THE REGULATION OF BROADCASTING IN CANADA AND THE UNITED STATES: STRAWS IN THE WIND

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Une étude comparative de la règlementation américaine et canadienne en matière de radiodiffusion. On prête une attention particulière aux principes constitutionnels de même qu’aux implications des nouvelles technologies.

Introduction

In an era of deregulation, which may affect the regulation of broadcasting in Canada, it is appropriate to consider whether in any respects the regulation of broadcasting may itself be impugned by the Canadian Charter of Rights and Freedoms. The Charter became part of the Constitution of Canada on April 17, 1982. Of particular relevance to the regulation of broadcasting is section 2(b), which reads as follows:

2. Everyone has the following fundamental freedoms:...........
   (b) freedom of thought, belief, opinion and expression
       including freedom of the press and other media of
       communication.

If any provisions of the Broadcasting Act, or of regulations under the Act, are inconsistent with section 2(b), it is then necessary to turn to section 52(c) of the Constitution Act, 1982, which provides that the Constitution of Canada (including the Charter) is "the supreme law of Canada" and that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect (Constitution Act, 1982, sec. 52 (1)).

In the course of considering the potential impact of the guarantee contained in section 2(b), it will be necessary to refer to American constitutional law, and in particular the First Amendment guarantee of "freedom of speech". This is not because the interpretation of the American constitution is conclusive on what the interpretation of a similar guarantee in the Canadian Charter should be. Indeed, it is clear from judgments of the Supreme Court of Canada that structural and contextual differences

between the Charter and the American Constitution require caution and restraint by
Canadian judges when referring to decisions of American courts interpreting their
Constitution. It is nevertheless also true that judgments of the Supreme Court of
Canada interpreting rights and freedoms guaranteed by the Charter have not hesitated
to refer to American doctrines, sometimes relying upon them and at other times
distinguishing them. Among the questions to be asked are some that are politically
sensitive and jeopardise the rationales of broadcast regulations that many Canadians
hold dear. To focus the light of the Charter upon them is not to advocate abandonment
of such regulation. Students of communications policy, no less than lawyers and
judges, should be capable of dispassionate analysis of the implications of our recent
constitutional reform.

Section 2(b) of The Charter of Rights and Freedoms

Before proceeding with the analysis of the effect of the Charter, it is necessary to
refer briefly to some aspects of the origins and history of broadcast regulation in both
Canada and the United States.

In the United States the federal regulatory agency since 1934 has been the Federal
Communications Commission (FCC). In Canada, from 1936 to 1958 the Board of
Governors of the Canadian Broadcasting Corporation regulated not only the radio and
television stations which were owned and operated by it, but also privately-owned
stations whether or not they were affiliated with the CBC networks. Since 1958 there
has been a regulatory agency independent of the CBC, that regulates all broadcasters;
since 1968 the agency has been called either the Canadian Radio and Television
Commission or (since 1976) the Canadian Radio-television and Telecommunications
Commission (CRTC).

Both countries became parties to the International Radio Telegraph Convention,
1927. This treaty assigned frequencies among the signatory states. The obligations
assumed by parties to this treaty necessitated regulation by statute. The governments
of both countries, faced with chaos resulting from unregulated use of radio frequencies,
sought to devise a system of regulation that would prevent signal interference among
broadcaster's. It was then generally believed that radio frequencies were a scarce
resource. As we shall see, it has been argued recently that this was a misconception.

There are two distinctive features of the Canadian broadcasting system: first, the
existence of a strong publicly-owned component in Canadian broadcasting, and,
second, regulations applicable to both public and private broadcasters, that require a
specified minimum proportion of Canadian programming content. These
characteristics do not reflect a lesser Canadian commitment to the liberal economic
tradition or to a capitalist form of mixed economy than is the case in the United States.
Rather, these features are a product of Canadian governmental policies from the 1930s
onward, which have had as their goal the use of broadcasting as an instrument of
national unity and national identity. The objective has been to prevent Canada from
becoming culturally and ultimately politically dependent upon the United States. Throughout the decades since the 1930s there have been concerns for political sovereignty, and fears that market forces, if left unregulated, would bring about the complete domination of Canadian communications by American enterprise. A Canadian historian has explained the effect of these concerns and fears as follows:

This national consideration, this desire for political sovereignty, leads to policies and actions that are influenced by other factors: geographic, economic, cultural, and demographic, that in turn lend distinctiveness to the legislation, the types of regulation, and the mixture of public and private ownership so characteristic of the Canadian system (Peers, 1983: 29).

The language of section 2(b) of the Canadian Charter is broader than that of the American First Amendment, which states: "Congress shall make no laws ... abridging the freedom of speech, or of the press ...". Despite the differences between the wording of the United States' First Amendment and that of section 2(b) of the Canadian Charter, some assistance in the interpretation of the Charter's provision can likely be gained from American cases. For example, the tie between freedom of speech and the "marketplace of ideas" was reflected in a judgment of Justice Oliver Wendell Holmes Jr., in 1919. He argued that, rather than prohibiting even seditious pamphleteering, the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market ...(Abrams v. United States, 250 U.S., 1919). This, then, is the "marketplace of ideas" approach.

A second theory is that "freedom of communication is also available in a democratic society because such a society is based on self-governance on an informed citizenry that will intelligently elect its representatives" (Franklin, 1981: 19-20). This point of view is incorporated in Article 19 of the International Covenant on Civil and Political Rights, which provides an important historical precedent for section 2(b) of the Charter). It reads, in part, as follows:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

This theory was reflected in a 1988 decision of the Alberta Court of Appeal in which Chief Justice Laycraft stated, in regard to

the philosophic basis for the general right of free speech: In modern times, the accepted basis is that freedom of expression makes possible the social co-operation between individuals by which our democratic society exists
(Regina v. Reid, Jan. 14, 1988). He adopted, the conclusion of a Canadian commentator who said:

Unity and social solidarity only exist, in any real sense, when individuals are free to make judgments and direct their lives. If communication were suppressed, the result would be a population which was inhibited in its ability to reflect upon important questions of value and a society which was closed and rigid rather than free and democratic' (Moon, 1985: 356-357).

Since the coming into force of the Canadian Charter of Rights and Freedoms in 1982, just one judicial decision has considered the potential application of section 2(b) of the Charter to the Broadcasting Act. That case, a decision of the Federal Court of Appeal delivered by Chief Justice Thurlow, was New Brunswick Broadcasting Co. Ltd. v. Canadian Radio-television and Telecommunications Commission (Fed. Court of Appeal, (1984) 13 D.L.R. (4th) 77; (1984) 2 F.C. 410). The court decided that a general direction given to the CRTC by Order in Council pursuant to a provision in the Broadcasting Act restricted the authority of the CRTC to issue or renew a broadcasting licence to persons who owned or controlled newspapers circulating in the area served by the broadcaster. The court held that the direction did not violate section 2(b) of the Charter. Consequently the CRTC's renewal of a broadcasting licence to a company that fell within the direction, for a shorter period than would normally have been the case, was held to be valid. The decision itself may be correct; this is not the place to consider it. It is the reasons that were given that are of interest beyond the specific facts of the case.

The reasoning of the decision turned on a provision in the Broadcasting Act which declares that "broadcasting undertakings in Canada make use of radio frequencies that are public property ..." The Court held that denial of a broadcasting licence does not violate "freedom of expression", for, the court said, section 2(b) gives no right to use someone else's land or platform to make a speech, nor to use someone else's printing press to publish his ideas, nor to enter and use a public building for such purposes, nor to use radio frequencies which are public property. Consequently an applicant for a broadcasting licence does not have a right to such a licence, and the rest of the public does not have a right to a broadcasting service to be provided by the applicant. Moreover, Chief Justice Thurlow said, the licensee's "freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking"; the licensee "would have the same freedom as anyone else to air its information by purchasing time on a licensed station."

The New Brunswick Broadcasting judgment assumes, without any discussion of the purpose of section 2(b) of the Charter, that the Charter does not reach into public buildings or public facilities of any kind. It assumes further that when Parliament declares property to be public which previously was not, the reach of the Charter can thereby be impeded. Doubts may be entertained as to the validity of both assumptions,
partly in the light of American decisions which have extended First Amendment protection to a number of public and quasi-public forums, and partly with the benefit of a more recent Canadian decision as to freedom of expression in a public airport. In that case, also a decision of the Federal Court of Appeal, (Committee for the Commonwealth of Canada v. The Queen, Jan 30, 1987) the majority, in holding that "freedom of expression" protected the right of political pamphleteers to propagandize at the Dorval Airport, made no mention of the New Brunswick Broadcasting reasoning. If the majority judges had considered it to be correct, as did two dissenting judges, they would surely have said so. The reasoning in the New Brunswick Broadcasting case, in so far as it is based on the "property" issue, is therefore of doubtful status even in the Federal Court of Appeal.

It may moreover be argued that the approach taken in the decision in the New Brunswick Broadcasting case, in effect treating all publicly owned facilities as being completely beyond the compass of section 2(b) of the Charter, does not reflect the kind of large, liberal or generous interpretation of section 2(b) that the Supreme Court of Canada has said should mark the courts' approach to the Charter (Hunter v. Southam Inc.(1984) 2 S.C.R.145). The interpretation given section 2(b) in the New Brunswick Broadcasting case, if applied beyond broadcasting, would leave the governance of freedom of expression in a wide variety of places -- for example, government office buildings, public parks, public streets and highways -- entirely under the control of the government without constitutional limitation.

What of the point taken by Chief Justice Thurlow, that a would-be broadcasting licensee denied a licence can purchase broadcast time from a successful licensee? If broadcasting frequencies were unlimited, as the ability to produce a newspaper is thought to be in the sense that anyone with sufficient capital can physically do so, would such an argument be considered seriously? Imagine such reasoning being applied to the statutory licensing of newspapers. It is hard to believe that, if a law permitted the refusal of a licence to print a newspaper because the proprietor operated a broadcasting station in the same area, any weight would be given to a justification on the basis that the proprietor could purchase space in a newspaper that is licensed. What the International Covenant describes as the "freedom to seek, receive and impart information", applied to the Charter as meaning that section 2(b) "protects both speaker and listener" (Regina v. Reid, Jan 14, 1988 (Alberta Court of Appeal)) is arguably offended by a licensing system in either case. To recognize this is not to advocate a conclusion that the system of licensing of broadcasting stations is invalid on constitutional grounds. We merely advance this point: even if "freedom of opinion" and "freedom of expression" contain inherent limits to be found in "the historical origins of the concepts enshrined" (Regina v. Big M Drug Mart Ltd.(1985) S.C.R. 295, p. 344 (Supreme Court of Canada)) in section 2(b) (such as rules of law prohibiting mischievous or defamatory utterances (Regina v. Reid supra, 1988), it is quite arguable that a system of licensing offends the constitutional guarantee. If that were held to be so, any and all legislative enactments designed to further public policies
in regard to broadcasting in Canada would not necessarily be constitutionally invalid. For, assuming that some aspect of the statutory licensing scheme violated section 2(b), it might still be salvaged if it satisfied the standards exacted by section 1 of the Charter as it has been interpreted by the Supreme Court of Canada in *Regina v. Oakes.*((1986), 1 S.C.R. 103).

**Some Implications of Section 2(b) of the Canadian Charter of Rights and Freedoms for the Regulation of Broadcasting in Canada**

The foundation upon which any attack on the statutory regulation of radio and television broadcasting would have to be based is the "freedom of expression" guaranteed by section 2(b) of the Charter, which has already been quoted in full. The discussion which follows assumes, contrary to the *New Brunswick Broadcasting* case, that certain aspects of the Broadcasting Act or regulations made under it violate section 2(b). If the Act in any way violates section 2(b) regulation could only be sustained by the provisions of section 1 of the Charter. Section 1 has no equivalent in the American Constitution. In the United States, limits to rights and freedoms that are found in the *Bill of Rights* have been created and defined by judicial decisions. In Canada, on the other hand, section 1 of the Charter provides the exclusive criteria for the justification of limits on rights and freedoms that are guaranteed by the Charter. It reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In *Oakes,* the Supreme Court authoritatively laid down the following propositions to govern the interpretation of section 1: Two "central criteria" must be satisfied to establish that a limit is protected by section 1. They refer to the objective of the limit, and to the means chosen to attain that objective. As for the objective, it

is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

As for the means chosen to attain the objective, it must be shown

that they are reasonable and demonstrably justified. This involves a form of proportionality test'

of which there are three components:

(i) First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.
(ii) Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... 

(iii) Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.

In support of the system of regulation established by the Broadcasting Act, if it were held that the system itself infringes section 2(b) "freedom of expression", the government would likely have little difficulty in persuading a court to agree. A major objective of this statute - the avoidance of technological chaos. After all the statute relates to what in Oakes were described as "concerns that are pressing and substantial in a free and democratic society". In the absence of such a system of regulation, the right of listeners and viewers to have the benefit of the "marketplace of ideas" would be impaired. Moreover, without such a licensing system, Canada would be unable to comply with its international obligations. Assuming that the very system of licensing meets the Oakes test, the technical aspect of the regulatory system would then have to meet the three-part "proportionality test" which Oakes imposes when the "means chosen" to attain the objective are assessed under section 1. The system of licensing is surely rationally connected to the objective. As to whether the system of licensing, as it is applied by the regulatory agency, impairs freedom of expression "as little as possible", and whether there is "a proportionality" between the effects of the licensing system and the objectives of avoiding domestic and international chaos, these questions merit more attention than space permits.

An important kind of regulation by the CRTC governs the extent to which the licensee's programs must contain "Canadian content". Since 1959 the CRTC and its predecessor have made regulations that have varied in the course of time as to details, but essentially require a certain proportion of broadcast time to be of "Canadian content". The first question is whether such rules, even though they do not restrict the content of any specific programs, nevertheless violate section 2(b). It is well established that, apart from any constitutional imperatives that may arise from the provisions of the Charter, the power given by section 16(b)(ix) of the Broadcasting Act to the CRTC to make regulations "respecting such other matters as it deems necessary for the furtherance of its objectives", gives the Commission power to regulate broadcasting content. The Commission has in fact regulated such content in various ways, some of which will now be discussed. Section 3(d) of the Broadcasting Act "declares" that

the programming provided by the Canadian broadcasting system should be varied and comprehensive ... and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources. (Emphasis added)
Before the adoption of the Charter of Rights, the Supreme Court of Canada considered a condition requiring a licensee to broadcast a certain number of hours of Canadian drama. The court held that the condition did not violate section 3(c) of the Broadcasting Act, which imposes upon licensees "a responsibility for programs they broadcast" but adds that "the right to freedom of expression and the right of persons to receive programs ... is unquestioned". The court was of the view that the condition did not restrict freedom of expression in any particular Canadian drama that would be presented *(CTV Television Network Ltd. v. CRTC (1982) 1 S.C.R. 530; 134 D.L.R. (3d) 193)*. The condition that was imposed in that case is no different in kind from the Canadian content regulations. If these regulations were challenged as being in violation of section 2(b) of the Charter, and indeed if section 3(d) of the Broadcasting Act were challenged on the same ground, such a challenge would be unsuccessful if the reasoning in the pre-Charter case were followed. However, if section 2(b) is given a generous and liberal interpretation, *(Hunter v. Southam Inc. (1984) 2 S.C.R. 145)* a court might hold that it is violated by Canadian content regulations even though no attempt is made to decree that some particular program must be "Canadian" or what point of view is to be expressed in the "Canadian content". If a licensee preferred to broadcast mostly American programs, it could be argued that the Canadian content regulations offend the licensee's freedom of expression protected by section 2(b), and that this is no less so because the regulations increase the ability of Canadian viewers and listeners to receive Canadian programs. The latter would be a consideration under the ensuing section 1 analysis.

Assuming that section 3(d) of the Broadcasting Act or the Canadian content regulations, or both, are in violation of section 2(b) of the Charter, would the statute and regulations as to Canadian content meet the conditions of section 1 of the Charter as interpreted in *Oakes*? The objective of the Act and regulations is to stimulate programming about Canadian affairs and to cause Canadian talent to be used, thus enhancing the consciousness of Canadian listeners and viewers of the heritage and identity of the Canadian nation. These objectives have been regarded as elements of the cornerstone of Canadian broadcasting policy since the 1930s. A nation-state is not likely to survive as a society that is "free" in the sense of being sovereign and independent of other nations, unless it is culturally autonomous and its citizens share a knowledgeable pride in their heritage. Bearing in mind the pervasiveness of American television programs and popular music that threaten continually to swamp English Canada's airwaves, a court would likely conclude that the objectives of the Canadian-content regulations relate to "concerns that are pressing and substantial in a free and democratic society". As to the means chosen to achieve the objective, and whether such regulations satisfy the three-part *Oakes* proportionality test, many broadcasters might argue vigorously that the regulations are overly broad, unduly impair freedom of expression, and lack proportionality. A regulation which prescribes that a certain proportion of broadcast time be devoted to Canadian content is, of course, merely one way of framing a rule that might have been drafted in terms of a maximum of so much time being devoted to foreign content.
Even if section 2(b) were to be limited to the protection of the expression of information and opinion in regard to political matters, it could be argued that the regulation inhibits Canadian television networks from importing American and other foreign programming on news and public affairs, because Canadian broadcasters are more likely to want to use as much of the imported content time for popular entertainment programs that are appealing to advertisers. If such is a consequence of the Canadian content regulations, then there is, in the result, a reduction of the ability of Canadians to benefit from programs about world affairs or even about domestic affairs in other leading democracies. There is an impairment of the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" that is protected by Article 19(2) of the International Covenant on Civil and Political Rights to which Canada is a party. Moreover, the Canadian content rules may be disproportionate in their restrictions on Canadian broadcasters' freedom of expression, in view of the emergence of American direct-to-home satellites capable of delivering American programs direct to Canadian homes, apartment buildings and hotels without being subject, at present, to any Canadian content regulation. The more Canadians tune in to such American satellite programs, the less effective are the Canadian content rules in furthering their objective, while at the same time impairing the freedom of Canadian broadcasters.

The Fairness Doctrine in the United States

Even if the "fairness doctrine" is not directly related to the discussion of the regulation of broadcasting in Canada, it has considerable impact on the regulation of broadcasting in the United States. Its rationale and its defects need to be explored as they may have an indirect effect on the analysis of Canadian issues.

The Supreme Court of the United States, in Miami Herald Publishing Co. v. Tornillo, (418 U.S. 241) held in 1974 that the First Amendment invalidated a state statute which imposed upon a newspaper an obligation to grant a "right of reply" to political candidates whom the newspaper had criticized on their record. Chief Justice Burger said that such a right of access, involving as it does governmental coercion, violates the First Amendment and that the First Amendment does not mandate press responsibility, however desirable the latter might be. Yet, in 1969 in Red Lion Broadcasting Co. v. FCC, (395 U.S. 367) the Supreme Court had upheld FCC regulations known as the "fairness doctrine". These regulations require broadcasting stations to provide discussion of public issues, fair coverage of each side of an issue, and a right of reply by persons attacked on a station. The Court unanimously supported a limited right of access to the broadcasting media. Speaking for the Court, Justice White found that access would "enhance rather than abridge the freedoms of speech and press."

The inconsistency between the Court's approach to the print media and its approach to broadcasting stations is apparent. In the one case the Court rejected
governmental regulation of a private newspaper's content; in the other the Court supported governmental regulation of a broadcasting station's programme content. The difference can be explained, if at all, by Red Lion's emphasis on "the scarcity of broadcast frequencies and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views." The last part of this reasoning, if applied to the Miami Herald case, would have supported a governmentally guaranteed "fair access" to a newspaper's columns, but the reasoning was not applied to produce that result. There is, in consequence, an unresolved inconsistency of principle in these two Supreme Court decisions.

Although in Canada the CRTC has no regulations comparable to the FCC regulations which have been known as the "fairness doctrine", section 3(d) of the Canadian Broadcasting Act itself states:

3. It is hereby declared that...........................

(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

This provision is perhaps unclear as to whether the obligation to "provide reasonable, balanced opportunity for the expression of differing views on matters of public concern" applies only to the system as a whole, or is also to be exacted of a particular broadcaster. If it applies to the latter, there may be a limit on the freedom of expression guaranteed by section 2(b), and if so it would be necessary to scrutinize that limit in the form of a section 1 analysis. In the United States, the fairness doctrine and the very regulation of broadcasting are based on the assumption that there is a spectrum scarcity. Thus, as far as "fairness" is concerned, a person desiring to reply to an attack would not in reality be able to reply unless the broadcaster were required to broadcast it, so that a balanced presentation of issues would be received by listeners and viewers.

The attitude of Americans to deregulation of the broadcasting industry, beginning with the deregulation of cable distribution, is closely related to their continued acceptance or their rejection of the theory of spectrum scarcity. Those persons, like a previous chairman of the FCC, Charles D. Ferris, who continue to espouse the theory of spectrum scarcity (at least in the case of off-air signals), support the fairness doctrine and oppose deregulation of program content (Ferris and Kirkland, 1985-86). Other persons like Mark S. Fowler, Chairman of the FCC from 1981 until the spring of 1987, contend that the theory of spectrum scarcity, if it ever was valid, no longer is. They
argue that the fairness doctrine should be abolished. Effective January 1, 1988 the FCC agreed to this interpretation and supports the deregulation of program content.

Competition to over-the-air broadcasting from new media has led to an awareness that traditional broadcasting is just one of many information delivery systems. Technological plenty is forcing a widespread reconsideration of the role competition can play in broadcasting regulation. And regulators and others have become increasingly aware that regulatory processes have infringed the first amendment rights of broadcasters without a sufficiently compelling constitutional justification (Fowler and Brenner, 1982:209).

He alleged that the "original electromagnetic sin" occurred when "Congress reserved a portion of the spectrum (and, in fact, not a very large portion in terms of the frequencies that could be used for broadcasting) for radio and later television." As for present conditions, he rejected "the belief that a condition of true scarcity prevails in broadcasting" and asserted:

*Scarcity is a relative concept even when applied to the limited spectrum earmarked for broadcast use. Additional channels can be added, without increasing the portion reserved for broadcast, by decreasing the bandwidth of each channel. Technology is an independent variable that makes scarcity a relative concept. At some point, quality becomes so reduced or costs so great that new channels should not be added. But until that point is reached, saturation of the spectrum has not occurred. The continued evolution of spectrum efficiency makes it difficult to say with certainty that saturation of channels will ever be permanent in any market (Fowler and Brenner, 1982:222).*

Fowler’s arguments supporting the abandonment of the theory of spectrum scarcity lack persuasiveness. Considerations of space prevent their detailed analysis here. Briefly, however, it can be argued that it is unrealistic to say that spectrum scarcity is overcome by technological changes which require massive investment by broadcasters and consumers. Furthermore the existence of a scarcity of one means of expression is not diminished by the availability of news and information through other distribution technologies such as videos, newspapers, magazines and other media. Supporters of extensive broadcast regulation in Canada would probably be shocked if a mandatory duty of "fairness" or "balance" were adopted in regard to the print media under a statute governing the press. But the question must, however, be posed as it has been posed in the United States: is there a valid ground of distinction between the two media in terms of the application of the constitutional guarantee of freedom of expression? One possible ground is the doctrine of spectrum scarcity. If that theory is not a sufficient basis for the differentiation, justification might be sought in what has been called the "impact theory", or in the notion that the constitutional guarantee
is designed to further the social goal of "diversity of views". The "impact theory" would argue that broadcasting has a more persuasive impact on the lives of Canadians than do the print media. In the words of an American commentator adapted to the Canadian context:

This rationale correlates to the power theory. The power theory postulates that because the broadcast medium is the source of a majority of [Canada's] news, regulation must ensure that it promote the common good ... To justify broadcast regulation on the basis of the impact theory [the broadcast media must be found to be more persuasive than print media] (Rossini, 1985:841).

However, proof that television is unique in having such a powerful effect, and proof of the extent of the causality or effectiveness of such a force "in the formation of collective attitudes, values and aspirations", are not available in the literature. The acceptance of the notion that broadcast media are more persuasive than print media and thus have a greater impact on Canadian society needs testing. Empirical evidence to satisfy one such test would have to show both that broadcast media have a greater effect on human behaviour and that broadcast audiences have a greater political and social influence than readers of print. Even if empirical evidence were to establish both of those points, there is still a question whether they afford a sufficient rationale for the regulation of broadcast content. The argument in favour of doing so appears to amount to asserting that the persuasiveness of the broadcast media justifies regulation by the state in the public interest. Yet, if that is the sole thrust of the argument, it proves both too much and too little. If the argument is correct, then surely any medium which has a significant impact upon the public, particularly the public's ability to reach informed opinion, should be subject to state regulation, even newspapers and magazines. Conversely, if we recoil from regulating newspaper and magazine content, then it is questionable to regulate the broadcast media solely on the ground that they have a greater impact upon the public and that therefore it is "in the public interest" to regulate the content of the product of those media?

Convergence

Inconsistency in the application of a principle to different modes of communication produces a conundrum when technological advances produce a convergence of two or more modes. For example, if it becomes economically feasible and profitable to "deliver" the daily newspaper's news and advertising contents to the residences of a community by means of a cable television channel, the lawmakers and the courts must decide how to reconcile the diverse rules that have been developed for the print media and the broadcasting media separately. The present revolutionary era of technological advances - what Pool has described as "an electronic revolution as profound as that of printing" - has produced a "convergence of modes". Writing in 1983, Pool described the problem and forecast the result as follows:
If the boundaries between publishing, broadcasting, cable television, and the telephone network are indeed broken in the coming decades, the communications policies in all advanced countries must address the issue of which of the ... models will dominate public policy regarding them

The phrase 'communications policy' rings oddly in a discussion of freedom from government. But freedom is also a policy. The question it poses is how to reduce the public control of communications in an electronics era. A policy of freedom aims at pluralism of expression rather than at dissemination of preferred ideas ... (Pool, 1983: 8)

Pool has identified a fundamental issue that may ultimately, in both Canada and the United States, necessitate a thorough re-thinking of the policies of regulation and of the constitutional rules applicable to them. In both countries we would expect the "convergence of modes" to point toward a rejection of the view, heretofore orthodox in the U.S. at least, that different media invite different standards of review of the statutory regulation of content, in terms of the constitutional protection of freedom of speech or freedom of expression. Beyond that, it is more problematic to foresee which of the following alternatives would find judicial favour in the interpretation of those constitutional provisions: (1) the traditional rejection of any state regulation of the content of the production of the print media, (2) assimilation of the regulation of the print media with the lesser standard of review applied by American courts to off-air broadcasting, or (3) some median that rejects state regulation of the contents of a specific presentation but permits state regulation of certain classes of content.

Conclusions

This paper has attempted to compare a number of aspects of broadcast regulation in Canada and the United States. In the process we have examined some of the rationales underlying regulation of broadcasting generally, and of the content of programs in particular. We have seen that in the United States the "fairness doctrine" is a controversial example of content regulation, while in Canada Canadian-content rules are a striking form of regulation of content. In both countries, the following points apply: The concept that the airwaves are public property and that a licensee is a "trustee" or "fiduciary" cannot, in itself, justify content regulation. Nor can such regulation be justified by the theory that broadcast media have a persuasive impact upon the public significantly greater than that of print media and that therefore broadcast media should be regulated in the public interest or to serve what are perceived as national goals.

Beyond that we have attempted to show that technological advances in radio and television off-air broadcasting have not rendered the spectrum scarcity theory obsolete; nor does the multiplication of other information and opinion delivery systems contribute to such obsolescence. In contending against those arguments we have,
however, questioned content-regulation based upon invalid arguments. We have noted the significance of the “convergence” of technological resources, which will blur the already artificial distinction that has been drawn between the broadcast media and the print media in terms of constitutional protection of freedom of speech or freedom of expression.

The implications of the recent Canadian Constitutional amendment have been examined in terms of possible judicial invalidation of well-established grounds and methods of regulation of broadcasting. Even if such invalidation should prove not to be the result of Canadian constitutional litigation, the very analysis of the ways in which the state regulates broadcasting, in the light of the purposes of the Canadian Charter of Rights and Freedoms, is intrinsically of value in an era when deregulation as a matter of government policy is a subject of public discussion. We have seen that for half a century Canadian government policy has favoured a broadcasting system in which the state itself plays an important broadcasting function of which there is no counterpart in the United States, and that some Canadian content regulation has reflected national goals that have no counterpart in the United States. In the past these Canadian objectives have justified not only a broadcasting system with a strong public component, but also a degree of state content regulation that would likely astound American observers. While Canadians have accepted such regulation in the past as an instrument of preservation of Canadian sovereignty, the validity of such regulation in the furtherance of that objective may be questioned today in the light of the Charter of Rights at the very time that the emergence of new consumer delivery systems may render content regulation of broadcasting relatively ineffective in fostering Canada’s sovereignty and Canadian’s sense of national identity.

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