NETWORK NEUTRALITY IN THE GREAT WHITE NORTH (AND ITS IMPACT ON CANADIAN CULTURE)

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This article contributes to the growing body of network neutrality literature by describing and commenting on recent developments in Canada. There have been and still are ongoing industry practices, regulatory policy proceedings, judicial decisions and pending litigation, and legislative proposals relevant to the issue of network neutrality in Canada. While most of the network neutrality literature has an economic focus, this paper dwells more on implications for Canadian culture. Though the dominant technological and economic discourses about issues like innovation and competition cannot be ignored, these are not the only paradigms with which to frame regulatory and other decision-making. Ultimately, this paper recommends a light-handed cultural policy response — one that clearly imposes neutrality obligations but does so in a principled rather than prescriptive manner.

I. INTRODUCTION

During the early 1980s Canadian comedians Rick Moranis and Dave Thomas played a pair of brothers, Bob and Doug McKenzie, in a television sketch called "The Great White North." The characters Bob and Doug, well known by their first names alone throughout and beyond Canada, embody some of our most humorous stereotypes. The beer-swilling brothers wore plaid flannel and touques, talked about hockey, doughnuts, and back bacon, and interjected "eh" at the end of most of their sentences. The sketch aired on the Canadian Broadcasting Corporation (known as the CBC) as part of a program called SCTV. That program was an offshoot of Toronto's very successful comedy troupe, The Second City, whose members included John Candy, Eugene Levy, Martin Short, and many other renowned actors and actresses.

Like Monty Python's Flying Circus in Britain and Saturday Night Live in the United States, the self-parody of SCTV and the Great White North sketch said a lot about how others perceive Canadians, and how Canadians perceive themselves. The program was picked up for several years by the American broadcast network NBC, and many of its stars went on to great careers in Hollywood. The Bob and Doug routine has been the basis for a top-20 album in the U.S. (including a still-popular rendition of The Twelve Days of Christmas), an ad campaign for the Pizza Hut chain of restaurants, and even two brother-moose characters in the hit Walt Disney franchise Brother Bear.

Whether or not you think they're funny, or are secure enough to know that a parody is just that, Bob and Doug have defined one of the ways that the world thinks about Canada. The characters, the comedy, and even the concept are wonderful examples of how Canadian culture has been effectively exported. The way in which this happened – through the medium of broadcast television, syndication and spin-offs – was typical of the cultural production models of the late $20^{\rm th}$ century.

But the world has changed. Today, an increasingly large chunk of Canadian culture is born and bred online. The Internet empowers any Canadian, not just those with access to professional

production studios and television broadcast networks, to express herself and to export that expression widely and instantaneously. Literally anyone can now contribute easily to the *creation* of Canadian cultural works, not just the *consumption* of them.

Want proof? Check out the social network forum http://www.homelessnation.org, which is just one example of how Canada's digital society is being reshaped by citizens who never before had much influence on cultural policy. Homeless people across Canada are trained where they are by outreach workers to use video cameras, computers and the Internet. They are empowered to upload short documentaries not just capturing but also defining the culture in which they live. Just one example is a recently posted parodic video voiceover critiquing an episode of the animated comedy South Park called "Night of the Living Homeless" from the perspective of people with lived experience on that issue. Though there are obvious social and economic barriers confronting this community of peer producers, about the only technological impediment they might face is accessing the bandwidth to engage Canadians by streaming their embedded blip.tv¹ videos via the Internet.

Now, I'm not suggesting here that the homelessnation members' online activity is currently being curtailed or even threatened in any concrete way (though some other online activities are); simply that this is a kind of cultural participation that we as a society want to – and are able to – encourage and sustain. This is explicitly spelled out in the official "Canadian Culture Online Policy Statement" (Government of Canada 2008), which reads, in part:

The Internet provides citizens – even those living in the most remote areas of Canada – with the ability to experience and express their culture [and] represents a tremendous opportunity to add to our understanding of Canada and its rich diversity, and to support our culture here and abroad. The combination of real-time interactivity with different types of media – such as print, audio and video – has an unprecedented capacity to increase the participation of all Canadians in our cultural life.

The government has several general strategies to take advantage of the Internet's potential to promote Canadian culture and democratise its production. But to be successful in this endeavour, a thorough and coordinated response across policymaking branches and agencies is needed. It requires careful consideration of, among many other things, telecommunications policy.

Realising that communications technology exists to facilitate increased engagement with Canadian culture created from the bottom up is a first step. Depending on the business practices adopted in its deployment, however, the same technological infrastructure might equally be used to stifle Canadians' ability to contribute to the creation and dissemination of cultural expression. How technologies like the internet and mobile networks are deployed to either facilitate or restrict persons' ability to engage in the collective generation of cultural and other content is one of society's most pressing communications policy questions (Lessig 2001; Zittrain 2006; Zittrain 2008). Confronting the debate over the concept of so-called "network neutrality" is an important part of the response to that question.

Professor Tim Wu (2003) first coined the term network neutrality in an article published in the *Journal on Telecommunications and High Technology Law*. The precise definition varies, but it is possible to unpack the basic concept (Marsden 2007, 409). The principle has its origins

in "open access" and the "end-to-end" architecture of the Internet (Lemley and Lessig 2000). Both supporters and opponents of regulated network neutrality have discussed the principle as a First Amendment issue for its connection to freedom of online expression (Yemini 2008, May 2007). Its egalitarian and participatory underpinnings have even been connected to fundamental theories of distributive justice (Schejter and Yemini 2007).

Neutrality is a network design principle that aspires to treat all platforms, applications and content equally; a neutral communications infrastructure does not discriminate among uses, users, or content (Wu 2004, 73). To make this idea more concrete, Wu (n.d.) puts it in lay terms using the analogy of an electric grid, which does not discriminate among toasters, irons, or computers – all are delivered electricity at the same rate. That, according to Wu, is one of the reasons the electric grid has been so successful, powering the radios of the 1930s and the flat-screen televisions of the 2000s.

The issue of network neutrality has gained attention worldwide. This paper attempts to contribute to the growing literature globally by describing and commenting on recent developments in Canada. Much has happened here lately, and matters are evolving month-by-month. There have been and still are ongoing industry practices, regulatory policy proceedings, judicial decisions and pending litigation, and legislative proposals relevant to the issue of network neutrality in Canada.

Each section of this paper addresses one such forum in which network neutrality law, policy and practice is being played out. The article's final section ties developments together and offers insights into future directions that the network neutrality debate may take in Canada. While most of the network neutrality literature has an economic focus, this paper dwells more on implications for Canadian culture. The central thrust is that cultural policy considerations impact debates about network neutrality more in Canada than in some other jurisdictions. Though the dominant technological and economic discourses about issues like innovation and competition cannot be ignored, these are not the only paradigms with which to frame regulatory and other decision-making. Ultimately, this paper recommends a light-handed cultural policy response – one that clearly imposes neutrality obligations but does so in a principled rather than prescriptive manner.

II. INDUSTRY PRACTICES

Though the Canadian Association of Internet Providers (CAIP) argued before the Supreme Court of Canada in a dispute over liability for copyright royalties that Canadian internet service providers (ISPs) were entirely neutral in terms of content transmission (SOCAN v. CAIP 2004, para. 4), recent behaviour demonstrates that claim to be equivocal or, in some cases, false.

Probably the first time people in Canada became aware that ISPs might not be treating all online content neutrally was in 2005. In that year Telus, Canada's second largest ISP, blocked access to a website set up in support of a union with which Telus was in the midst of a labour dispute (Geist 2008, 75). Telus defended its actions by arguing that the site contained confidential proprietary information and raised privacy concerns for its employees. Watchdogs as well as the online media realised that the ISP's interference was more likely tied to the website's content, which Telus was opposed to (Barret 2005, OpenNet Initiative 2005).

Geist (2008, 76–78) describes other, less dramatic examples of non-neutral ISP behaviour. Executives of the Québec-based company Videotron threatened to charge producers fees for the ability to transmit content to its subscribers, which is an unfortunate but understandable position given producers' efforts to extract copyright royalties from carriers for this same activity. Shaw, another large Canadian telecom company, in 2005 offered a premium service to prioritise Internet telephony traffic. Some observers feared the anticompetitive potential of this move, since the implication is that Internet telephony would be relatively *de*prioritised without the premium service (Geist, 2008, 77). This concern is particularly relevant given that Shaw is itself a provider of digital telephone services.

Most of Canada's other major ISPs have also stirred controversy with their Internet traffic shaping practices. In the context of an ongoing regulatory proceeding, discussed below, ISPs including Bell, Cogeco, Rogers, Shaw and others have acknowledged managing their networks using a technique known as DPI, which stands for "deep packet inspection" (CRTC 2008b). According to experts, DPI is becoming "widely deployed" by ISPs to identify and manage traffic related to particular applications (Finnie 2009). Management can have either mild or harsh effects. In nuts and bolts terms, harsher tactics include dropping data packets altogether while milder tactics mean lowering the priority of some packets and delaying them on that basis (Felten 2006, 2–4). Harsher still is the possibility of intercepting packets and forging new ones to make the sending computer think it needs to slow things down. This was done by the American ISP Comcast (Free Press et. al. v. Comcast 2008, paras. 9, 41). So far, the network management practices currently employed by most Canadian ISPs essentially involve delaying the transmission of certain types of content deemed by the ISP to be less time-sensitive than other content.

Active network management is usually defended as a necessary response to congestion attributable to increasing Internet traffic, particularly traffic involving peer-to-peer applications but also streaming video. Unfortunately, it is difficult to validate or refute congestion claims because reliable, transparent data is not made publicly available (Brown 2008). And even if technical data were publicly available, the motivations underlying network traffic management tactics are extremely hard to detect (Felten 2006, 5–6).

The regulatory, judicial and legislative developments discussed below may, however, provide an opportunity to scrutinise ISPs' activities more closely.

III. REGULATORY POLICIES

A. THE TELECOMMUNICATIONS POLICY REVIEW PANEL

Even before industry practices involving network neutrality, or rather the lack thereof, came to light, the Government of Canada realised the need to think forwardly about regulatory policies concerning Canada's telecommunications sector. In 2005 a Telecommunications Policy Review Panel was entrusted to study and make recommendations regarding Canadian telecommunications policy generally. During that year the Panel issued a consultation paper and received extensive submissions on various policy matters.

Its final report was issued in 2006 (Telecommunications Policy Review Panel 2006). The term network neutrality was not adopted in the report, but the panel (2006, 6–15) did address the fundamental issue: "the technical capability of network operators and providers of retail Internet services to block or degrade access to certain types of applications or content." Consumer

access issues are complex and context specific, the panel reported (2006, 6–16). Potential anticompetitive behaviour by ISPs was acknowledged to be a risk, though not warranting a unique response in the context of Internet access. The panel also accepted that carrier interference for non-commercial reasons, such as to enforce criminal or copyright laws for example, could be justifiable. Censorship, by contrast, would be a serious problem; the panel specifically referenced the actions taken by Telus described earlier in this article (2006, 6–16).

The most challenging policy issues the panel identified would arise when carriers interfere with content communications, such as by charging a premium price for access or by blocking access altogether, for purely business-related reasons. Though the panel did not believe such behaviour would frequently occur, it stated: "open access is of such overriding importance that its protection justifies giving the regulator the power to review cases involving blocking access to applications and content and significant, deliberate degradation of service" (Telecommunications Policy Review Panel 2006, 6–18).

B. STATUTORY FRAMEWORK FOR REGULATORY REVIEW

Regulation of Canada's facilities-based telecom providers (*i.e.* Canada's major ISPs) is a matter of federal jurisdiction (Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission 1989). Pursuant to that jurisdiction the federal government has enacted the Telecommunications Act (1993). Subsection 27(2) of the Act states:

No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

Section 36 of the same act states:

Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

In plain language, the statute basically says that telecom companies cannot discriminate when it comes to access or price, and they cannot control content or influence communications. The first prohibition is, notably, qualified by reference to unreasonableness: carriers cannot *unjustly* discriminate or give *undue* preference. The implication is that some discrimination and preference might be reasonable.

Though the appropriateness or adequacy of these provisions is debatable, they do provide at least a basic legal framework for network neutrality regulation in Canada, which does not really exist in some other jurisdictions (McTaggart 2008). Regulatory and other administrative developments since the Telecommunications Policy Review Panel's report was released demonstrate the potential utility of this framework.

Near the end of 2006 the Minister of Industry began implementing some of the policy review panel's recommendations, specifically related to greater reliance on market forces to achieve the objectives of the *Telecommunications Act* (Industry Canada 2006). The Minister issued to the Canadian Radio-television and Telecommunications Commission (CRTC) the first-ever "Policy

Direction," which is a tool the government can use to guide the commission on how it should exercise its regulatory mandate. The purpose of the directive, according to its accompanying regulatory impact analysis statement, was "to mandate that the CRTC should rely on market forces to the maximum extent feasible and regulate, where there is still a need to do so, in a manner that interferes with market forces to the minimum extent necessary" (Industry Canada 2006). This directive is key to understanding the attitudes of the government and the commission during recent and ongoing discussions of network neutrality.

C. WHOLESALERS' APPLICATION TO PROHIBIT PEER-TO-PEER 'THROTTLING'

The first opportunity for the CRTC to consider the application of network neutrality principles to a matter within its jurisdiction came in April 2008. At that time CAIP² filed an application for an order directing Bell, Canada's largest ISP, to cease and desist from throttling access services it sells wholesale to other ISPs for final sale to customers (CAIP 2008). It is important to note that the application did not directly relate to any network management practices *vis-à-vis* Bell's end-user subscribers.

The grounds for CAIP's application included allegations that Bell violated, among other laws, subsection 27(2) and section 36 of the *Telecommunications Act*. Bell both denied the allegations and defended its behaviour (Bell Canada 2008). This regulatory proceeding before an administrative commission generated a tremendous amount of media attention, and triggered submissions from a wide variety of stakeholders ranging from other large ISPs to large and small technology companies to consumer and public interest groups.³ Over 1300 individuals weighed in as well.

By summer 2008 it was clear that the issue of network neutrality had captured the CRTC's attention. The commission had declined CAIP's request for expedited relief (*i.e.* an immediate injunction) and decided to fully consider the complaint. In June at the Canadian Telecom Summit, an annual gathering of industry heavyweights, CRTC chairperson Konrad von Finckenstein raised this topic in a keynote address (von Finckenstein 2008). It was interesting that he called network neutrality an 'issue of increasing importance', but even more noteworthy that he remarked:

this particular dispute is just the tip of the iceberg. Under the heading of "net neutrality" lies a whole range of questions affecting consumers and service providers. Fundamental issues of technology, economics, competition, access and freedom of speech are all involved.

His comments foreshadowed the CRTC's then-forthcoming decision, as well as its next steps.

In November 2008 the CRTC ruled finally in Bell's favour, against CAIP (CRTC 2008a). It reached several key conclusions. First, the commission (CRTC 2008a, paras. 27–33) accepted Bell's methodology for determining whether its network was congested, and supported Bell's conclusion that it was. In particular, the commission accepted that peer-to-peer file sharing is the primary culprit of congestion, and that measures – such as traffic shaping during peak periods – are required to prevent degradation of the quality of service to other network users. The importance of this disputed conclusion about the need for, and lack of alternatives to, traffic shaping cannot be overstated: it greatly influenced the commission's decision in this proceeding, and is likely to influence other ongoing and future proceedings as well.

On the issue of whether traffic shaping violates the prohibitions on unjust discrimination and undue preference in subsection 27(2) of the *Telecommunications Act*, the commission (CRTC 2008a, para. 45) decided that there was no evidence to prove Bell's traffic shaping was intended to secure more bandwidth for its own services or prevent competition. That may in fact be true, but whether Bell *intended* to discriminate or give preference is not the relevant question under the Canadian statute.

Even industry executives do not suggest that lack of intent could justify discrimination or preference (McTaggart 2008). The commission's focus should have been on whether discrimination or preference was the *effect* of Bell's traffic shaping, and more to the point, whether the discrimination or preference was unjust, undue or unreasonable. To be fair, the commission did consider that Bell did not benefit from its traffic shaping at the wholesale level, but this finding still leaves open questions about the impact of traffic shaping on individual end users and society more broadly.

By delaying the transmission of peer-to-peer traffic, does Bell control the content or influence the meaning or purpose of telecommunications in contravention of section 36 of the *Telecommunications Act*? The commission (CRTC 2008a, paras. 54–59) decided no. It focused narrowly on the issue of *editorial* control, noting that content did (eventually) reach the intended recipients unchanged. Of course, control over content could be exercised other than editorially, but the commission did not seem to consider that possibility.

A distinction was drawn between controlling the speed of telecommunications and the content itself. The commission held that simply delaying a telecommunication does not alter its meaning or purpose. That is also an odd conclusion to reach, because a delay could very much affect the purpose of communicating via the Internet. The Supreme Court of Canada has been clear on this point. For example, publication bans delaying the reporting of an event for a given period curtail freedom of expression "by their very definition" (Dagenais v. CBC 1994). Similarly, delays in the publication of election results constitute limits on freedom of expression that must be constitutionally justified (R. v. Bryan 2007).

The fact that peer-to-peer transmissions in any case take time to complete does not justify the commission's conclusion. No Internet transmission is truly instantaneous, so the issue of time delay is really a relative question. And the kind of traffic shaping going on in Canada necessarily requires an implicit or explicit judgment about the relative time-sensitivity of the delayed telecommunication. Access providers should not be empowered to exert influence over citizens' ability to telecommunicate by making judgments about which information from which sources is transmitted more or less quickly. That is unacceptable in any free and democratic society.

The CRTC has already been asked by CAIP to reconsider its decision (CAIP 2009), which is likely a prelude to an application for judicial review by Canada's Federal Court. CAIP alleges that the CRTC did not have an adequate understanding of the factual, legal and policy issues at play. CAIP suggests the CRTC's decision to hold broader hearings, discussed below, evidences its lack of understanding, and that rendering a decision without such understanding of the issues was procedurally unfair.

D. PUBLIC CONSULTATION ON TRAFFIC MANAGEMENT PRACTICES

Several times in its decision the commission reinforced the fact that its conclusions pertain solely to the wholesale access providers' complaint against Bell based specifically on the record before

it. This is what chairperson von Finckenstein (2008) earlier referred to as "the tip of the iceberg." Therefore, simultaneously with its decision the commission issued a "Public Notice" to initiate a fuller proceeding, including a public oral hearing, to review the current and potential Internet traffic management practices of ISPs with respect to both retail and wholesale services (CRTC 2008b).

An elaborate process of notices, interrogatories, submissions, responses and so on was established to formally structure this "Review of the Internet traffic management practices of Internet service providers." The extended deadline for filing comments and a request to appear passed in February 2009. The volume and range of responses to the public notice is substantial. Greatly oversimplified, opinions are divided between those who believe that unfettered network management is necessary for the technical and commercial viability of the Internet and those who believe that application-based throttling is a threat to competition and open access.

For this proceeding, the commission has gone beyond the usual paradigm for public hearings. It conducted a bold and innovative online consultation at isppractices.econsultation.ca, where the commission provided background information on the issues including a consultation paper on technical matters, parties' responses to all the interrogatories, an embedded YouTube video inviting public opinion, discussion threads that will be placed on the record of the proceedings, and more. The e-consultation closed at the end of April 2009.

There is some irony in the fact that the commission is using the Internet to decentralise control over the consultative process and enable a more participatory system of democracy, when that is just the sort of citizen engagement that could be threatened by non-neutral regulatory policies and network management practices. Indeed, the commission's own YouTube-embedded, streaming video invitation to participate could easily be the kind of traffic that eventually gets throttled.

E. COMPLAINTS TO THE PRIVACY COMMISSIONER

The CRTC is not the only administrative forum in which network neutrality issues have been raised. In May 2008 the Canadian Internet Policy and Public Interest Clinic (CIPPIC), based at the University of Ottawa's Faculty of Law, filed a complaint with the Privacy Commissioner of Canada over Bell's use of DPI for traffic shaping (Canadian Internet Policy and Public Interest Clinic 2008). The complaint was lodged pursuant to Canada's federal privacy legislation, the Personal Information Protection and Electronic Documents Act (2000). CIPPIC alleged in its complaint that Bell's collection and use of personal information was unnecessary and non-consensual. In July, CIPPIC follow up this complaint with a series of others against Canadian ISPs Rogers, Shaw and Eastlink.

The complaints are based upon the view that DPI involves the use of personal information, and more specifically that internet protocol addresses connected with inspected data packets transmitted online can be linked to an identifiable individual. Though the extent to which Bell or other ISPs do in fact inspect data in ways that identify individuals was not determinable at the time of the complaint, obtaining further information and guaranteeing privacy safeguards in that respect were among CIPPIC's objectives.

Although no formal response to the complaint has yet been given, it has apparently had an impact. In particular, the Privacy Commissioner has made a submission to the CRTC in the

context of its proceedings on traffic management practices (Privacy Commissioner of Canada 2009). The commissioner (Privacy Commissioner of Canada 2009, para. 13) is concerned that

DPI can look into the content of the message sent over the Internet. To use a real-world example, using DPI is akin to a third party opening an envelope sent by surface mail, and reading its contents before it reaches its intended destination.

The submission continues: "it is not clear that examination of content is necessary for network management and may constitute an unreasonable invasion of an individual's privacy" (Privacy Commissioner of Canada 2009, para. 32). It is foreseeable that the CRTC would give weight to these views of the Privacy Commissioner in considering whether, for example, any possible discrimination or preference flowing from traffic management is unjust, undue or unreasonable.

Regardless of the outcome of proceedings before the CRTC or the Privacy Commissioner, further appeals or judicial reviews are almost certain to occur in respect of the issue of network neutrality. Before such a court proceeding occurs, however, it is worthwhile noting the existence of other past and ongoing litigation in Canada relevant to the topic. That is the focus of the next section of this article.

IV. COURT LITIGATION

A. COPYRIGHT LIABILITY AND NETWORK NEUTRALITY

The highest-level judicial consideration of principles related to network neutrality in Canada occurred in the Supreme Court's decision, *SOCAN v. CAIP* (2004). The case involved a dispute between a copyright collective society of composers and music publishers and an industry association of ISPs over liability to pay royalties in respect of music transmitted via the Internet. Copyright holders argued that ISPs were active, not neutral, parties in the online telecommunication of music. ISPs argued they were merely passive providers.

Canada's *Copyright Act* (1985) contains a safe harbour provision, 2.4(1)(b), which in effect exempts passive carriers from copyright liability for the content they transmit:

a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

One of several questions for the Copyright Board of Canada, which initially considered the matter, was whether ISPs do anything more than merely provide the means of telecommunications for others to communicate via the internet. It ruled they do not, and the Supreme Court eventually upheld that ruling.

The Supreme Court judgment contained numerous (seven, to be precise) references to *neutrality* as a requirement for immunity under the *Copyright Act*. For example, at paragraph 92 the court explained that an intermediary is immune from liability if it "does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others." The factual

basis for this conclusion was in part "the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet" (SOCAN v. CAIP 2004, para. 101).

It is easy to imagine how the court's ruling in this case could be applied to indirectly encourage ISPs to behave in a neutral fashion. ISPs whose participation in telecommunications is not content neutral are exposed to the risk of significant copyright liability. If it is now technically and economically feasible to monitor and shape particular types of traffic, like experts report it is (Finnie 2009), the factual basis on which the Supreme Court relied to absolve ISPs from liability would no longer exist.

The paradox, however, is that traffic shaping practices are currently being used to delay access to transmissions using peer-to-peer applications. Copyright holders are highly likely to support ISPs shaping of this traffic on the belief that much of it is infringing content. It would be strange if slowing down potentially infringing transmissions could increase ISPs' risk of liability, especially considering that copyrights holders worldwide are working to encourage or even require this kind of network management (de Beer and Clemmer 2009). Perhaps such a counterintuitive result would be used to justify the adoption of alternative policies regarding copyright liability and network neutrality.

The Supreme Court's discussion of potential liability for ISPs' caching activities is relevant to this discussion. The Federal Court of Appeal had overturned the Copyright Board's decision that caching was necessary for the efficient transmission of content and therefore did not take ISPs outside the ambit of the safe harbour, but the Supreme Court reinstated the Board's ruling. The Supreme Court (para. 114) cited the Board's finding that early utility of the Internet had been limited by the lack of bandwidth necessary to transmit audio files. Given the CRTC's findings discussed above, it is possible that a court dealing with a copyright issue might find that – like caching – traffic shaping is necessary for efficient and effective Internet transmissions.

B. CONSUMER CLASS ACTION

As if Bell and other Canadian ISPs did not have enough to deal with in regulatory proceedings before the CRTC and Privacy Commissioner, in May 2008 a class action lawsuit was filed in the province of Québec (Union des Consommateurs v. Bell 2008). The action was initiated by a consumer rights association on behalf of a representative plaintiff, and seeks certification of a class consisting of all Bell's Internet subscribers in Québec.

The underlying allegation is that Bell is deliberately slowing down Internet traffic, has misrepresented its services, and raised consumer privacy concerns. Consequently, the action seeks the return of 80 percent of Bell subscribers' payments for Internet access (submitted to approximate the level of service degradation), \$600 per subscriber to compensate for false advertising, and \$1500 per subscriber for alleged privacy violations.

It is important to note that the litigation has not yet proceeded past the application for certification. And, in Canada, it is not uncommon for class action certification applications to be denied, or for disputes to be settled before certification. At this stage, the litigation is simply one development to keep watch on.

V. LEGISLATIVE INITIATIVES

A. POLICY REVIEW PANEL RECOMMENDATIONS

Recall that the Telecommunications Policy Review Panel report issued in 2006 addressed principles of network neutrality, indicating the overriding importance of open access to Canadians' telecommunications services (Telecommunications Policy Review Panel 2006, 6–18). Based partly on that recognition, the panel recommended the following specific reforms to the existing legislative framework in Canada:

The *Telecommunications Act* should be amended to confirm the right of Canadian consumers to access publicly available Internet applications and content of their choice by means of all public telecommunications networks providing access to the Internet. This amendment should

- a. authorise the CRTC to administer and enforce these consumer access rights,
- b. take into account any reasonable technical constraints and efficiency considerations related to providing such access, and
- c. be subject to legal constraints on such access, such as those established in criminal, copyright and broadcasting laws.

Though not framed as a response to this recommendation specifically, McTaggart (2008) argues that legislative amendments are not necessary to meet the panel's policy objectives. Depending on how the current CRTC proceedings unfold, I believe he may be right about that particular point. Some members of parliament, however, would seem to disagree.

B. PROPOSED PRIVATE MEMBERS' BILLS

Though the Canadian government has not acted on the panel's recommendation to update the Telecommunications Act, some elected representatives have nevertheless been pushing for legislative reform. In the 2nd Session of Canada's 39th Parliament during 2008, two private members' bills that could have been relevant to the issue of network neutrality were introduced. One, Bill C-552, was put forward by Charlie Angus of the NDP, Canada's social democratic party. The other, Bill C-555, was introduced by the centrist Liberal party member David McGuinty.

Angus' Bill C-552 was titled An Act to amend the Telecommunications Act (Internet Neutrality). The short proposal would have made more explicit reference to network neutrality than the current Telecommunications Act does. Its approach to network management practices would have also been more explicit, by adding a section 36.1 to the statute. That section would have specifically prohibited practices that degrade or prioritise any broadband content, application or service based on its source, ownership or destination, subject to a number of exceptions. Network operators would retain the right to manage networks to, for example, relieve congestion, differentiate prices for different levels of bandwidth or quantity of data transmitted, enforce terms of service contracts, or prevent violations of law. Other key provisions in C-552 would have expressed the consumers' right to use any device of their choosing with a network, provided it does not cause damage to the network, and impose greater transparency obligations on network operators.

McGuinty's Bill C-555, An Act to provide clarity and fairness in the provision of telecommunications services in Canada, 5 was also short. The focus of Bill C-555 did not require or even

promote network neutrality *per se*, but rather was about cellular telephone service and consumer protection in the telecommunications industry generally. Within that context, however, the Bill would have required the Cabinet to direct the CRTC to "to gather information, seek input and make a report on competition, consumer-protection, and consumer-choice issues relating to telecommunication services." This would have mandated an assessment of, among other things, "network management practices that favour, degrade or prioritise any packet transmitted over a broadband network based on source, ownership or destination," as well as means to compel service providers to "provide clear and accurate information with respect to network management practices that reduce advertised speeds or interfere with the ability of consumers to access, use, send, receive, or offer lawful content, applications, or services over broadband networks."

Both Bills failed to make it into law, because of a Canadian federal election held in the fall of 2008. The Conservative party has again formed a minority government, which in Canada is typically a tenuous position. As such, it is likely that the newest Bill introduced, again by Angus, will not become law. Angus' new Bill C-398 is very similar to his original proposal, save for some differences in terminology and definitions. None of the changes materially alter the basic principles being tabled.

C. PRINCIPLES OF STATUTORY INTERPRETATION

A significant question is whether legislative reforms of the sort proposed would have any real impact on industry practices. It is possible they would not. The effectiveness of the Angus proposal depends largely on the CRTC's interpretation of both the new provision itself and the network management practices of telecom industry providers. The commission's previous ruling on network neutrality suggests it would be unlikely to suddenly prohibit the kinds of traffic shaping currently taking place, even with an updated provision in place. And the aspects of McGuinty's proposal pertaining to network neutrality have basically been rendered moot by the public consultations currently being undertaken at the CRTC's own initiative.

So, as I suggested above, it appears that McTaggart (2008) might be right: Canada does not need legislative reform. Rather, what is required is statutory interpretation of existing provisions that gently promotes network neutrality, and a willingness by the CRTC, and if necessary the courts, to enforce those provisions. On a practical level, efforts should therefore be focused on establishing, applying and enforcing appropriate interpretations of existing law.

McTaggart (2008) suggests several guiding principles that would be beneficial to large Canadian telecom companies. Essentially, his recommendations would facilitate implied exceptions to Canada's statutory prohibitions on discrimination, preference, control, and influence. It is hard to take issue with his suggestion that ISPs should be permitted to act non-neutrally in order to comply with legal requirements, as long as due process guarantees are in place.

Slightly more controversial are interpretive principles that would permit "low-priced Internet access offerings that either do not support a full range of applications, or that only provide access to one social networking site, for example, that of a commercial sponsor" (McTaggart 2008, 10–17). The unstated implication here is that customers could also consent to high-priced, premium access offerings that offer speedier transmission, for example. That issue is an important aspect of what the network neutrality debate is all about.

Similarly, it is fine to say that ISPs should be allowed to take technological steps to enforce their consumer contracts, but the truth is that no consumer really knows what their contract

says their ISP does or can do. And Canadian courts have consistently held that telecom companies can unilaterally change their terms of service with little more than an obscure link to some online legalese (Kanitz v. Rogers Cable Inc. 2002; Rogers Wireless Inc. v. Muroff 2007). So, in practice, this exception to network neutrality regulations would be a Trojan Horse through which ISPs can slip in consent to do whatever they want.

Finally, a proposed interpretive exception for "reasonable network management" would basically close much of the debate canvassed throughout this paper and in many others on the subject of network neutrality. The details and implications of network management practices are precisely the issues that the CRTC is currently investigating. An exception to existing neutrality obligations in the statute for reasonable network management is not so much an interpretive tool for the CRTC as it is a dispositive principle, except that it begs the question of what is or is not reasonable.

Underpinning all of these interpretative principles is the recommendation that regulators not act until there have been demonstrable harms that require a regulatory response. It is easy to be sympathetic to this position, and on first impression, I'm tempted to agree. The difficulty, however, is that this is a chicken-and-egg scenario. As long as transmissions via peer-to-peer applications, especially those like Miro (an open internet TV application) that are used often for legal purposes, are delayed, they cannot compete on an equal playing field with more conventional distribution tools. Given this competitive disadvantage, opportunities to demonstrate harms necessitating regulatory intervention may not even arise. In other words, the need for a regulatory response would not become apparent if non-neutral practices stifle the potential of the application being discriminated against.

What follows in this article, therefore, are some alternative conclusions and recommendations about the ways in which interpretation, application and enforcement of existing principles of network neutrality would enhance cultural participation online.

VI. CONCLUSIONS AND RECOMMENDATIONS

Public awareness of the network neutrality issue seems to be building. In 2007 a poll suggested that barely one third of Canadians were familiar with the term, though about three quarters apparently believed in the principle that the federal government should protect Canadians' ability to access the internet and its content without interference from ISPs (CNWGroup 2007). But by May 2008 the issue had gained enough attention to attract hundreds of demonstrators to Parliament Hill for a rally in support of network neutrality. By November 2008 1300 individual citizens added to the thousands of pages of submissions to the CRTC from industry and public interest groups. Interest in the still ongoing CRTC proceedings is even greater.

What is missing from the discussion, however, is a conscious appreciation of how network neutrality law, policy and practice might impact not just the telecommunications industry, technology companies, and Internet users but also the more amorphous notion of a Canadian online culture. That issue is more difficult to articulate because Canadian culture is not created, distributed or consumed by any particular industry, company, or individual. It is the aggregate result of all Canadians' online engagement with each other. Culture is also a dynamic concept. Because of its fluidity, the cultural impact of network neutrality regulations or the lack thereof may not be immediately apparent. But that doesn't mean it isn't important.

Sometimes arguments about network neutrality, for example in submissions to the CRTC in the context of its previous and ongoing hearings, are too technical. Obviously I would never suggest – nobody would – that an intelligent policy debate can take place without an accurate appreciation of the technological details regarding Internet infrastructure. But Crawford (2007, 69) explains: "[The internet] is much more than wires and cables; instead it is a complex environment in which the actions of a billion autonomous human beings are constantly creating persistent, nonlinear forms of order and creativity."

In all respects, much of the network neutrality debate seems to be cast in economic terms, with advocates on either side trying to establish whether openness or deregulation will be most effective for competition and innovation (Wu 2004; Yoo 2005; Wu and Yoo 2007). Law and economics oriented literature on network neutrality – which is actually most of the literature on network neutrality, in North America at least – is rich and crucially important (Baumol, et al. 2007, Economides 2007; Economides and Tåg 2007; Frischmann and van Schewick 2007; Hahn and Litan 2006; Litan and Singer 2007; Owen 2007; Sidak 2006; Spulber and Yoo forthcoming; van Schewick 2007; Yoo 2007; Yoo 2006; Yoo 2005), but it does not present a complete picture of the underlying social choices policymakers face. Game theory modeling (Cheng, Bandyopadhyay and Guo 2008; Hass 2008, 1616–1617), for example, can only go so far.

More generally, Crawford (2007, 89) is correct when she notes: "current communications-law discussion does not adequately take into account the interactive, user-generated nature of the internet nor the benefits that open access to this resource has generated and will continue to generate for humanity." Maybe by that statement Crawford was simply trying to defend openness within economic debates. Visionary work on rethinking fundamental economics in our networked society has already begun (Benkler 2006), which will surely help in crafting appropriate regulatory responses to issues like network neutrality.

But maybe part of what Crawford meant is that the communications policy debate needs to broaden even more – from a mainly technological and economic discourse about the players driving innovation and market competition, and the corresponding legal regulations, to a more robust socio-cultural debate about the way that people engage each other and what people value about those engagements. If that isn't what she meant, then it's what I'm suggesting. My intention is not to detract from the economic arguments, but to bring in culture as another lens through which to view the network neutrality issue.

This is where the contours of the network neutrality debate in Canada become somewhat distinct from discussions in other jurisdictions. Canadian governments and policymakers have always paid particular attention to cultural matters when crafting regulatory strategies. Part of the reason is Canada's cultural vulnerability to its hegemonic southern neighbour, the United States. In addition to history and geography, Canada is proud of its linguistic and cultural diversity. Justifications for regulating broadcasting and telecommunications in Canada have never been limited to economic and technological considerations; concepts of nation-building and cultural identity have for a long time been prominent in crafting responses to regulatory challenges.

Canadian cultural policy manifests itself in various ways, among the most notable of which are the "Canadian content" requirements regulated by the CRTC pursuant to its authority under the *Broadcasting Act* (1991). The policy objectives of that *Act* are described in subsection 3(1). They include recognition that Canada's broadcasting system provides "a public service essential

to the maintenance and enhancement of national identity and cultural sovereignty" (Broadcasting Act 1991, s.3(1)(b)). As such, it should:

i. serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

ii. encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity ...

iii. ... serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

iv. be readily adaptable to scientific and technological change; (Broadcasting Act 1991, s.3(1)(d))

If you studied the definitions in section 2 of the *Broadcasting Act* for such terms as "broadcasting", "broadcasting undertaking", and "distribution undertaking" you would see that the internet sure seems like a "broadcasting" system, though of course the internet is much more too. Certainly, the Internet would qualify as a "technological change" to which the broadcasting system should be readily adaptable to.

Recognising this reality, the CRTC in early 2009 held hearings and recently decided not to lift an exemption for "new media" from the requirements of the *Broadcasting Act*, which has been in effect since 1999. The repercussions of opening that Pandora's Box could have been wide and deep.

The commission has already acknowledged the cross-relevance of the network neutrality and new media exemptions issues. Linking the debate about network neutrality with Canadian cultural policy, not just telecommunications policy, does complicate the issue. Mandated network neutrality is difficult or maybe impossible to reconcile with some other proposals advanced to promote Canadian culture via the internet, including for example the suggestion that the CRTC should apply minimum Canadian content requirements to online producers and distributors. Minimum "Cancon" requirements are certainly not neutral.

But that does not mean that the objectives of network neutrality and the promotion of Canadian cultural content are irreconcilable; they are not. Effectively addressing network neutrality may be an effective, alternative means to promote online Canadian content. If that is to happen, the next step in Canada is for the CRTC to accept that its mandate cannot be segregated into silos for the purposes of administering the *Telecommunications Act* and the *Broadcasting Act*. That means the CRTC ought to allow the cultural purposes of the broadcasting system to crosspollinate with the economic objectives of the telecommunications system. I realise that this is a controversial idea, which critics would say is not just undesirable but illegal for various technical reasons. (Specifically, it is arguable that the CRTC's jurisdiction is narrowly circumscribed by reference only to the particular statute under which a proceeding is brought, and not by the aggregate of legislative and policy instruments empowering the commission.) I believe, however,

that if policymakers have the will, there are legal tools and policy levers with which to achieve this vision.

One prescriptive approach is to treat the Internet as a broadcasting system and regulate it just like radio and television. For the sake of innovation and competitiveness and for so many more reasons beyond the scope of this paper, that would be a bad idea. A better route – a light-handed regulatory response – would be to more fully consider telecommunication policy's role in regulating creativity and culture (Shaffer von Houweling 2005; Geist 2008c). Section 7 of the *Telecommunications Act* already spells out the fact that "telecommunications performs an essential role in the maintenance of Canada's identity." Given the dramatic technological convergence, economic developments and social changes we have witnessed recently, it is no stretch at all for the CRTC to begin connecting this telecommunications objective to the principles underpinning the broadcasting system and more generally to the commission's overall mandate.

To summarise why network neutrality is as much a cultural policy matter as it is a technological or economic issue, I want to end this paper where it began – with a discussion about programming provided by CBC. Unlike "The Great White North" of the 1980s, the 21st century CBC could promote Canadian culture online almost as much as off. A good example is the CBC series, "Canada's Next Great Prime Minister," a search for young, talented Canadians capable of leading the country, hosted most recently by Canadian Alex Trebek. The series is notable for its online engagement of Canadians: auditions are conducted via YouTube, participants maintain online profile pages, and fans follow the Facebook group. But the CBC's most significant online move was to distribute its prime-time 2008 finale via the peer-to-peer file-sharing protocol Bit-Torrent.

Doing so was in part a response by the CBC to its statutory obligation under the Broadcasting Act (1991, s.3(m)(vii)) to make its programming "available throughout Canada by the most appropriate and efficient means." Canadian telecommunications companies whose network management practices slow down peer-to-peer traffic, however, hindered the CBC's efforts. Consequently, Canadians were wondering why they were unable to swiftly download the content (Geist 2008b). Similar links exist between network neutrality and the path-breaking BBC's even more ambitious initiatives in respect of enabling users to generate content online (Ganley and Allgrove 2006, 461–462). Canadian policymakers should better appreciate the intersections between network neutrality and cultural policy.

ENDNOTES

- blip.tv is a videoblogging and podcasting service whereby videobloggers can create and distribute self-made serialised content or shows.
- Note that membership in CAIP changed significantly during the period between the litigation with the copyright collective society SOCAN that ended at the Supreme Court in 2004 and the filing of the CRTC application in 2008. Specifically, during that time, the industry association ceased to represent several major ISPs including Bell.
- A list and copies of all documents filed in respect of this application are available via the CRTC's website, http://www.crtc.gc.ca/PartVII/eng/2008/8622/c51_200805153.htm.
- http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3524372&file=4.

- http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3535409&file=4.
- http://www.cbc.ca/nextprimeminister.

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