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CANADIAN CONTENT REGULATIONS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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This article examines the Canadian content regulations for television in the context of s. 2(b) of the Charter of Rights and Freedoms. It argues that on the basis of s. 1, these regulations may be demonstrably justified.

Cet article examine les réglements concernent le contenu canadien de la télévision canadienne dans le contexte de la s. 2(b) de la Charte Canadienne des Droits et Libertés. Il démontre que les réglements sont justifiable à la lumière de la s. 1.

On 17 April 1982 Queen Elizabeth II proclaimed the **Constitution Act 1982** the supreme law of Canada. Its coming into force was heralded by many as the long-awaited and dramatic severance of the colonial umbilical cord with Britain. Others, however, were more circumspect, for included in the act was the **Canadian Charter of Rights and Freedoms**. This novel element in Canada's constitution led to much speculation about its effects on Canadian jurisprudence and on the nation as a whole.

This article investigates the possible implications of the Charter in one significant sphere of government regulation. More specifically: do the Canadian television content regulations, as prescribed by the Canadian Radio-television and telecommunications Commission under the authority granted it by the Parliament of Canada in the **Broadcasting Act 1968**, violate s.2(b) of the Charter, the guarantee of

> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication?

Second, if they do, can these regulations be justified by invoking s.1?

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Although the Canadian content regulations do not prescribe the intellectual matter, opinions, attitudes or subjects to be included in television programming they do direct broadcasters to allot a certain percentage of broadcast time to programming that is "Canadian" in nature. Traditionally this has been determined by the general theme of the programme or the nationality of the on- and off-camera talent involved in the production.

Given that the regulations attempt to control television programming, particularly in prime-time, undoubtedly a prima facie case exists to find these content regulations in violation of s.2(b). Any control of the media may be a restriction of the freedom guaranteed in the Charter. However, this article argues that a substantial case can be formulated to limit the above freedom by answering four questions.

1. Do the Canadian content regulations violate the Constitution Act with regard to jurisdictional concerns?

2. Do the Canadian content regulations violate the freedom of expression guaranteed in the Charter?

3. Can the limits prescribed by the regulations be demonstrably justified?

4. Do other free and democratic societies allow similar limitations?

DO CANADIAN CONTENT REGULATIONS VIOLATE THE CONSTITUTION ACT?

The jurisdictional question regarding the right to control broadcasting was decided by the courts two decades before television services were a reality in Canada. Both levels of government were anxious to control broadcasting and the dispute finally found its way to the Supreme Court of Canada by means of a reference question, In the Matter of a Reference As to the Jurisdiction of Parliament to Regulate and Control Radio Communications (1931) S.C.R. 541.[1]

The opinion of the Court was delivered by Chief Justice Anglin. Recognizing that hertzian waves were unknown to the framers of the British North American Act, he acknowledged that in the Court's interpretation:

> every effort should be made to find in the B.N.A. Act some head of legislative jurisdiction capable of including the subject matter of this reference. **(1931, S.C.R. 541, 546)**

The Court was of the opinion that several jurisdictional headings[2] were broad enough to include radio communication and Chief Justice Anglin concluded:

> we find a sound basis for holding that radio communication is subject to the exclusive jurisdiction of the Dominion Parliament. (1931 S.C.R. 541, 547)

The governments of Quebec, Ontario, Manitoba and New Brunswick appealed the decision to the Judicial Committee of the Privy Council in Great Britain. In Re: **Regulation and Control of Radio Communication, A.G. Que. v. A.G. Canada, et al. (1932) 2 D.L.R. 81, the Supreme Court** decision was affirmed.

It was September, 1952, before the first two television broadcast undertakings were established in Canada, but by 1954, 75% of the population had access to Canadian television via twenty-four stations. By this time broadcasting, and especially television, was recognized to be pervasive and powerful. Broadcasting had already been the subject of two Royal Commissions and was destined to become the topic of many more because of what Eugene Hallman identifies as the paradox confronting Canadian broadcasting.

> The size of the country, the small, dispersed population, the two official languages of her people, make radio and television coverage difficult and costly challenge. But the isolation of time and space and language are the very factors which give broadcasting a national purpose. (Hallman, 1977, xi)

After the courts' affirmation of federal authority with respect to broadcasting, the Canadian Broadcasting Corporation (CBC-RC) was created. The CBC was responsible for the operation of all public broadcasting undertakings. Moreover, for over twenty years, it also regulated the private sector. This dual role, "cop and competitor", ended with the passage of the **Broadcasting Act 1958** which created the Board of Broadcast Governors (BBG) as an independent regulatory agency to regulate and supervise the development of all broadcasting in Canada. In its attempt to protect the national airwaves, the Board of Broadcast Governors initiated Canadian content requirements for television **in what has been identified as the "embryonic phase of regulation** of Canadian electronic media" (Mazer, 1980, 101).

The Canadian Radio-Television Commission[3] (CRTC) replaced the Board of Broadcast Governors as the federal regulatory authority following the enactment of the Broadcasting Act 1968. Its mandate is broad -- to attempt to ensure that the airwaves, which are public property, are utilized in the manner described in the Broadcast Policy for Canada as found in s.3 of the Broadcasting Act 1968. To fulfill its mandate the CRTC also turned to quota requirements. It tightened up the definition of Canadian content, increased the quota for prime-time viewing, introduced radio content quotas, and regulated cable television as well. Most recently, the CRTC has put more emphasis on the quality of the programming to be produced and aired on Canadian stations. The motive is not to force Canadians to give up American programming, but to provide them with a high quality Canadian alternative. As Brian Mazer argues:

> If Canadians can be offered the opportunity of quality programming which is as entertaining or stimulating as foreign material, but which is more relevant to their way of life, it will only be a matter of time, until the "if it's Canadian, it must be bad" syndrome will disappear. (Mazer, 1980, 120 - 121)

The question of whether federal jurisdiction over broadcasting includes control of the content of broadcasting has also been answered by the courts. In Re C.F.R.D. and Attorney-General of Canada et al. (1973) 38 D.L.R. (3d) 335, Justice Kelly affirmed the federal government's authority to regulate programme content. Chief Justice Laskin delivered the opinion of the Supreme Court in **Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al.** (1977) 81 D.L.R. 609. The Court concluded that:

> Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise. (1977, 81 D.L.R. 609, 623)

It appears, therefore, that the decision handed down in the Radio Reference case has subsequently been interpreted to include federal government authority to regulate all facets of the broadcasting industry, including content. Parliament, through its regulatory agency, has utilized this power in an attempt to create and maintain a national broadcasting system that would "contribute to the development of national unity and provide for a continuing expression of Canadian identity" [Broadcasting Act 1968, s.3(g)(iv)]. The Canadian content regulations are merely one aspect of the means accepted to achieve that end.

DO CANADIAN CONTENT REGULATIONS VIOLATE THE CHARTER?

Although the regulations have not been challenged formally on the basis of the Charter, the decisions in two earlier cases may provide insight into the courts' possible interpretation of the question. The first case questioned the validity of government authority to control the media under The Canadian Bill of Rights. The plaintiff argued that both his right to equality before the law and his freedom of speech were violated by federal regulations. The Court rejected his claim and took the opportunity to discuss the nature of Canadian liberal democracy.

> While one does not wish to expatiate on the value Canadians place on the democratic system of Government they enjoy and which they have jealously guarded against influences which might detract from the ability of each citizen freely to express his views on matters of public concern, if the cultural, political, social and economic fabric of Canada is to be safeguarded, enriched and strengthened -- it is a matter of some concern that any erosion of our political independence be resisted. (1973, 38 D.L.R. (3d) 335, 342)

In the second case, the CTV Network appealed a CRTC requirement that it produce a specified number of hours of original new Canadian drama each season. In **C.T.V. Television Network Ltd. v. Canadian Radio-television and Telecommunications Commission et al.** (1981) 2 F.C. 248, the appeal was upheld because the applicant was not informed of the condition of licence prior to its imposition. However, with respect to whether the condition interfered with the applicant's right to freedom of expression as declared in s.3(c) of the Broadcasting Act **1968**, the Court stated:

> There is nothing whatever in the condition which interferes with freedom of expression...concerned as it is with the presentation of Canadian drama and containing no restrictions on freedom of expression in such drama. (1981, 2 F.C. 248, 261)

During the Supreme Court's review of that decision, Chief Justice Laskin concurred with the Federal Court of Appeal:

> no restrictions were imposed on freedom of expression in the drama requirements of the condition. (1981 41 N.R. 271, 281)

In both of these cases the courts recognized that the regulations do not specify the intellectual nature of the content to be carried. Furthermore, it should be noted that the CRTC is prohibited from prior censorship of programme content as a means of achieving its goals.

Although it is permitted to apply sanctions against an errant broadcaster after the fact, these situations usually are handled through the public hearing process which allows for many individuals and organizations to present their views. The procedure thereby seeks to prevent the imposition of tyrannical value judgements by Parliament or the CRTC.

Reliance on the rule of stare decisis may lead jurists to these two cases for guidance in their interpretation of freedom of expression in future cases. The restraint observed by the Court in its attempt to prevent the "erosion of our political independence" (1973 3 D.L.R. (3d) 335, 342) is likely to be maintained.

A preliminary indication of a potential legal dispute which may lead to a challenge of CRTC regulations under the Charter of Rights and Freedoms, is currently being undertaken in Quebec. The CRTC prohibits the use of well known personalities to advertise beer. However, Carling O'Keefe breweries Ltd. has engaged Bernie "Boom Boom" Geoffrion, a former N.H.L. hockey star and "Mad Dog" Vachon, a Quebec wrestler, to endorse O'Keefe products in its television commercials. The CRTC has ordered O'Keefe to cease using these advertisements as of 1 January 1986. In the preliminary media coverage, communication lawyer, Francis Fox, has argued that his clients are being denied the right to earn extra remuneration and, therefore, are being denied equal opportunity by the CRTC's rules. Although this case is not directly related to the Canadian content regulations, it illustrates that a range of traditional CRTC regulatory activity may be challenged under the Charter of Rights and Freedoms.

CAN THE LIMITS PRESCRIBED BE DEMONSTRABLY JUSTIFIED?

The courts, Parliament, the CRTC and a multitude of scholars warn of the impending loss of national identity and sovereignty should Canada relinquish control of broadcasting. Successive governments have recognized not only the power and influence of broadcasting as a positive contributor to the national consciousness but also its potential for subverting national goals. As Don Jamieson warned:

> Broadcasting calls into question the whole concept of traditional nationalism. It respects no geographic boundaries and, through use of new space satellites, its reach is global. (Jamieson, 1966, 15)

The Canadian airwaves have traditionally been considered public property and broadcast licence holders have been regarded as "public trustees" of these valuable resources. Their primary responsibility, therefore, is the creation and maintenance of a Canadian broadcasting system that reflects the values and ideals expressed in the Broadcast-

ing Policy for Canada. This policy expresses a national desire for a broadcasting system that is Canadian in all respects. Moreover:

> Central to this national ideal has been the enactment and enforcement of a programming regulation which has demanded a particular kind of creative behaviour by Canadian broadcasters. (Romanow, 1976, 26)

When mandated to review Canadian broadcasting in 1957, the Royal Commission on Broadcasting devoted much attention to programming and concluded:

> free enterprise has failed to do as much as it could in original program production and the development of Canadian talent, not because of a lack of freedom, but because of a lack of enterprise. (Fowler Commission, 1957, 153)

History has shown that the major obstacle to the development of a viable Canadian television programme production industry is, ironically, the success of and ready access to the competing American industry.

> High cost, professionally produced, lavishly publicized American programmes attract large viewing audiences in Canada. The challenge for Canadian networks, with far less money and smaller resources, is to create programmes and schedules to compete for the Canadian audience. (Hallman, 1977, 27)

The Canadian content regulations were enacted, therefore, to ensure that the images and messages disseminated to the Canadian public "promote a value system of 'things Canadian' rather than of 'things U.S.'" (Litvak and Maule, 1974, 4). Without such regulation it is doubtful that private broadcasters would proceed independently to produce Canadian programming because, as Robert Babe explained:

> From the time of the Aird Commission to the present, Canadian programming has been and continues to be antithetical to the financial interests of the broadcasters, (it costs more and earns less). (Babe, 1975, 259)

In addition, the regulations have been criticized as vehicles for Canadian cultural nationalism. In response to this charge the Applebaum-Hebert Committee, which reviewed federal cultural policies, argued:

> Whether they are a manifestation of nationalism or not, content regulations cannot be identified with other nationalistic policies....Television programmes are a completely different type of product. No two are alike. If they are good they reflect something vital, insightful and dramatic about their subject....(I)n the realm of culture, Canada

> cannot import Canadian products....If Canadians do not produce their own writing, music, theatre, films and television programs, no one else will. (Federal Cultural Review Commission, 1982, 288)

Canadian content regulations, therefore, seek to promote the development and dissemination of a distinctive Canadian identity. This leads to the theoretical argument that the national government and others use to defend intervention in the electronic media. The belief predominates that society's rights or interests and the survival of the nation are more important than the freedom of the individual broadcasters. The Massey Commission recognized that if broadcasting was to serve the needs of Canadians it had to be under national control and the Royal Commission on Broadcasting reaffirmed the need for Canadian programming.

> **As a nation,** we cannot accept, in these powerful and pervasive media, the natural and complete flow of another nation's culture without danger to our national identity. ...Assuming, as we must that their broadcasting system is satisfactory and suitable for Americans, this is no basis for thinking it is desirable for Canadians. (Fowler Commission, 1957, 9)

George Nowlan, Minister of Revenue, reiterated the same concerns in 1958 during debate on the proposed broadcasting bill.

> Canadian strength and Canadian unity ultimately depend upon Canada's maintenance of her autonomy and spiritual independence on the North American continent. Throughout our history we have persistently followed national policies devised to strengthen our unity....A national broadcasting system. ...(with) a steady flow of live programs along the east-west lifeline will express Canadian ideas and ideals, employ Canadian talent, **and help unite our people from sea to sea.** (House of Commons, Debates, 16 August 1958, 3651 - 3652)

The struggle to maintain a distinctive Canadian broadcast industry is not over. When the CRTC announced its new content regulations on 31 January 1983, it affirmed the high priority which the Commission attaches to the Canadian content objectives. It also acknowledged the need for immediate action given the emerging broadcast environment.

> Canadian television programming must attract, engage and entertain. It must also inform, educate and enrich our cultural experience. For if Canadians do not use what is one of the world's most extensive and sophisticated communications system to speak to themselves -- if it serves only for the importation of foreign programs -- there is a real and legitimate concern that the country will ultimately lose

> the means of expressing its identity. Developing a strong Canadian program production capability is no longer a matter of desirability but of necessity. (CRTC, 1983, 3)

DO OTHER FREE AND DEMOCRATIC SOCIETIES ALLOW SIMILAR LIMITATIONS?

The previous section attempted to demonstrate that "A national broadcasting system is central to a distinctive Canadian national outlook" (McPhail, 1976, 1). However, this justification may not be sufficient. The last phrase of the limitations clause imposes the need to investigate the policies of other free and democratic societies to determine the extent to which similar limitations are permitted.

A brief examination of the policies of other nations reveals that most countries have regulations regarding the content of broadcasting. These restrictions have been accepted with the understanding that no freedom is absolute.

It has generally been assumed that the available broadcast spectrum is "an invisible and vital resource" (Read, 1977, 713). Moreover, the nature of the electronic media is such that access is denied or limited to "all outsiders, rulers and ruled alike" (Gurevitch and Elliot, 1973, 510). Concern for access has caused many analysts to interpret the demands of broadcasters for freedom of the media as a demand for freedom for those who own or control the media. Therefore, all countries have found it necessary to implement some form of government regulation over broadcasting (Beke, 1970, 104).

But Canada faces problems which are somewhat unique in terms of cultural sovereignty. Described as "a mouse sleeping next to an elephant," the consequences of:

> A promiscuous open-skies policy would, given the nature of our case, prevent the very things we seek; a blend of programming that avoids being one-sided, which includes that which is universal and cosmopolitan, as well as those things which reflect our national concerns and experiences, including the realities of our regions, sub-regions, and diverse minorities. (C.C.A., 1981, 82)

CONCLUSION

Admittedly, the Canadian content regulations limit the freedom guaranteed in s.2(b) of the Canadian Charter of Rights and Freedoms. However, earlier discussion acknowledged that no liberal democracy perceives those freedoms to be absolute and all governments and judiciaries have found justification for restricting them when they infringe on the rights or freedoms of others.

The major thrust behind the activities of Parliament and the CRTC is to encourage and maintain a truly Canadian broadcasting system which reflects the national identity. The Americanization of Canadian culture has long been acknowledged as a real threat.

> There are a significant number of Canadians who are disturbed about the way in which the country is maturing....Not only is a sizeable portion of the Canadian economy under American influence, but our radio, television, movies, and popular magazines reflect the predominance of American culture. If a national...ideology is not firm, the mass culture and economic resources imported from abroad will tend to make a cultural and economic colony of Canada. (Commission on the Aims and Objectives, 1968, 23, 30)

Regulators are acutely aware of the ability of the electronic media to socialize -- "It is no exaggeration to say that broadcasting continually colours and even shapes the way we see the world around us" (Federal Cultural Review Commission, 1982, 269). They are also cognizant of the limited means of access to these media. Radio and television, therefore, traditionally have been more tightly controlled than other means of communication. The Canadian content quotas as currently enacted are merely a regulatory device utilized by the CRTC to ensure that the Canadian broadcasting system reflects Canadian interests and serves as a vehicle for the expression of Canadian ideas. The CRTC is not attempting to force Canadians to watch Canadian produced programming: nor is it prohibiting the reception of American signals or programmes. It is simply developing a policy which aims to ensure an alternative -- high quality, attractive Canadian programming.

This article argues, therefore, that the restrictions imposed on the electronic media's freedom by Canadian content regulations may be justified in favour of their continuation. The real issue here is not freedom of expression but rather freedom which allows Canadians to create and preserve a distinctive broadcasting system through which they encourage and maintain the expression of their own national identity.

FOOTNOTES

[1]Television broadcasting was included in the reference question despite the fact that it did not exist at that time in Canada. See: (1931) S.C.R. 541, 542.

[2]Sections of the British North American Act considered were:

s. 91 5. Postal Service.
7. Militia, Military, and Naval Service, and Defence
8. Beacons, Buoys, lighthouses, and Sable Island.
10. Navigation and Shipping ....
20. Such Classes of Subjects as are Expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to Legislatures of the Provinces.

s. 92 (10) a
Lines of Steam or other Ships, Railways, Canals, Telegraphs, and Other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;

[3]The Canadian Radio-Television Commission became the Canadian Radio-television and Telecommunications Commission in 1976.

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