcasters" -- the idea that the same overall output of mandated content could be produced if broadcasters were able to trade their content quota obligations. In inviting discussion on this concept, the ABA noted:

Australian commercial broadcast licensees are subject to obligations imposed in pursuit of public policy objectives. These include requirements to show specific types of programs which are valuable to audiences for social and cultural reasons. ... Changes in the broadcasting environment such as the growth of subscription television and the introduction of digital television have prompted debate on revised approaches to content regulation. ... The pace and direction resulting from digitalisation is unclear. There is some consensus however, that existing mechanisms will require review and that flexible and innovative approaches need to be explored.<sup>16</sup>

This potential regulatory tool should also be considered in the Canadian context across the broad range of Canadian content requirements. Ironically, although the issue has not been considered in Canada in a broad policy sense, a proposal currently before the CRTC does raise some aspects of the question of trading regulatory obligations. The proposal comes from the Canadian Cable Television Association (CCTA), and it seeks permission for cable companies to sell commercial advertising in two minutes per hour that are made available in U.S. cable (specialty) channels such as CNN and A&E, in competition with Canadian services. The U.S. services in question do not carry Canadian content. So the CCTA has proposed that its members would contribute 25 per cent of the advertising revenues to the Canadian Television Fund.<sup>17</sup> The Commission had previously returned an application from a company called 49<sup>th</sup> Media, which had proposed to sell commercials in Canada in all of the commercial slots in five of

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<sup>16</sup> Australian Broadcasting Authority, "Trading the Regulatory Obligations of Broadcasters," October 2003, P. 5 [available at [www.aba.gov.au](http://www.aba.gov.au)].

<sup>17</sup> In the interest of full disclosure, note that I have also acted as a consultant to the Canadian Association of Broadcasters on this issue, dealing with the likely market impact of the CCTA proposal.

the top U.S. cable channels received in Canada; it, too, promised to contribute 25 per cent to the CTF.

While the CCTA and 49<sup>th</sup> Media proposals are not the same as the trading regime studied in Australia, it can be argued that they also represent a form of trading of regulatory obligations. In the case of both of those proposals, competitive economic activity (advertising sales) in Canada would be allowed, even though the channels in question carried no Canadian content. Those who proposed the schemes would have traded a regulatory obligation for exhibition and spending on Canadian content for a contribution to the Canadian Television Fund. Without belaboring the point, that raises two important questions:

1. Why should that kind of trading of obligations be limited to advertising sold in non-Canadian services?
2. Should we even consider that kind of trading of obligations before a broader review of the full potential from a trading regime?

The example I have used here is specific, but it is the general point that is most important -- in a fragmented, competitive broadcasting system, regulatory decisions are likely to have systemic implications, and should be considered within a systemic context.

### **Other tools of public policy**

While regulation and direct spending are the two most obvious tools of Canadian public policy in broadcasting, they are not the only examples of the role of the state, over and above laws of general applicability. The state affects broadcasting in at least three other ways:

1. Copyright law;
2. Tax policies; and
3. Laws affecting defamation and hate speech.

Copyright is fundamental to the broadcasting industry. It is obvious that copyright law is already being challenged, and will be challenged even more, as borders erode. What is less obvious outside the industry is the degree to which copyright obligations are placed on Canadian broadcasters in ways that appear to be out of sync with industry realities. For example, radio stations currently pay authors, composers and performers for the right to use their music. That is logical and fair. But Canada's copyright law also requires those same radio stations to pay extra if they copy a CD onto a hard drive to facilitate its broadcast. That makes no sense, and illustrates how copyright law may be out of sync with new technology.

Tax provisions have been used over the past three decades as a means of supporting public policies related to broadcasting. In 1976, Parliament amended the Income Tax Act (Bill C-58) to limit the deductibility of advertisements placed on U.S. border TV stations. In light of current proposals before the CRTC, it is somewhat ironic to note that, in 1976, some of the affected border stations proposed contributing a portion of their advertising revenues from Canada into a fund for Canadian program production, if they could continue to sell advertising in Canada.<sup>18</sup> Parliament rejected those proposals and passed the amendments.

The laws of defamation and laws respecting hate speech are also part of the role of the state in relation to broadcasting. Recently, the CRTC was involved in controversy when it decided not to renew the licence of a radio station in Quebec City, because, in the view of the Commission, the station did not live up to previous commitments on objectionable content. The matter is currently before the Federal Court of Canada. The CRTC also attracted controversy over its treatment of a non-Canadian channel for which it required cable and satellite operators to put in place safeguards against objectionable content. Both of these actions by the CRTC also raise a broader issue: To what extent should it be the job of the broadcast regulator to deal with questions of objectionable content, or should a greater reliance be placed on other remedies available to citizens, such as laws of defamation or laws against hate speech?

One theme that runs through many of these questions is that they are linked. Yet, too often, policies are made or decisions are taken in one area, with too little regard for the system as a whole. So the final argument I would make is that we need a more holistic approach to broadcasting policy in Canada, an approach that takes into account not only CRTC decisions, but also Copyright Board decisions, and the spending priorities of the government agencies that have been created in this field.

### **The role of the state in 2005**

In the preceding pages, I have argued that, in a rapidly changing broadcasting environment, the tools of intervention are as important an area for public debate as the question of whether or not to intervene. I have further argued that a greater focus on effective tools -- what works -- will inform the broader debate about intervention itself.

To the extent that the state has a role in broadcasting in 2005, then that role should be defined by:

1. A rigorous assessment of the actual areas where intervention is required;

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<sup>18</sup> The proposals from the U.S. border stations are described in detail in Appendices to the *Proceedings of the Senate Standing Committee on Banking, Trade and Commerce*, Senate of Canada, Issue No. 93, June 16, 1976.

2. An equally rigorous assessment of the efficiency and effectiveness of the tools of intervention;
3. A willingness to let institutions compete for incremental public funds that will be spent in pursuit of public policy goals for broadcasting; and
4. A holistic approach across regulation, public broadcasting and funding agencies, to maximize the effectiveness of the public resources that are used in this area.

To some degree, these ideas challenge the status quo. But I believe it is better to question the status quo than simply to assume that current policies and institutions will be able to meet the challenges that are rapidly approaching.

In Hemingway's novel *The Sun Also Rises*, one character asks another how he went bankrupt. The reply is: "Gradually and then suddenly." My opinion is that many of our broadcasting policies will be in gradual decline, not because they were bad ideas at the time, but because the distance between policy and reality keeps growing. Eventually, the distance gets so great that the policy no longer works, and, in some cases, the old policy actually prevents us from adapting to face the new reality. Until the actual tipping point, however, one can still find signs that the old policies have some effect. In a broadcasting market with the size and structure of Canada's, the alternative is not simply to abandon everything to some hypothetical, completely unregulated marketplace; it is to devise new policies that balance -- and use -- the marketplace in a more realistic manner. Or, to put it another way ... what works.