

Introduction: [Canadian Television Broadcasting]

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INTRODUCTION

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There is a widening gap between a burgeoning television technology and its use by those who manage the medium. From the United States, cable has snaked its way to the populous border cities of Canada. Micro-relay has amplified the range of station choice. Satellites soon may turn a North American market into a global village.

Yet, viewing any of the nine channels, soon to be made ten, in Metropolitan Toronto, (which through cable has access not only to the major Canadian networks, but also to those in the United States), does not afford the viewer significant diversity of content. What he sees is often literally the same. American programs tend to be repeated on the Canadian networks; viewer choice is the opportunity to see "The F.B.I." on Wednesday if it's missed on Sunday. Save for National Educational Television, the new television technology has not been utilized in the service of communication except for amplification of the existing programs.

Nearly forty years have passed since public policy in Canada and the United States declared the airways a resource of the nation-state to be regulated in the public interest through licensing. Only recently, however, have *some* of the regulators begun to ask the fundamental questions that would give this policy real content: What is television? What is its effect on people? What are the people receiving in terms of the capacity of the medium? Even these queries, however, have been blunted in the United States by proposals such as the *Pastore Bill* which would tend to make a broadcasting license a vested right subject to limited attack.¹ So too, in Canada a two-pronged frontal assault has been launched by the Canadian

¹ S. 2004, 91st Congress 1st Session, April 29, 1969.

The bill would foreclose the Commission in a renewal proceeding from considering any other license application. Rather, the agency would be compelled to look solely to the renewal applicant and ask the question as to whether, on the record, the license renewal would serve the public interest.

Association of Broadcasters on the jurisdiction of the Canadian Radio-Television Commission. The CAB has challenged generally the authority of the CRTC to structure a *system* of Canadian broadcasting, before the House of Commons Standing Committee on Broadcasting.² Before the Commission itself, the CAB has questioned CRTC capacity to promulgate rules that would require 60 percent Canadian content during prime time hours.³ So, at the same time that the regulators in both Canada and the United States are giving meaning to public policy, voices are being raised that would undercut their power to implement it.

In December, 1969, a highly skilled panel, including three regulators, two from the United States, and one from Canada, met to discuss broadcasting and control over program content. The meeting, sponsored by the Trade Regulation Roundtable, and the Canadian-American Committee, Association of American Law Schools, was held in San Francisco. Those who participated in the panel were: Harry Boyle, Vice-Chairman, Canadian Radio-Television Commission; Stanley Cohen, Washington Editor, "Advertising Age"; Louis Leventhall Jaffe, Professor of Law, Harvard University; Nicholas Johnson, Commissioner, Federal Communications Commission; Mary Gardiner Jones, Commissioner, Federal Trade Commission; Paul M. Bator, Professor of Law, Harvard University; Charles Templeton, Vice President, Corporation Development and Programs, CTV Network Ltd., Toronto. Preparation for the Roundtable had been more than a year in the making. During that time the panelists had the opportunity to meet and discuss the multifaceted aspects of television and program content. This issue of the Osgoode Hall Law Journal contains, *inter alia*, papers prepared by the panelists for that December Roundtable meeting.

So often in our case books and class room discussions, we tend to view competition, or rather the competitive model, with reference to its commercial characteristics only. Seldom do we question the effect of commerce upon other social goals. Similarly, little attention has been devoted to the impact of trade regulation policies upon society in terms of these other social objectives.

The papers suggest that an exclusive concentration, or fixation, on traditional economic considerations is myopic. Commerce and trade regula-

² Minutes of Proceedings and Evidence, House of Commons Standing Committee on Broadcasting, Films and Assistance to the Arts, May 5-6, 1970 (unpublished). Support for the CAB's position was found among some members of the Government's party.

³ CRTC Transcript of Hearing April 14-22, 1970 (April 16 session).

The CAB's presentation was lengthy. Late at night the CAB argued that the Canadian Bill of Rights might preclude the Commission from promulgating rules of Canadian Content. Chairman Juneau instructed the reporter to expunge the remarks from the record.

As a result of the CAB's position three member stations either withdrew or "disassociated" themselves from the broadcaster's association. They were CFTO-TV (Toronto); CJOH-TV (Ottawa); CFTM-TV (Montreal). Yet, it should be noted that the three stations either satisfied or were quite capable of meeting the proposed Canadian content requirements. See, P. Scott, "CTV Caught in Its Own Crossfire", *The Toronto Daily Star*, April 21, 1970, p. 22, c. 1.

tion do have a profound and pervasive impact upon society; however the papers suggest that regulatory instruments have been either oblivious to or imprecise in reflecting other social values.

Communications policy and the industry itself were singled out as examples of this problem. Yet, employment policy, environmental pollution, or any one of a number of other consequences that flow from industry structure and trade practises would just as easily have sufficed to illustrate the theme. But, communications stood in relief because it mirrors so much of society. As an industry it is important in its own right.

The three regulators — Vice-Chairman Boyle and Commissioners Jones and Johnson — were alarmed over television's effect on people, on the generation of children who will spend as much time watching television as they might spend in school. In the United States, and one would assume, in Canada, the statistics are formidable. Television, said FTC Commissioner Jones, reaches 80% of the population. The average TV viewer is exposed to some 40,000 commercials a year. Indeed, the average North American over his productive life span watches TV commercials for more hours than he ever spends in school. The average pre-school age child is estimated to have absorbed more hours of unstructured TV input than the hours an average student at a liberal arts college spends for four full years in the class room.

It is in such context that the regulators have voiced concern not merely over waste, but the effects of that waste. Their approach, interestingly enough, is not to embark upon an examination of what television in fact has done. Rather, they have asked, each in his own way, what can be done to bring diversity of thought to the medium. Their collective approach is structural. If the regulatory scheme is modified having regard to certain social values, there will be a concomitant effect on broadcasters, and the public will be benefitted accordingly. Consequently, the fundamental question to which the authors and the panelists collectively addressed themselves was: How might television, through regulatory or innovative processes, achieve the goals established by public policy?

To some extent, Professors Jaffe and Bator argued that public interest can be equated to consumer demand. As a simple matter of economics, advertisers, producers and the broadcasting stations must give consumers what they demand if profits are to be realized. In their criticism of this argument both Mr. Boyle and Commissioner Johnson agreed: All that commercial television now demonstrates is what most of the public will accept; there has been no significant effort, aside from educational television, to provide diversity, and, therefore, choice. To point to consumer demand as the answer is to evade the issue.

More important, however, public policy in both the United States and Canada has delineated affirmative goals to which licensees are required to strive. In the United States, Commissioner Johnson describes these goals or values as including creativity, diversity, flexibility, competition and individual

participation. In Canada the 1965 Report of the Committee on Broadcasting,⁴ which paved the way for the 1968 Broadcasting Act,⁵ stated Canadian objectives that are not dissimilar from those expressed by Commissioner Johnson:

Canadian broadcasting would not be doing its job, if it did not strive to permit all Canadians from one ocean to the other to know themselves better; if it did not permit each of the two Canadian national cultures to express itself; if every ethnic group and every region of the country could not recognize itself through the broadcasting system and could not be known by every other ethnic group of every other region; if it did not provide something special for all Canadians — artists, politicians, teachers, farmers, workers, students or housewives.⁶

Notwithstanding these comments, public regulation has failed if these goals have been its objective. The media are highly concentrated in terms of ownership, with broadcasting being viewed as an economic instrument in North America, and advertising providing its predominant means of finance. What constituted so much of that stated by Commissioner Johnson and by Stanley Cohen, was the fact that the broadcasting industry quite naturally strives for the largest possible audiences. In doing so they frequently take program postures designed to please the most and to offend the fewer. Controversy is not a highly prized commodity.

Commissioner Jones takes the theme a step further by reflecting upon the impact of bland, one-sided presentations and, the implicit assertion in commercials that a "never-never land" does in fact exist.

The approach to goal realization differs as between the United States and Canada. In the United States great emphasis is placed on the dangers of concentration of media ownership. In Canada, however, concentration is often encouraged, so that there might be capacity to fulfill statutory responsibilities. So it was that the Canadian Broadcasting Corporation was established as the exclusive national broadcasting enterprise, operating as a Crown corporation. Yet, Commissioner Johnson points to the danger of a highly concentrated industry which presently exists in the United States. Among that nation's largest cities there is not a single network-affiliated VHF television station that is independently and locally owned; all are owned by the networks, multiple station owners, or by the major local newspapers. Add to this the two wire services, Associated Press and United Press International,

⁴ Report of The Committee on Broadcasting 1965 (Fowler Report No. 2).

⁵ The report has had a significant effect on the CRTC. See, CRTC Decision Concerning The Improvement and Development of Canadian Broadcasting and The Extension of U.S. Television Coverage in Canada by CATV, appendix 4, p. 4, Dec. 3, 1969.

⁶ The American position is strikingly similar. See, Final Report, President's Task Force on Communications Policy, Dec. 7, 1968, at p. 2. "Within each nation, and among nations the wide use of telecommunications is a key to success in building and reinforcing the sense of community which is the foundation of social peace: a sense of community based on freedom; and on tolerance of diversity; a community which encourages and appreciates the unpredictable richness of human imagination; but a community nonetheless, faithful to its own rules of civility and order. In the United States, our faith is committed to the principle of freedom of speech."

each serving approximately 1200 newspapers and 3,000 radio stations. Reflect on the fact that of the 1500 communities with daily newspapers, 96% are served by single owner monopolies, and 28% of all television stations are owned by newspapers.

Superimposed on this pattern of concentration is the multi-media conglomerate, the enterprise in the business of communications. The NBC network, for example, controls a book publishing firm, a record company, and is a major manufacturer of television sets. The larger the broadcasting conglomerate the greater the danger there can be of conflicting interest as applied to the conglomerate. Commissioner Johnson points to the aborted ITT-ABC merger. He documents the efforts made to distort the news and the coverage of that story by the conglomerate itself. Commissioner Johnson's concern in part is how to fragment what may be the danger of size.

Specific implementation of any solution requires innovation. Existing concepts, such as antitrust and the FCC's own standard against undue concentration of control, have been utilized in a too limited fashion. Antitrust is a proper matter for the FCC to consider in terms of whether any license issued is in the public interest. Yet, antitrust traditionally has been applied to economic injury, not to impairment of creativity, though Commissioner Johnson suggests that a broadened view is surely worth exploring.⁷

More directly in point, there is the existing mandate against undue concentration. In 1968 a Federal Appellate Court declared: "The public welfare requires the Commission to provide the 'widest possible dissemination of information from diverse and antagonistic sources' . . ."⁸ Yet, said Commissioner Johnson, the FCC majority has never attempted to pour specific content into this broad and potentially far reaching standard.

Efforts are being made in Canada to meet the danger posed by the sheer size of broadcasting in the United States. Consider the problem facing the CRTC. It is charged with the mandate of creating a sense of Canadian identity through broadcasting. Yet, the Canadian nation consists of only 21 million people, most of whom reside in border cities to the United States. Great numbers of Canadians, simply by the use of high antenna can pick up the major United States networks. How then can the CRTC aid in shaping broadcasting as an instrument in forwarding a Canadian culture?

⁷ Illustrative of this approach are the FCC's recent rules restricting network ownership and syndication of television programs, and the amount of network programming stations in the major markets may carry during prime time. The new rules are designed to provide "greater diversity of programs and program sources than [those] presently contained in network schedules. . ." After Sept. 1, 1971 in any of the major markets where there are three commercial TV stations no more than three hours of network programs may be carried during prime time (7 to 11 p.m.) In effect, the stations will be compelled to create one hour of their own prime time viewing. *In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, FCC Dkt. No. 12782, May 7, 1970.

⁸ *Joseph v. FCC*, 404 F. 2d, 211 C.D.C. Cir. (1968).

To date the response has followed three lines. First, the CRTC has published and recently promulgated rules relating to Canadian program content. Simply stated, the rules would require 60% of all programming during prime time to be Canadian produced.⁹ Second, severe limitations have been placed on the extension of cable television. The Commission has endeavoured to assure the opportunity for profit to Canadian broadcasters so that they might be encouraged to develop Canadian programming.¹⁰ Third, through licensing, the CRTC is attempting to stimulate innovation. It views the license as a privilege, the granting of which must yield a public benefit. In several cases, the Commission has asked for, and then has seemed to adopt as an implied condition to the license requirement, a magazine format, on the theory that a program can be designated for a limited group only.¹¹ In this regard the Commission seems to be drawing upon the United States model of National Educational Television (NET). To the Commission there seems no basis in logic for a requirement that broadcasters seek a majority of a listening audience. To the Commission there may be no majorities, only an infinite number of minorities. The way is open for innovation.

Splintering ownership patterns, despite the theory that classes a broadcasting license as a privilege rather than a right, is a difficult task at best and, to some extent, it may even be a needless chore. Commissioner Johnson writes on this issue:¹²

⁹ Except for the CBC, the rules allow at least one broadcasting year for their implementation. The CBC had prepared a schedule for the 1970 broadcasting year that met the proposed rules. CTV indicated at the time of hearings on the Proposed rules it was willing and able to add ninety minutes a week of Canadian content during the 1970 season as a transition to larger responsibility for Canadian programming.

It should also be noted that the rules would not permit the *remaining forty percent* to emanate from any single country. The result is that the United States may export only thirty percent of prime time television to us. *CRTC Decision 70-99*, May 20, 1970.

¹⁰ CRTC Decision Concerning the Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada by CATV, Dec. 3, 1969. "The salient fact about cable television in Canada in recent months is its extremely rapid growth. Of the 4 million urban households in Canada, 926 thousand were subscribing to cable television on September 1, 1969, almost one in four. This represents an annual growth rate of 45 percent since September 1968." *Id.*, appendix 5.

¹¹ Patrick Scott, a respected broadcasting critic, interpreting CRTC Chairman Juneau's remarks, wrote; "Newspapers and magazines, the commission chairman noted, do not seem compelled to aim each and every article they carry at the broadest possible audience. Many of them would interest only minority factions of their readership, yet the package as a whole is attractive to the average reader and advertiser alike."

"Could not the broadcasting industry, Juneau asked, evolve a similar fragmentation formula, or did it feel compelled to live forever by the credo that everything it did must be aimed at the widest possible audience — 'the people who buy the deodorants?'"

"Although Juneau did not specify it yesterday [at CRTC hearings], the sort of programming he was talking about would seem to bear a striking resemblance to that of the U.S. National Educational Television network, which he has cited several times at this hearing as a possible model for Canadian broadcasters in general and the CBC in particular." P. Scott, "The Admen Pitch In Their Gloom", *The Toronto Daily Star*, April 21, 1970, p. 29, c. 1.

¹² Compare, Commissioner Johnson's dissent in the FCC proceeding that initially allowed the International Telephone & Telegraph Corporation to acquire the American Broadcasting Companies Inc., FCC Dkt. No. 16828, at p. 28, which deals with the potential immediate effects of concentrated ownership.

Access to ownership is not the only way to open television up to greater diversity. One does not have to own a station to get views out, any more than one has to own a taxi-cab company to take a ride across town. All you need is access to the station's or network's transmission facilities. There are a number of devices, present and proposed, that might accomplish this.

Answers, too, may be found in an evolving technology. There are now nearly ten times as many radio and television stations as there were thirty-five years ago and further innovations in cable television offer a potentially unlimited number of channels in the home. But technological innovation will not in itself resolve the problem of quality.

There are two alternatives for change. Either licensees can be directed by order of a government agency to channel their efforts into particular kinds of programing, or the airways, the technological opportunity for an infinite number of channels, can be characterized as common carriers. The exclusive control of those airwaves by broadcaster can be removed and the public at large can be given access to air time, free of any regulatory restraint.

The first option has severe limitations. It places another layer of responsibility between the creative artists — the production unit — and the finished program. A result must be that the potentially flexible medium of broadcasting will be made more rigid. Orders would come through a regulatory body to intermediate administrators who, in turn, would have to lay down rules and exercise individual judgment over programs to be produced. It would not be enough for an agency concerned with quality to demand public affairs or local or even Canadian programming. Nor would it be enough for such an agency to demand that a given amount of time, or money, be devoted to a specific subject. Such rules would not in themselves *create* a program, make it interesting, or insure its quality.

In North America the regulating agencies controlling broadcasting have placed themselves in a position of seeking elusive goals. Not without reason did FCC Commissioner Kenneth Cox write:

As for the question whether the FCC should consider the quality of programming within a category, or seek to set minimum standards of quality, I think that is nearly impossible. Any such effort would probably reflect the subjective tastes and prejudices of the Commissioners of the day, and whatever the grounds for our selection, I'm sure that 'expertise' in program judgments was not among them.¹³

The second option, characterizing licensees as common carriers, opens vistas that have yet to be explored. In essence, the market could exert its own control. Producers would have the opportunity, through channel availability, to go *directly* to the consumer who could pay for programs that appeal to him. The consumer no longer need be saddled with heavy indirect costs of paying for programs through the inefficient vehicle of advertising support. Professor

¹³ Cox, "The FCC's Role in Television Programming Regulation", *14 Villanova L. Rev.* 590, 595 (1969); cf., B. Fisher, "Program Control and the Federal Communications Commission: A Limited Role", *id.* at 607-10.

R. H. Coase of the University of Chicago summarized the difficulties of commercial broadcasting, comparing it to this second option:

With commercial broadcasting, the person who pays for the broadcast of a program is the advertiser. It follows that the programs broadcast are those which maximize the profits to be derived from advertising. The market for broadcast programs is one from which the consumer is barred: what he would pay plays no part in the determination of programs. The result is that some sectors of the public feel that they are not being catered for. The FCC is unusually aware that all is not well. And so it has exhorted the businessmen to act in the public interest and, incidentally, against their own. It seems clear that in this case the highest motive was not the strongest.

The obvious way of dealing with this problem is to introduce some form of pay-television. If this were done, consumers who were willing to pay more for resources used in the broadcasting industry than were the advertisers could secure the kind of programs they wanted.¹⁴

As an industry, why couldn't television be structured like movies in terms of production and distribution? Movies are made neither as works of charity nor solely for social comment, but rather for their appeal to people who are willing to spend *their* money to see or consume the product. There are both good and bad, light and deep, offensive and pleasing. Even the rules of censorship for obscenity have been eased to allow the individual to impose his own judgment. A film with a light budget can earn one million dollars profit, while one with heavy production expense can fail. The market takes its own measure. Units of production can be separated from those of distribution to allow for freer choice. That is, a producer can be removed from the position of compelling a distributor to take both his bad shows as a condition to being allowed those of good quality.

The effect of pay television on existing regulation could be dramatic. Licensees would be treated as common carriers.¹⁵ The primary concern of a regulating agency would be technical; it would address itself to producer channel access, for which cable and microwave television provide multiple opportunities. The licensee, like Bell telephone, would be a carrier; its services would require appropriate compensation including reasonable profit — but no more. The regulatory powers could remove themselves from the impossible task of assessing quality and leave that problem where it properly resides — in the judgment of individuals. A retort would be that this is a possibility for the future, requiring an administration that must be arrived at slowly, when a capacity is demonstrated. At present, we are concerned with the "here and now".

The solutions suggested by the papers do not represent cures to the ills of present media structure and its impact on society. It may take a com-

¹⁴ R. Coase, "The Economics of Broadcasting and Advertising — The Economics of Broadcasting and Government Policy", *American Economics Association* (1967) 440, 446.

¹⁵ For a more recent statement on "pay", or over-the-air subscription television, by the FCC see, *In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to provide for Subscription Television Service*, FCC Dkt. No. 11279 (Sept. 11, 1969).

combination of such remedies to achieve the social goals society deems important. However, far from recommending a comprehensive solution, these materials are intended to create a sensitivity to the impact of trade regulation on society and to lay the ground work for future dialogue. They are being published at a time when the public is becoming more aware of government presence in the communications industry.

