

Don't sell the beaver: train it

**Why sovereignty and redesigned legislation will
strengthen Canada's broadcasting system**

**Submission by the
Communications, Energy and Paperworkers
Union of Canada**

To the Competition Policy Review Panel

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I. CEP is one of Canada's largest unions

1. CEP is one of Canada's largest unions, with more than 150,000 members who work for Canadian broadcasting, telecommunications, energy, print and forestry companies. CEP is also Canada's largest union of media workers. In broadcasting, CEP members work at the major Canadian radio and television stations, as well as specialty services, across the country.
2. Our members support the growth, prosperity and success of Canadian broadcasters: private broadcasters' success can yield strong benefits for Canada's cultural sector, Canadians, and broadcasters' employees. CEP and its members therefore have a keen interest in decisions affecting these areas, and in the Panel's conclusions.
3. Like every other industrialized country in the world, Canadians prohibit foreign ownership of and limit foreign control over Canadian broadcasting. The main reason for such limits is that, because control of the media can so easily determine their content, Canadians must be assured that broadcasting companies offer Canadians well-researched and balanced news and information about Canada. The second important reason is that broadcasting's natural oligopolistic tendencies operate to replace expensive, high-quality Canadian programming with less expensive foreign imported programming. Regulation is required in broadcasting not only to reduce the demonstrably harmful effects of oligopoly power, but also to ensure that Canadians can access diverse views about matters of public concern to this country.

Among the potentially most important social implications of major concentrations of corporate power is the influence exerted by corporations upon public authorities and public opinion [where] influence may be thought of as both "the capacity or power of persons or things to produce effects on others by intangible or indirect means", and the capacity to persuade.

1978 Report by the Royal Commission on Corporate Concentration, quoted by Royal Commission on Newspapers, *Report* (Minister of Supply and Services Canada, 1981) p. 59.
4. Parliament's broadcast legislation specifically introduces a number of non-economic objectives for Canada's broadcasting system. While the Federal government's communications services policy is supposed to "foster fair competition and an increased reliance on market forces in the provision of facilities, products and services....",¹ the *Broadcasting Act* requires, among other things, that the broadcasting system's programming should "provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern"²
5. Unfortunately, an ideologically-based focus on deregulation since 1983 has allowed Canada's private broadcasters to reduce programming diversity in news and information and other Canadian programming expenditures, and has strengthened Canadian broadcasters' dependence on foreign broadcast content. Rather than enforcing Parliament's broadcasting policy for Canada to maximize the benefits of broadcasting for Canadians, Canada's broadcast regulator has allowed Canadian broadcasting to become an unhealthy, highly-concentrated oligopoly, whose profitability has increased at the expense of Canadian content while it has reduced services to Canadians and exported their jobs.

It is important to remember that Canada's broadcasting policy is in fact a cultural policy.

House of Commons, Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, (House of Commons: June 2003) at 525.
6. The clear risk exists that if Canada allows foreign ownership or control of Canadian broadcasting services, a few large foreign corporations will swallow our radio, television and distribution services like small but lucrative hors d'oeuvres. This risk is not theoretical, but real: until Parliament explicitly prohibited foreign control in Canadian broadcasting in 1968, non-Canadians controlled 24 radio or television stations and 56 cable systems in this country.³

7. Rather than allowing foreign ownership and increased control of Canadians' broadcasting system, an effective and enforced regulatory framework must be established to ensure that Canadians obtain the benefits to which they are entitled from private companies' use of the publicly-owned communications spectrum.
8. Foreign ownership or control in broadcasting has been and should continue to be prohibited to ensure that Canadians are able to hear and watch stories that reflect their lives and values, and may participate effectively in our democratic system.

"Canadians are best served by a broadcasting system that offers an ample supply of high-quality, distinctively Canadian content that enlightens, entertains and informs citizens."

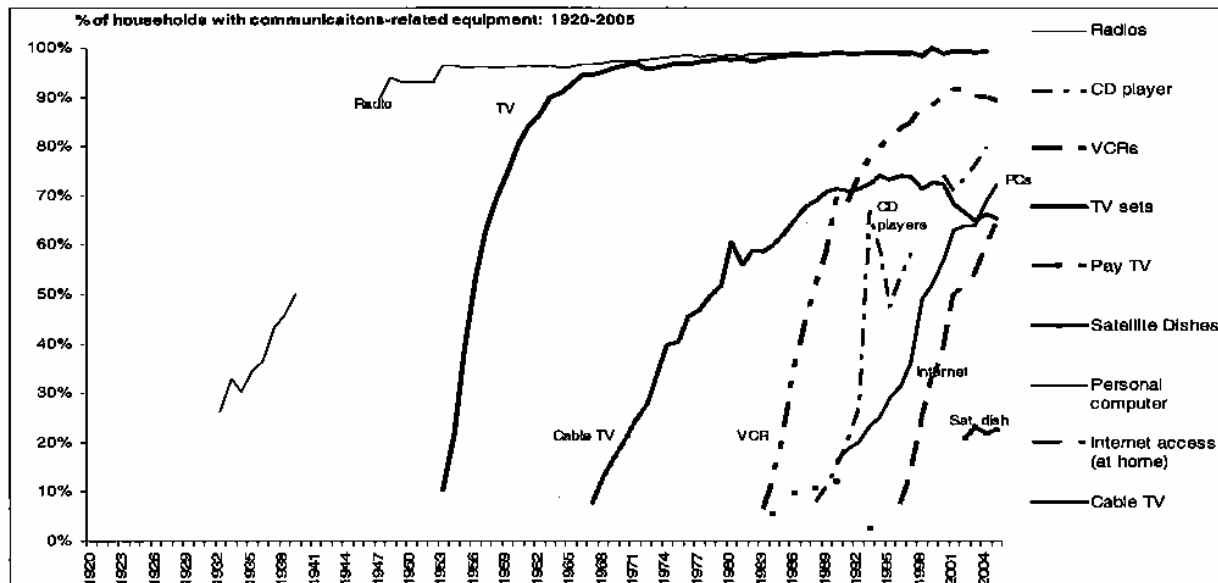
Treasury Board of Canada, Secretariat, *DPR 2004-2005 Canadian Heritage*, "Section II: Analysis of Performance by Strategic Objective" online: [tbs-sct.gc.ca/rma/dpr1/04-05/PCH/PCHd4502_e.asp](http://www.tbs-sct.gc.ca/rma/dpr1/04-05/PCH/PCHd4502_e.asp).

II. Canadian Broadcasting: private gain at public expense

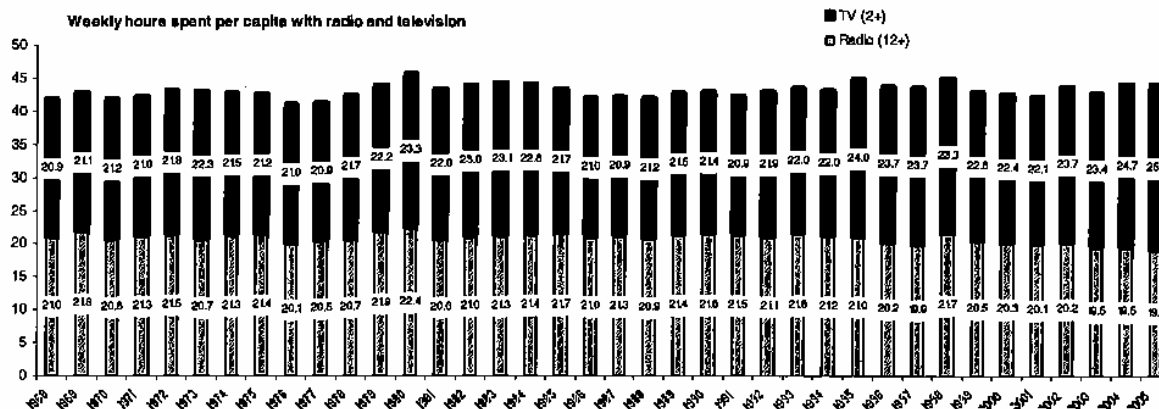
9. To support a continual refrain for less regulation, more concentrated ownership and access to more foreign content and foreign investment, Canada's broadcasters have raised, are raising and will continue to raise the fear that their very existence is threatened – by change, by new technology, or by new competition. Existing evidence refutes this claim.

A Canadian broadcasting has survived many changes

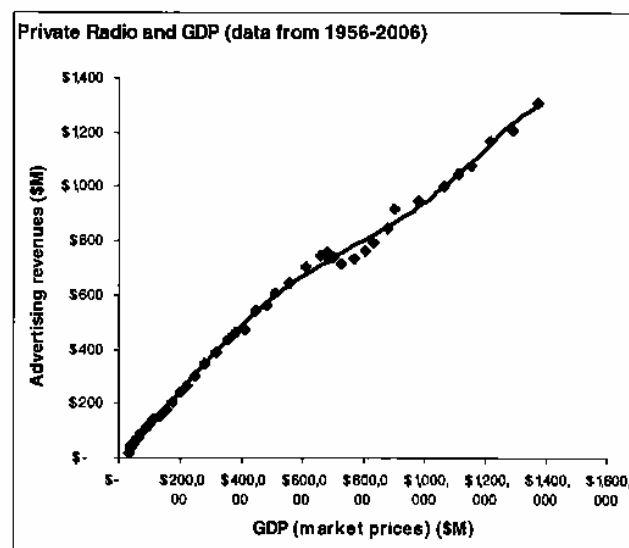
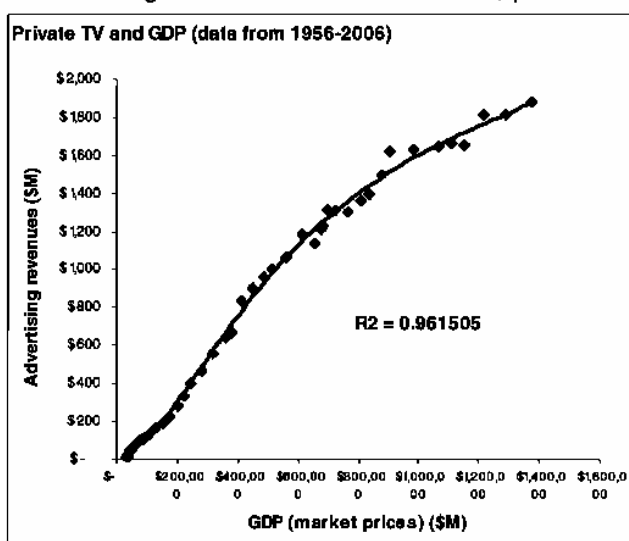
10. Canada's broadcasting system has survived and thrived despite numerous major technological and economic shocks over the past century. Canadians did not throw away their radios after television went on air in 1952, and Canadian television stations did not fade to black in 1979, when for the first time more than half (51.4%) of Canadian households subscribed to cable television. It turns out that Canadians like choice and control: they bought VCRs and CD players, but kept their TVs and radios too.



11. The simple undeniable fact is that Canadians enjoy diverse sources audio-visual information and entertainment. Regardless of the latest technology that comes onto the market, their time with radio and television has remained remarkably steady for decades:⁴



12. Since their revenues come primarily from sales to advertisers whose buying is prompted by general economic conditions, private radio and television broadcasters' economic fortunes are tied directly to the economy.



13. Although new entrants have presented new competition to existing broadcasters, their impact has been negated by substantial increases in cross-media and concentrated ownership. Between 1970 and 2006 the average number of radio and/or television stations each private broadcasting company controls has quadrupled (from 3 to 13). The number of cross-media ownership groups with controlling interests in radio, television and/or pay and specialty services decreased by more than half (from 91 to 57) but the number of services each group controlled more than tripled. (See table, at right.) In brief, existing broadcasters either bought new entrants, or vice versa.
14. Estimates of the Herfindahl-Hirschmann Index (HHI) demonstrate that the oligopolistic character of Canadian broadcasting has strengthened in just the past decade. (The HHI measures whether an

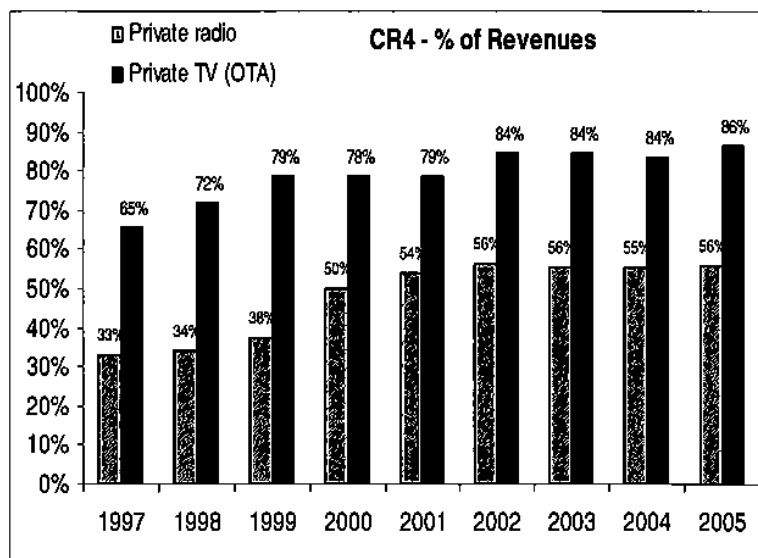
| Ownership structures | 1970 | 2006 | Difference |
|----------------------------------|------|------|------------|
| # of broadcasting services | 419 | 812 | 93.8% |
| # of owners of these services | 208 | 146 | -29.8% |
| Owners with 1 service | 117 | 90 | -23.1% |
| Multi-service owners (MSOs) | 91 | 57 | -37.4% |
| MSO services controlled | 302 | 722 | 139.1% |
| % of total broadcasting services | 72% | 89% | 23.6% |
| Average services/MSO | 3 | 13 | 333.3% |
| Cross-media owners (CMOs) | 37 | 15 | -59.5% |
| CMO services controlled | 148 | 505 | 241.2% |
| % of total broadcasting services | 35% | 70% | |
| Average services/CMO | 4 | 34 | 750.0% |

Sources: CRTC licensing decisions, ownership charts; Davey Committee; Massey Commission; Fowler Committee

economic sector is becoming more or less competitive, ranging from close to zero in highly competitive sectors, to 10,000 in situations of pure monopolies. Results of 1,800 or more indicate a high level of oligopoly power.)

15. Using the very limited TV revenue data published by the CRTC since 1997,⁵ CEP estimates that the HHI for Canadian TV has grown substantially more concentrated from 1997 to 2005, becoming a measurable oligopoly just after 1999.⁶
16. Statistics about the four largest owners in Canadian broadcasting (CR4) confirm that Canadian broadcast ownership is highly concentrated.⁷ Where diverse, local ownership once dominated Canadian broadcasting – to ensure that broadcasters responded to the needs and concerns of the audiences they served – four groups now obtain the majority of revenues in both radio and television.
17. The CRTC's policy of perpetual licensing has reinforced Canadian private broadcasting's oligopolistic structure. Once an applicant's application for a broadcasting licence is granted, that licensee can hold the licence for life, until it chooses its successor.
18. Rather than encouraging competition, the CRTC has actively discouraged it by restricting access to the broadcasting market of existing licences. This is not the case for the Federal Communications Commission whose competitive renewal process allows applications for licences to be filed when the licences are up for renewal.
19. Although nothing in the 1968 or 1991 *Broadcasting Acts* prohibits the CRTC from inviting other applicants to apply to use licences that companies no longer want, the CRTC decided thirty years ago to rely on private broadcasters to choose their successors.⁸ Since virtually all major broadcasting transfers have been approved in the past twenty years, private broadcasters -- not the CRTC -- decide who uses these valuable licences. Meanwhile, since 1999 the CRTC has in some situations dispensed with competitive licensing altogether.⁹
20. With operating profit margins well over 10% over most of the past forty years, private radio and television have enjoyed strong economic success (with the exception of the recession of the early 1990s whose effects were widespread).¹⁰ This success may explain why concentration of ownership has occurred: Canadian broadcasters have easily raised billions of dollars.¹¹
21. If existing broadcasting law were enforced, it might not matter that the broadcasting marketplace is now an uncompetitive oligopoly. After all, effective regulation would ensure the existence of competing news sources and the balanced news and information required to best serve democracy. But this is not the case. A 1980 study for the Law Reform Commission of Canada (LRC) concluded that the CRTC had failed to address important issues since 1976, and that it was unable "to commit the time and resources necessary" to do so.¹² In 1983 another study undertaken for the LRC concluded that its examination of the CRTC's regulatory activity "has not discovered clearly articulated, coherent compliance

| Private OTA TV HHI (revenues) | |
|----------------------------------|----------|
| 1997 | 1,230.87 |
| 1998 | 1,466.97 |
| 1999 | 1,734.90 |
| 2000 | 1,984.27 |
| 2001 | 2,001.27 |
| 2002 | 2,259.73 |
| 2003 | 2,532.58 |
| 2004 | 2,200.74 |
| 2005 | 2,310.45 |



programs"¹³ and that the CRTC had "not demonstrated a willingness to employ the harsh sanctions against licensees for even the most flagrant violations of the FM radio policy."¹⁴ In 1986 a third discussion of the CRTC by the LRC in 1986 concluded that the CRTC's failure to enforce regulatory compliance threatened the Commission's integrity,¹⁵ and a federally-appointed task force on broadcast policy concluded more broadly that the CRTC had "...[n]ot developed any clear strategy to ensure compliance with regulations and licensing conditions."¹⁶ In 2006 research found that from 1968 to 2005, 499 of Canada's 735 (68%) commercial, community and campus radio stations breached the CRTC's regulations at least once, and over half (285 or 57%) of the non-compliant stations breached the regulations twice or more.¹⁷ But over the past 40 years the CRTC has revoked just 2 licences on its own initiative¹⁸ and has decided not to renew the licences of another 16 licences (all but one before 1990).¹⁹ Once granted (and very much like diamonds), broadcasting licences are forever.

22. In this context, arguments for deregulation (or foreign ownership) that are based primarily on "change" are disingenuous if not misleading. Claims that Canadian broadcasting is overregulated and that this will "suffocate" the "market" are equally spurious.²⁰

| CRTC's explanations for deregulation | |
|--------------------------------------|---|
| 1983 | The environment for conventional television broadcasting "is changing rapidly and is characterized by uncertainty related to the future evolution of technology, competition, the present economic situation and government policy." ²¹ |
| 1988 | "The primary objective in undertaking this review [of its regulations] was to provide a regulatory framework free of outdated regulations and more suited to the rapidly changing and increasingly competitive broadcasting environment." ²² |
| 1990 | CRTC announces review of its FM policy in view of its goal of "streamlining its policies, regulations and administrative practices to retain only those mechanisms necessary to attain the objectives set out in the Broadcasting Act" ²³ |
| 1994 | "Given the rapidly evolving communications environment, the Commission will re-evaluate its position [on allowing infomercials during the broadcast day] in three years." ²⁴ |
| 1995 | " 'Since [private TV] stations' licences were last renewed in 1989, the Canadian broadcasting environment has undergone tremendous change, ' said [the] CRTC Chairman. 'In coming years, local broadcasters will be challenged by an increasing number of viewing options available to consumers. To help them adapt to changing circumstances while promoting Canadian programming, the Commission has adopted a more flexible policy approach to guide the operations of private, English-language television stations over the next five to seven years." ²⁵ |
| 1998 | "The Canadian television environment has undergone significant changes since the last major review of the Commission's policies in the mid-'80s. the Commission feels that the time is right to review its regulatory framework to ensure that it continues to effective in this rapidly changing environment." ²⁶ |
| 1999 | The Commission reviewed its television policy because "regulation needed to continue to be relevant and effective in today's changing environment. " ²⁷ |
| | "... with technology changing, with relationships shifting, and with public expectations evolving, we must move along a continuum from detailed regulation to broader parameters whenever possible. We must be more focused on promoting the opportunity for Canadians to build on their successes in the changing communications landscape." ²⁸ |

23. The real fact that explains deregulation is strong and persistent lobbying by private broadcasters that quite rationally want to reduce their costs, including those imposed by regulation. This is, after all, precisely what their fiduciary obligations to shareholders and investors bind them to do: maximize return on investment.
24. Expansion through consolidation is easy to understand in that context: broadcast consolidation "is driven by the need to find economies of scale, eliminate duplication of efforts and exploit natural synergies between companies."²⁹ Owning more systems allows each owner to minimize the acquisition,³⁰ production³¹ and/or scheduling costs of its stations'

programming.

25. Concentrated media ownership reduces the negative effects of audience fragmentation due to competition,³² because larger groups can maximize advertising revenues³³ while reducing programming and employment costs.³⁴
26. Yet the federal regulator has also passed off its deregulation and creation of ever-larger private broadcasting groups as benefitting the broadcasting system and Canadians. It accepted private

broadcasters' arguments that larger companies would lead to more and higher-quality Canadian programming, outweighing fundamental concerns about the control of information and entertainment by a few large groups. In 1994, the licensee of CKVU-TV (Vancouver) explained that "[t]hrough the unity of stations comes strength.

... We are believers that it is possible to make our Canadian broadcasting system stronger, in order to face the realities of international consolidation trends. Approval of our application will strengthen the long-term structure of our Canadian broadcasting system.

Leonard Asper, President and CEO of CanWest Global Communications Corp, *Opening Remarks: WIC Transaction*, 25 April 2000 (CRTC public examination file: Vancouver BC, Item 1B, Top of File) at 3.

To the extent that concentration of ownership and control in the Canadian broadcasting system increases, particularly in regard to the powerful medium of television, to that extent power is concentrated in fewer hands, diversity of opinion and information available to Canadians is potentially reduced, increased numbers of viewers are exposed to the ultimate programming decisions of fewer broadcasters, the number of outlets to which writers, performers and other associated with television production can have access is lowered, and the variety in the programming which the public can receive from Canadian sources is potentially diminished.

Decision CRTC 78-669 (12 October 1978), denying transfer of effective control of Multiple Access Limited (CFCF-TV Montreal) to Baton Broadcasting

... only through such concentrations of broadcasting strength can Canadians hope to develop programming that will woo our audiences away from U.S. programming. ...

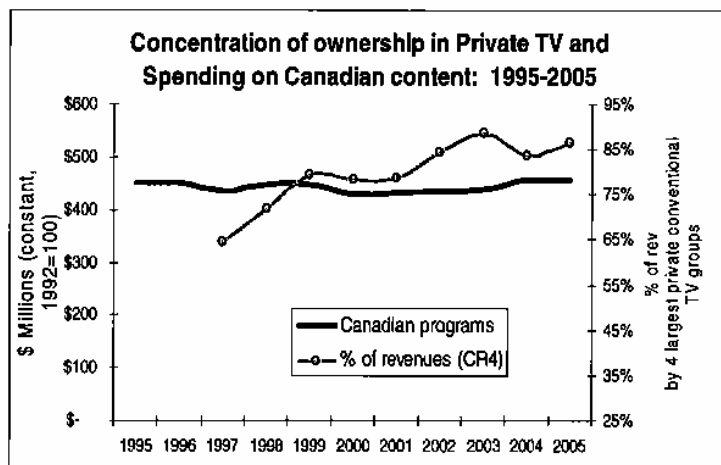
John Bassett, Chairman of Baton Broadcasting, at a CRTC public hearing (13 April 1978)

Strength for production, strength for acquisitions, strength for the overall economic base to support weaker markets, strength to fuel the cost of high quality Canadian production, and strength for the concerted promotion and scheduling of this Canadian production for assured viewing opportunities to large Canadian audiences.³⁵

27. But where private broadcasters have prospered, Canadian broadcasting as a whole has been weakened. The benefits promised to Canadians were never concrete to begin with, and are now disappearing.

B The Mystery of the Disappearing Benefits

28. Instead of strengthening Canadian programming – through higher spending, leading to higher quality – more concentrated media ownership has weakened Canadian programming. In television, spending on Canadian programs has flatlined, even as ownership has consolidated. More consolidated ownership has not led private broadcasters to allocate more

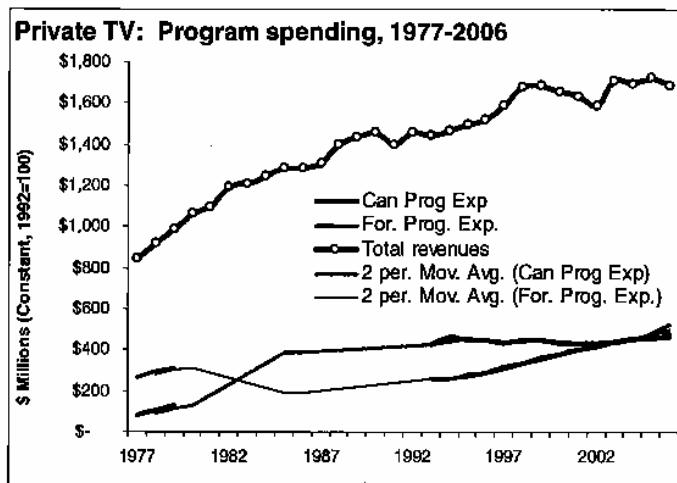


money to Canadian content, because regulatory requirements for Canadian program spending have been eliminated.

29. Instead of offering more, higher-quality Canadian programming, Canada's private broadcasters have transferred their program spending to non-Canadian content. Canada's private TV broadcasters now spend more on foreign programs, than on Canadian program. Instead of strengthening Canadian broadcasting,

deregulation and concentration of ownership have brought Canada back to where it was in the 1970s.

30. As for radio, the CRTC does not report on radio stations' expenditures on Canadian programming, many stations rely on non-Canadian network programming for content, and up to 65% of their music can be foreign. More radio stations share the same or similar programming formats, reducing ownership groups' costs but minimizing originality and local service. In July 2003, for instance, the same three announcers presented almost half of the programming offered by two British Columbia radio stations owned by Rogers,³⁶ reducing average programming costs for each station.



News and sports programs are not included as priority programs. The Commission is confident that broadcasters will continue to provide Canadian news and sports programs in peak hours without regulatory requirements because such programs are either profitable, or at least break even for most private broadcasters and are in high demand by Canadian audiences.

CRTC, *Building On Success - A Policy Framework for Canadian Television*, Public Notice CRTC 1999-97

31. Concerns about consolidated ownership's impact on news and information remain and have grown even more serious. The CRTC never regulated AM radio station news, and eliminated all news requirements for FM in 1993.³⁷ The CRTC's 1998 and 2007 TV policies set no requirement for local news.
32. But in the late 1970s a CRTC ownership study

group found that when ownership groups grew larger, they carried less news.³⁸ Current data show that for more than a decade, TV stations' spending on news relative to their total expenses and program expenses has decreased since their highest levels in 1995. Meanwhile, their spending on non-Canadian programs relative to program expenses has steadily grown.

33. The quality and quantity of local news and information available to individual Canadian communities from their broadcasting services has decreased: large ownership groups have reduced news production costs by sharing program items, reducing individual stations' spending or by eliminating stations altogether.
34. In fact, it is the largest companies that have most publicly cut back on news. Before BCE acquired CTV and its television stations, for example, CTV's four Northern Ontario stations employed 35 journalists who served 4 local newshour programs.³⁹ After BCE's purchase, CTV consolidated its 4 supper-hour newscasts into a regional program in Sudbury and laid off 40 people, to cut costs.⁴⁰
35. Just four months ago (October 2007) CanWest announced plans to move all

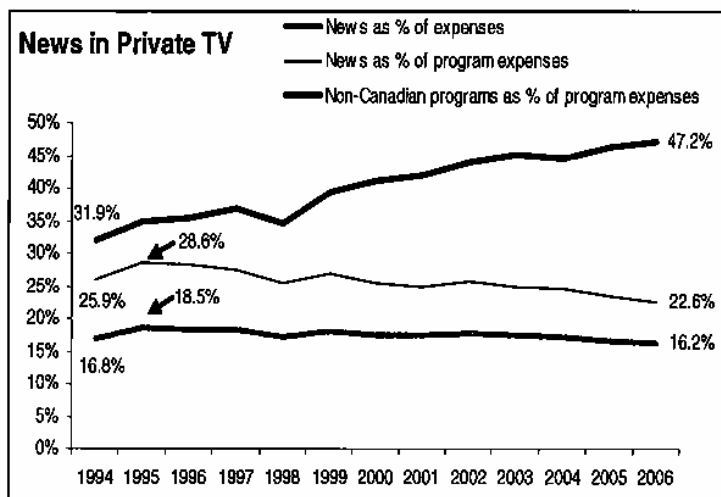
... More and more, concentration and convergence are such that decisions are made outside the regions, and people no longer have access to information that concerns them first and foremost; but they know what is happening in Nigeria, because someone feels that is more important. I am not saying that it is not important, but people must also have access to local and regional information, and that is something they have less and less of.

Professor Marc-Francois Bernier, Meeting of the Standing Committee on Canadian Heritage (26 November 2002).

If one reporter covers an event and supplies information to everybody, there is only one vision. But if you have fifteen reporters who cover the same event; you will have fifteen different versions.

....
My focus on major cross-ownership was, if you turn on the radio or turn on the TV or open a daily newspaper and they all come from the same source. We see that as a problem in terms of diversity.

Standing Senate Committee on Transport and Communications, *Final Report on the News Media*, Vol. 2 (June 2006) at 5, citing the President of the Fédération professionnelle des journalistes du Québec and the National President of the Canadian Association of Journalists.



local program production away from its local television stations to four broadcast centres. This will transform CanWest's 13 television stations into newsgathering shells that simply contribute local items to centrally-created newscasts. This move will reduce CanWest's costs substantially – since it is eliminating 200 or more jobs – but reduces local news content even more, and further tightens one group's control over broadcasting content in Canada.

36. Quite simply, large Canadian broadcasters don't invest in high-

quality Canadian news and non-news content because they don't have to, and because they can get programs more cheaply elsewhere. It would be irrational to expect Canadian broadcasters to spend more than needed or more than required by regulation, because as businesses their very first duty is to shareholders, not Canadians. Since programming is just the hook to attract audiences that broadcasters 'sell' to advertisers, rational profit-maximizing broadcasters will always buy programs as cheaply as possible for the greatest return in advertisers' spending, and will put their money into amortizing costs over larger and larger numbers of stations (*i.e.* expansion).

37. Now, with the coming shift to digital (and the aging of the nine or ten family owners that control most broadcasting in Canada) we again hear that new ownership changes are needed again, to generate the never-delivered benefits that highly-concentrated ownership was supposed to deliver. But now it is suggested that we permit foreign ownership of Canadian broadcasting, either to obtain lower-cost investment (perhaps to replace analog transmitters), or to allow a few large families in the business sell out entirely.

III. Foreign control of Canadian broadcasting: been there, done that

38. Allowing foreign ownership or increased control of Canadian broadcasting will return Canada to the past, reducing Canadian employment levels, employment opportunities for Canadians, Canadian programming quality, Canadian production and Canadians' access to their news and other cultural content. CEP bases its position on historical evidence, its members' experience, analysis of Canadian trade treaties and current statistical data.

A *Non-Canadians controlled Canadian broadcasting until the mid-1970s*

39. When Canadian broadcasting began in 1918, usable frequencies for broadcasting radio programs were scarce.⁴¹ For years high-powered radio stations simply drowned out all other stations.⁴² In fact, spectrum scarcity became an international problem: despite agreements reached at several international conferences,⁴³ frequencies assigned to Canada by international treaty had simply been appropriated by other countries, most notably by Americans. (This is the origin of the 'scarce spectrum' argument for national control over broadcasting.)
40. Some American broadcasters openly planned to take over Canadian broadcasting. During the 1920s Canadian broadcasting channels were "subject to continual invasion and appropriation" by Americans.⁴⁴ Although the US federal government prosecuted the US-

I've worked a lot of these files in the private sector. I have rarely if ever seen deals that didn't succeed because there was a lack of foreign capital. They were business-plan driven, and to the extent that the business plan made sense, capital was available.

Charles Dalfen, then-Chairman, CRTC, quoted in Ian Jack, "Foreign Ownership Rules Don't Need Review: Dalfen" *The National Post*, 29 July 2002, cited in *Our Cultural Sovereignty* at note 53, page 425

based Zenith Radio Corporation in 1926 for using a Canadian broadcasting channel, American legislative ambiguities led to Zenith's acquittal. U.S. broadcasters considered themselves "free to occupy other Canadian 'clear' channels – which they did."⁴⁵ In 1927 the Federal Communications Commission (FCC) reported that channels assigned to Canada "were violated" despite "repeated warnings from the [U.S.] government and ... personal appeals from members of the President's Cabinet that national good faith and international goodwill were at stake".⁴⁶ In 1928 a *New York Times* editorial said Canada "would do well to remember the best programs were those which were being radiated from the United States"⁴⁷ and allow its citizens to access them. In 1930 NBC's President

... drew attention to the fact [that] programs from the United States were being sent to Canada. There was a deliberate effort by American broadcasters to serve Canada [He] pointed out that the provision of service from the United States to Canada had the effect of making the boundary between the two countries invisible or non-existent. The American broadcasters were laying claim to Canada, by network connections to Canadian stations and by direct broadcasts, as an area for them to serve.⁴⁸

41. But Canadians wanted Canadian programming, not foreign content: the 1929 Royal Commission on Radio Broadcasting found unanimity on this "one fundamental question", noting that "it has been emphasized to us that the continued reception of these [programs from outside Canada] has a tendency to mould the minds of the young people in the home to ideals and opinions that are not Canadian."⁴⁹ Canadian content, not just spectrum interference, explains the principles for Canadian broadcasting set out by Conservative Prime Minister R.B. Bennett in 1932, the first of which being,

... this country must be assured of complete Canadian control of broadcasting from Canadian sources, free from foreign interference or influence.⁵⁰

42. Even after the 1937 Havana Conference organized by Canada reached agreements on allocating radio frequencies to reduce interference,⁵¹ American broadcasters unable to secure US channels simply established high-powered stations in Mexico "using exclusive Canadian channels. The result [was] that not one of the six channels allotted to [Canada] [was] free from interference from Mexican sources."⁵²
43. By the mid-1950s a number of major Canadian stations had become American network affiliates: among others, CFRB Toronto and CKAC Montreal affiliated with CBS, CKWX Vancouver and CKLW Windsor with Mutual, and CFCF Montreal with ABC.⁵³ The Canadian Association of Broadcasters (CAB), Canadian private broadcasters' lobby group, demanded "permission to enter into broadcasting or telecasting agreements with American networks or stations"⁵⁴
44. By the 1960s foreign-controlled companies also ran several Canadian cable companies⁵⁵ and television stations.⁵⁶ In 1963 three cable television systems with head-ends in the United States were operating in Canada.⁵⁷ In 1967, Quebec's only private television stations – CFCM-TV and CKMI-TV -- were controlled by non-Canadians: 50% of the shares in Television de Quebec (Canada) Limitée were owned by Famous Players Canadian Corporation and American residents controlled 51.8% of that company's capital stock.⁵⁸
45. During Canada's centennial the federal government introduced new legislation to reduce foreign control,⁵⁹ the 1968 *Broadcasting Act*.⁶⁰ Foreign ownership in all Canadian broadcasters was reduced to a minority and non-controlling position. Between 1969 and

Until 1968, there was substantial foreign ownership and control of Canadian broadcasting interests After the 1968 *Broadcasting Act* was passed, foreign ownership in all broadcasting entities was reduced to a minority and non-controlling position.

The purpose is to protect Canada's cultural sovereignty by ensuring that decision-making is in Canadian hands. We recommend ... that any revised legislation continue to require that all broadcasting undertakings be owned and effectively controlled by Canadians.

Task Force on Broadcasting Policy, *Report*, (Minister of Supply and Services Canada: Ottawa, 1986) at 639.

1973 non-Canadians divested themselves of 80 different broadcasting undertakings in Canada (56 cable, 11 radio and 13 television services).⁶¹ Canadians have controlled Canadian broadcasting for just three of the nine decades in which Canadians have enjoyed radio and television broadcasting.

46. Foreign governments have continued to pressure Canada for preferential treatment in the audio-visual sector. In a dispute about regulatory actions which involved American broadcasters near the Canada-US border, "retaliation had involved disallowing the deductibility of convention expenses for income tax purposes when Americans attended conventions in Canada."⁶² When Canada proposed an import licensing system that would have limited foreign firms to distributing their own films or films for which they held world distribution rights, U.S. trade negotiators threatened to abandon the FTA.⁶³ And following the CRTC's decision⁶⁴ to remove an American-based country-music specialty service, from the list of foreign services from which Canadian BDUs choose additional services to carry, US government representatives threatened economic sanctions.⁶⁵

"The only thing that will keep the system Canadian is Canadian programming."
CAB, President, *Opening Remarks (CRTC's Structural Hearings: Hull, 8 March 1993)* at 4

47. It is clear that the US still sees Canadians' assertion of jurisdiction over Canadian broadcasting as

... the very fact the foreign ownership issue is being considered in the context of the Canadian broadcast system is evidence of the extent to which our public agenda is being controlled by the forces of globalization.

... The direction indicated by the very few who advocate elimination of foreign ownership restrictions runs contrary to the fundamental goals of the current *Broadcasting Act*. We must protect our sovereignty in one of the few remaining bastions of Canadian identity.

Joie Warnock, CEP, Meeting of the Standing Committee on Canadian Heritage (25 February 2002).

... concrete evidence of an increasing and disturbing trend in Canada toward the implementation of policies that are intended to protect Canadian industry by discriminating against legitimate U.S. broadcasting, publishing, and copyright interests in Canada. In an era of rapidly changing communication technologies and the development of the information superhighway, it is difficult to understand the Government of Canada's implementing such policies, which are directly contrary to the global trend toward liberalization.⁶⁶

48. Meanwhile, non-Canadians are able to and do hold interests in Canadian broadcasting services.

B Limited foreign ownership exists

49. Canada does not prohibit foreign ownership in broadcasting, and Canadians do not lack for foreign content. Non-Canadians can now own up to 46.7% of a Canadian broadcaster.⁶⁷ US-based Discovery Communications Inc. holds a 20% interest in CTV's Discovery Channel specialty service, and Animal Planet North America Inc.'s 20% interest in CTV's Animal Planet. The CRTC recently – and in CEP's view wrongly – allowed non-Canadians to put up the majority of the money CanWest needed to buy Alliance Atlantis. Canadian distributors regularly apply to add more foreign services to their channel line-up (even when they decline to offer Canadian services similar treatment).⁶⁸
50. Canadian broadcasters rely so heavily on other countries' programming for a simple reason: it eliminates much of the expensive work needed to bring new programming ideas to fruition. The foreign companies have already developed programming ideas, registered trademarks, and created schedules and marketing plans. Apart from the limited domestic news they offer, and their steadily decreasing investment in Canadian content, Canadian broadcasters still do little more than retail other countries' cultural products. CTV's Discovery Channel, for example, recently applied for the right to schedule a trivia TV show based on the US Discovery Channel's *Cash Cab* program.⁶⁹

C Foreign ownership's benefits impossible to measure

51. It is perhaps trite to say that you cannot manage what you cannot measure. As it stands, however, Canadians do not even know the true current level of foreign investment in Canadian broadcasting services, although the *Direction to the CRTC (Ineligibility of non-Canadians)* specifically prohibits foreign control "whether on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control".⁷⁰ Since the CRTC does not report on voting interests, non-voting interests, or Canadian broadcasters' foreign-held debt, it is impossible to make accurate forecasts about any benefits that outright foreign ownership, or higher levels of foreign control might yield.
52. Data from a related sector show that foreign companies produce less Canadian content than Canadian companies. Between 1996 and 2005 sound recording companies in Canada produced 4,310 new releases of Canadian artists: 83% were produced by Canadian-controlled companies, and 17% by foreign-controlled companies.⁷¹
53. The bottom line, in CEP's view, is this: Canada's private broadcasters are running out of excuses to avoid the obligations they agreed to assume when they applied for and were granted temporary rights to use Canada's broadcasting spectrum. Having profited from lax regulatory scrutiny for the past twenty-five years, the now extremely small group of owners that controls our broadcasting system wants to cash out – and to maximize the price they receive for their sale by opening up the bidding to foreign buyers. While this very small group of owners may benefit from foreign ownership, the risk of harm to Canadians is substantial

Concentration of ownership in broadcasting and other cultural industries raises cultural and civil liberties issues, rather than the economic issues – the danger of excessively high prices – raised by concentration in other areas.

Task Force on Broadcasting Policy, *Report*, (Minister of Supply and Services Canada: 1986) at 169.

IV. Foreign ownership places Canadian democracy at risk

A Communications are not like any other business sector

54. Broadcasting differs from other business for several reasons. First, the product it sells is not clearly defined: broadcasters sell audiences to advertisers, not programming per se. Second, audiences typically don't buy broadcasters' product – advertisers do. Third, unlike virtually any other product besides politicians themselves, broadcasters' product affects democratic decision-making. The World Trade Organization has pointed out that "[d]ecision-making in open societies presupposes informed public discussion."⁷² Other countries agree about the importance of control over news content not only domestically, but internationally. In February 2002, for example, the *New York Times* reported that the American Pentagon's Office of Strategic Influence was "developing plans to provide news items, possibly even false ones, to foreign media organizations" in an effort "to influence public sentiment and policy makers in both friendly and unfriendly countries".⁷³ Our point is that control over news and information is vital, but assessing 'productivity' of this content is extremely difficult.

...
The Commission also took note of the concerns expressed by the intervenors regarding the possible conflicts of interest that might arise between the objectives of a company engaged in the development and management of real estate and the responsibilities imposed on broadcasters by the *Broadcasting Act*. The Commission agrees that such public issues as government housing policies, regional planning, the rezoning of lands, the relationship of landlords to tenants contain a potential for conflict between the objectives of a developer and manager of real estate and the responsibilities of broadcasters to provide balanced opportunity for the expression of differing views on matters of public concern. In the opinion of the Commission, the representatives of Campeau failed to respond adequately to these concerns.

...
In Decision CRTC 74-390 (21 October 1974) the CRTC denied an application to transfer effective control of cable systems in Ottawa, to the Campeau Corporation

55. Broadcaster's non-news content also helps to define our society by reflecting and shaping Canadian values, ideas and experiences, and – no less importantly – creating a broad range of careers and employment opportunities for Canadians and our members. Thousands of Canadians make an income through their careers in our cultural sector, and rely on broadcasters to make their work accessible to Canadians (and when exported, to audiences around the world).

"Interviewed in his Winnipeg office, David [Asper] was bubbling with enthusiasm in his role as content guru. ... 'We now have this whole content engine. As a means to understanding who the papers work, how its content is generated and in shaping a view or editorial direction, one of us needs to be accountable for these businesses. They're important and they shape people's attitudes and perceptions and that's principally what I'm doing.'"
Gordon Pitts, *Kings of Convergence: The fight for control of Canada's media*, (Canada: Doubleday Canada, 2002) at 266

56. The importance of news and non-news audio-visual content explains why, during the negotiations for the General Agreement in Trade in Services that began more than ten years ago, only 14 countries made specific commitments about the audiovisual sector, and just 7 made specific commitments about radio and television services: the Central African Republic, Gambia, Lesotho, New Zealand, Panama, Thailand and the United States.⁷⁴ Subsequently "... audiovisual services were taken off the [Uruguay Round] negotiations altogether, with the agreement to initiate negotiations on these sectors within three years of entry into force of the agreement establishing the WTO."⁷⁵ By June 2005, 26 countries offered to liberalize entry into the audio-visual sector, but six times as many (122) other countries had made no audio-visual commitments.

B What would Smith say?

57. Countries' reluctance to allow foreign control over mass media such as broadcasting is perplexing in light of conventional economic wisdom that foreign investors will provide Canadian businesses with the know-how they obviously lack.⁷⁶ Allowing foreign competition would adhere to Adam Smith's original advice to the prudent household head: "never to attempt to make at home what it will cost ... more to make than to buy."⁷⁷
58. But Adam Smith also supported measures to safeguard domestic control over the then-great communications highways of his era – the navigable waterways of Great Britain. He agreed with rules in Great Britain's shipping legislation which limited access to British nationals and their vessels, even if such rules raised the cost of foreign goods to the British:

[a]s **defence**, however, is of much more importance than opulence, the *Act of Navigation* is, perhaps, the wisest of all the commercial regulations of England."⁷⁸

59. The simple fact is that broadcasting is not a competitive marketplace. (Even if it were, as the authors of one major university economic text point out, no economy in the world operates in a free market;⁷⁹ "even when there is maximum reliance on the market economy, government is needed to enforce contracts and prevent theft."⁸⁰) And as a mass medium of communications, Canadians rely on broadcasting to access the news and information that are fundamental to Canada's democracy and the decision-making this entails.
60. This special attribute of the media – not just to entertain Canadians, but also to inform them – is the only rationale for governments' differential, and perhaps even preferential, treatment of information-oriented media.

We recognize that if those [distribution programming] choices were made in New York or Los Angeles, it's far more likely those people would deal with people they're used to dealing with and whom they have gotten to know socially. They owe them a favour or want a favour from them or they've done business with them. It's quite possible that the Canadian coming out of St. John's, Toronto, or Vancouver wouldn't even get in the door to present a proposal for a specialty channel.

BCE, Meeting of the Standing Committee on Canadian Heritage (26 November 2002)

C Media ownership determines media content

61. Just as widget manufacturers decide the shape

of the widgets they manufacture, Canadian broadcast owners also determine the content of their news and non-news programs.

62. Even if many Canadians maintain their own websites, most do not have the time to read more than 30 million blogs daily, and rely on mainstream newsgathering organizations that employ professional journalists and reporters for information and analysis. But since these mainstream organizations also have limited time and resources, their editors and producers act as gatekeepers, selecting what they view as the day's key events.⁸¹ The gatekeepers that are hired to work at Canadian radio and television stations have the "[t]he power to determine each day what shall seem important and what shall be neglected"⁸² The problem is that consolidated ownership has reduced diversity and autonomy in gatekeeping. As Dalton Camp explained a decade ago,

Someone who is sacked on one Black paper is likely banned from future employment at the 57 others Chain ownership is likely to produce less dissent, fewer questions, and more Velveeta, a measurable lack of diversity of opinion in the Canadian print media.⁸³

63. Content analyses conducted in the United States over the past twenty years have confirmed a relationship between ownership and the way that stories are framed.⁸⁴ Concentrated ownership reduces the critical viewpoints that democracy needs. One US study examined stories about Iraq in the evening newscasts of 6 TV networks during March 2003:⁸⁵ after the invasion of Iraq began official voices dominated U.S. network newscasts, while opponents of the war were notably underrepresented; "[a]nti-war sources were treated so fleetingly that they often weren't even quoted by name." Clear Channel, one of the largest US radio station operators, is accused of firing radio hosts who appeared not to support the invasion of Afghanistan, and of warning radio stations in 2001 not to play music focussed on peace, such as John Lennon's *Imagine*.⁸⁶

Lowry Mays, Founder of major US broadcaster, Clear Channel:

"If anyone said we were in the radio business, it wouldn't be someone from our company. We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers products.

Alexander Lynch, "The Media Lobby" online: *AlterNet MediaCulture* (posted 11 March 2005) <<http://www.alternet.org/mediaculture/21477/>>. According to Lynch, *Fortune* quoted Mays as making this statement in 2001.

64. It is now well known that stories about matters of public concern can be framed differently, positively or negatively, using a number of techniques.⁸⁷ Canadian anecdotes and research confirm the strong link between ownership and media content, although for the most part the research involves the print media.⁸⁸ Knowing that fewer employment opportunities exist due to concentrated media ownership – or that foreign owners sign their paycheques – could clearly affect how media workers perform their jobs.⁸⁹

... Another ingenious method of controlling the news was used by Air Canada. In 1978 it notified newspaper advertising managers that its ads would be canceled as long as any news story of an Air Canada crash or hijacking ran in the paper and if its ads were carried within two pages of a news story of any crash or hijacking on any airline.

Ben Bagdikian, *The Media Monopoly*, 6th Edition, (Beacon Press: Boston, 2000) at 167:

65. Consolidated media ownership has already reduced Canadians' access and exposure to different ideas and information. More stations share their journalistic resources and programming content, instead of producing such content separately.⁹⁰

66. Believing that if foreign ownership of Canadian broadcasting were allowed, Canadians could simply switch to alternate sources of information – such as blogs or Canadian broadcasters' and newspapers' websites – simply ignores the large amount of time that

If foreign ownership is not capped, our Canadian perspective would be diluted to the point of disappearing into the continental perspective of large foreign media conglomerates.

André Bureau, CEO, Astral Media and former chairman of the CRTC, *Remarks to shareholders* (11 December 2002)

Canadians spend with conventional broadcasting services. It also ignores the source of much internet content about Canada: Canadian newspapers and magazines, Canadian broadcasters, and Canadian bloggers who often rely on Canadian newspapers, magazines and broadcasters. The last American newspaper correspondent left Canada in early 2007, when *The Washington Post* closed its Toronto bureau.⁹¹ So when Canadian broadcasters reduce or eliminate their newsgathering staff, the amount of professional journalism about Canada that is available to Canadians online decreases. If the same Canadian news item is repurposed and reused in radio, television, newspapers and online, it is not 'new' news, but recycled news, providing multiplication of the same content, but not diversity in coverage.

D Foreign ownership threatens Canadians' access to Canadian information from the mass media because trade agreements and domestic regulation just don't mix

67. Canada has signed numerous bi- and plurilateral trade agreements that promote investment. NAFTA is the most well-known of these agreements; it and now serves as the model for new bilateral trade investment protection agreements of which sixteen are now in force.⁹² The agreements are intended to "secure and maintain reliable access to foreign markets for Canadian exporters, service providers, and investors", by "reducing the level of risk associated with foreign markets through the creation of a rules based system with effective dispute resolution mechanisms."⁹³
68. Trade treaties affect domestic public policy because they affect the "more subtle measures taken by governments, including ... regulation, taxation, legislation and judicial decision-making."⁹⁴ Under NAFTA, for instance, foreign investors must be protected not just from uncompensated expropriation, but more broadly from any measure equivalent to expropriation: Article 201 broadly defines a measure to be "any law, regulation, procedure, requirement or practice" and Article 1139 defines investments to include enterprises, equity as well as debt securities and loans. Article 1110 prohibits Canada from taking "a measure tantamount to nationalization or expropriation" except for a public purpose that is non-discriminatory and based on due legal process, and requires that Canada compensate investors affected by the introduction of such measures.
69. If the current cultural exemption were removed from NAFTA, article 1106 would on its face clearly prohibit Canada from requiring domestic programming content or domestic program production. Foreign buyers of Canadian broadcasting services which believed Canadian broadcasting requirements breach the article could threaten legal action.

North American Free Trade Agreement, Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

...

- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

...

- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

70. Of six investor-state disputes that have been settled to date, five have favoured the investors (see chart, next page).

71. As for arguments that Canadian broadcasters' growth is impaired by their inability to fully own other countries' broadcasters, it is worth bearing in mind the context in which Canada operates. Although Canada is the world's seventh-largest market economy⁹⁵, it is said to be the second largest exporter of audiovisual products.⁹⁶ But the largest audiovisual exporter is the US⁹⁷: of the television fiction imported by Western European television services 71% comes from the US, while under 2% comes from Canada.⁹⁸

E Jurisdiction may no longer be in Canada

72. Canadian national sovereignty – not just over its physical borders, but over its culture and the values of its society – gives Canadians control over Canadian broadcasting. Even apart from specific broadcasting legislation, Canadian common law and other (human rights) legislation applies to all Canadian broadcasters.⁹⁹ But this is not true in other jurisdictions where more foreign entrants have been permitted. In 1997 the European Court of Justice (ECJ) held that under the European Community's audio-visual directive, broadcasters are subject to the laws of the state in which they make their scheduling decisions.¹⁰⁰ In the case of advertising to children, an area that the CRTC and Quebec both regulate, the ECJ has also held that

... a Member [of the European Commission] cannot object on grounds of national law to the broadcasting of an advertisement from another Member State which aims to attract the attention of children under 12.¹⁰¹

And in a 2001 case an American court held that American law has jurisdiction over American companies that transmit simultaneously to other countries.¹⁰²

73. This caselaw suggests that in some cases a broadcaster in Canada may not fall under the jurisdiction of Canadian courts. If it breaches CRTC regulations, but is a subsidiary of a foreign company whose head office and main business are located outside of Canada, if its main target of broadcasting consists of the citizens of another country and whose programming content is broadcast simultaneously within Canada and the other country,¹⁰³

V. Conclusions: prohibit foreign ownership and regulate Canadian broadcasters

74. CEP fundamentally disagrees that current restrictions on foreign ownership should be removed or amended to permit foreign ownership of Canadian broadcasting services. Foreign ownership will not solve, but will compound, the current problems of oligopoly ownership, inadequate regulatory enforcement and declining commitment to Canadian employment, production and programming.

75. Quite frankly, while it is easy to see how some private broadcasters will benefit from cheaper loans, it is very difficult to see how Canadians will benefit from direct foreign control of Canadian broadcasting services.

First, the risk to fundamental values such as voters' ability to be fully informed about local,

| | |
|--|--|
| 1997: Ethyl Corporation, against Canada | Canada repealed challenged legislation, apologized to the company and settled 'out-of-court' with Ethyl for US\$13 million |
| 1998: S.D. Myers, Inc., against Canada | Tribunal determined Canada breached Chapter 11; awarded damages of US\$6.05 million and costs of \$850K |
| 1999: Pope & Talbot, Inc., against Canada | Tribunal determined Canada breached Chapter 11; awarded damages of US\$462K and costs of \$US120K |
| 2000: Metalclad Corp., against Mexico | Tribunal determined Mexico breached Chapter 11, awarded damages \$16.5 million plus interest |
| 2005: Marvin Feldman Karpa, against Mexico | Tribunal determined Mexico breached Chapter 11; awarded damages of US\$1.6 million |
| 2007: Archer Daniels Midland & Tate and Lyle Ingredients, against Mexico | Tribunal ruled that Mexico breached Chapter 11; damage award not yet public |

We're saying for content companies ... go to 49 percent. Keep the content rules, make sure you get reciprocity ... so that we can expand .. to their markets and have broader outlets over which to amortize Canadian programming, for example.

We also say that a second step could be to go to 100 percent. It doesn't matter, as long as there's content regulation underneath it.

Leonard Asper, CanWest , Meeting of the Standing Committee on Canadian Heritage (1 March 2002).

regional and national matters of concern is extremely high. Second, arguments that foreign broadcasters will adhere to Canadian broadcasting regulations simply ignore trade treaty obligations that prevent regulatory protection of Canada's cultural sector, and also ignore the current regulatory authority failure to enforce existing Canadian broadcasters' regulatory non-compliance. And third, attempting to sanction foreign broadcasters' behaviour, when breaches of the same rules by Canadian broadcasters are not sanctions, looks like a fast way to bring Canada before an international trade arbitration panel or into a court of law.

76. Appealing investment-related arbitration decisions and awards is difficult, even if an arbitration tribunal wrongly decides facts or law.¹⁰⁴ Canada's courts have held that "a high level of deference should be accorded" to these Tribunals¹⁰⁵ and Canada's Supreme Court has upheld and affirmed "the fundamental principle of the autonomy of arbitration". Specifically, the Court stated that "[r]eview of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law".¹⁰⁶
77. CEP considers that the most efficient way to improve conditions in our broadcasting system is to replace our current broadcasting legislation with converged communications legislation to address current problems and issues. The most important problem in Canadian broadcasting, is not that non-Canadians can't own radio and television stations. After all, Canadians support domestic control of their communications systems: in 2001 Decima found that 68% of Canadians opposed changes that would allow Canadian media and telecommunications companies to be majority owned by foreign companies; in 2003, 72% were opposed.¹⁰⁷ In late 2007 a new survey of voting preferences found that 66% of voters "believe broadcasting and communications are too important to our national security and cultural sovereignty to allow foreign control of Canadian companies in this sector" and that "62% of Canadians are more likely to vote for candidates who oppose giving control of Canadian media to foreign interests".¹⁰⁸
78. The real problem is not foreign ownership, but the lack of more, better-financed Canadian news and non-news programming content, excessive focus on deregulation and non-enforcement of existing regulation and law. Canada does not need a rerun of the current inefficient, unregulated broadcasting oligopoly's failures, with different foreign participants: Canada needs a properly regulated communications system focused on maximizing public benefits from private sector gains.

A 'Control' poorly defined

79. One major problem that new legislation must address is a more precise definition of 'ownership' and 'control'. Parliament did not clearly define precisely what it meant in requiring as an objective of its broadcasting policy that the broadcasting system be 'owned and controlled by Canadians'. Cabinet's current direction on non-Canadian ownership¹⁰⁹ also lacks certainty because it does not explicitly address debt and non-voting equity.
80. The result is inconsistent decision-making by the CRTC. In some cases, the potential for foreign influence over the undertaking (and not the percentage of voting or non-voting shares) has resulted in applications being denied.¹¹⁰ In others, the CRTC has approved applications after changing them through conditions of licence:¹¹¹ in 2004 the CRTC approved an application for change in ownership of cable distribution undertaking in which non-Canadian interests contributed 65% of the transaction's equity financing and held 33% of the acquiring company's voting shares.¹¹² The CRTC has no clear test to determine whether non-Canadians are already exercising control over Canadian broadcasting services.

B Canada needs converged communications legislation

81. The current legislative distinctions between broadcasting and telecommunications are encouraging a divided approach based on economic ideology and politics, rather than sound, empirically-based policy that serves the public interest.

82. Convergence has arrived in Canada and needs new legislation to ensure it serves the public interest and deals with the real problems in Canadian communications. Canadian legislation must take a holistic view of its communications subsectors to protect its own national security and the interests of Canadians. Digital technology allows telecommunications companies to offer internet audio/video streaming, broadcasting to mobile telephones, podcasting and different forms of video on demand. These companies now perform the same functions as cable and satellite distribution companies, without any regulatory oversight.
83. Where telecommunications companies formerly dealt exclusively with the carriage of content from one point to another, many also now own interests in broadcasting and the print media. Digital technology allows telecommunications companies to offer internet audio/video streaming, broadcasting to mobile telephones, podcasting and different forms of video on demand. And where the regulatory authority once ensured structural separation between communications media, it now actively encourages and promotes cross-media ownership. Companies such as Rogers, Shaw, Telus and Quebecor wield enormous influence over regulatory and legislative decisions in a variety of communications subsectors, including print, broadcasting, and telecommunications. Simply amending the rules that affect one communications subsector and either disregarding or minimizing the negative effects of such changes on others, amounts to the favouring of a very small group of privately-held companies over the broader public interest.
84. Legislation is required because communications, more than any other sector of the economy, affects Canadians' views and behaviour. Legislation is required to protect the public interest, since our broadcasting and telecommunications systems were financed primarily by the public – whether by direct public investment in infrastructure, the granting of monopolies, the licensed use of electromagnetic spectrum, the preferential tax treatment of expenses and depreciation, or regulated subscriber payments. New legislation is required because the few very powerful companies working in both telecommunications and broadcasting now believe their interest in higher profits and low-cost loans subordinate all other concerns.
85. Converged communications legislation must deal with the real challenges in Canadian communications: universal, reliable and affordable service (including broadband access) to the urban and remote areas of a very large country with a small, widely-dispersed population that relies on our communications system for unfiltered, uncensored and 'network neutral' content. More specifically, CEP believes that new converged legislation must:
- a. **acknowledge the essential national role of the broadcasting industry**, and therefore set out objectives that include the protection and strengthening of Canada's national sovereignty, national security and cultural identity
 - b. **require that Canadian audio-visual content providers be owned and controlled by Canadians**, whether on the basis of number of directors on a Board of Directors, voting shares, non-voting shares, debt, equity or any other form of control
 - c. **define telecommunications to include all systems of communication that transmit content** without alteration, which includes the traditional sectors of telecommunications, broadcasting (*i.e.*, cable), and print media (to the extent that they operate telecommunications or broadcasting services)
 - d. **limit cross-media ownership** to current levels, or prohibit cross-media ownership where demonstrable risk of harm to the public interest exists
 - e. **ensure universal access** to communications services for Canadians which, in the context of audio-visual content providers, requires that reliable, state of the art telecommunications services be available to all Canadians without discrimination on the basis of content (*i.e.*, introduce and enforce provisions that guarantee network neutrality)
 - f. ensure that **reliable, high quality audio-visual services** provided to Canadians are **affordable**

- g. ensure that the Canadian communications system **protects and expands employment** for Canadians, rather than exports jobs to other countries
- h. ensure that **Canadians' rights to the privacy of their communications are respected**, and therefore maximize the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
- i. establish an **independent administrative authority to regulate Canadian communications in the public interest**
- j. **require transparent decision-making** and prohibit meetings with unnamed 'stakeholders' about important communications policy matters without notes or transcripts being taken
- k. **establish maximum licence terms of ten years**, so as to provide parity between broadcasters and telecommunications service providers that are now treated differently
- l. require that all licensee commitments or promises be transformed into **conditions of licence** (to ensure that non-compliance can be addressed using the sanctions set forth by Parliament)
- m. employ a **competitive licence renewal** system that maximizes benefits for the public and does not grant automatic preference to existing licensees
- n. **allow competition for each existing licence** after five years of a licence's being granted, provided prospective licensees propose to and do improve communications services to the public
- o. **prohibit what is now the effective "sale" of licences by licensees** (that decide which companies acquire the licences) and require the regulatory authority to allow competing applications to acquire these licences
- p. require the administrative authority to **use only the sanctions established by Parliament** for the breach of a condition of licence, regulation or mandatory order (*i.e.*, fines, prosecution, licence suspension or licence revocation) rather than any informal sanctions it may itself devise (such as written warnings or short-term licence renewals)
- q. permit decisions of the regulatory authority to be **appealed on the basis of law, jurisdiction or mixed fact and law**, and
- r. **encourage telecommunications research and development** in Canada, and innovation in the provision of telecommunications services.

C Panel's 'stakeholder' meetings

- 86. CEP understands that the Panel will be meeting with certain unnamed 'stakeholders', behind closed doors. This represents the latest in a series of non-transparent meetings where a selected few discuss important issues. Other 2007 examples include the 'no-notes-taken' meetings held by the CRTC Task Force to review the Canadian Television Fund and the CRTC's closed door discussions about New Media Issues.
- 87. Given the original emphasis placed on accountability, openness and transparency in legislation such as the *Federal Accountability Act*, CEP questions this Panel's apparent desire to again engage in closed-door meetings with unidentified persons or corporate representatives. What is so secret about removing or softening foreign ownership restrictions in Canada's communications sectors that the Panel selected to study this issue (considers it necessary to meet in private with representatives from those sectors or elsewhere)?
- 88. To ensure that the views of its members are reflected, CEP hereby formally requests the opportunity to participate in the Panel's meetings with stakeholders. CEP also urges the Panel to publish the criteria it will use to select participants in such meetings, along with transcripts of these proceedings.

Endnotes

¹ Order in Council P.C. 1994-1689 (11 October 1994), being Appendix II of CRTC, *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition*, Report in response to the Governor General in Council (19 May 1995) at ix.

² *Broadcasting Act 1991*, C. B-9.01, S.C. 1991 [*Broadcasting Act*], ss. 3.(1)(f) and 3.(1)(i)(iv). Other objectives are that the programming provided by the broadcasting system should:

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

encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, ...

through its programming and the employment opportunities arising out of its operations, 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,

Ibid., s. 3.(1)(d).

³ Stratavision, *Ownership Structure and Behaviour in the Canadian Broadcasting System*, Prepared for the Task Force on Broadcasting Policy (Toronto: 17 January 1986) at 6.

Exemptions granted by order in council (date indicated in parentheses) allowed Canadian Marconi (18 August 1959), Western Ontario Broadcasting Company Limited (16 February 1961), Central Ontario Broadcasting Company Limited (17 October 1963) and Television de Quebec (Canada) Limitée (18 Feb 1965) to operate broadcasting undertakings. *House of Commons Debates*, at 3114 (Question No. 397 – Mr. Grégoire; answered by Ms. LaMarsh). Western Ontario Broadcasting Company Limited held the licences for CKLW-AM, CKLW-FM and CKLW-TV in Windsor. It was owned by RKO Distributing Corporation of Canada Limited, owned in turn by RKO General Inc., which was owned by General Tire and Rubber Co. of Akron, Ohio. The stations' promotional literature described them as "Detroit stations". Foster, *supra* note 41 at 261.

⁴ Sources of information for the chart:

1968-1995/1999 (TV/Radio): Barry Kiefl (6 June 2000) *50 Years of Canadian Radio and TV: Do Canadians Still Hear and See Themselves?* (using BBM and AC Nielsen data);

1970-1979: TV (Fall BBM) CRTC, *Broadcasting and Telecommunications Macro-Statistics*;

1995-2001: TV (BBM) CRTC Broadcast Policy Monitoring Report 2003 at 39;

2002-2005: TV (BBM) CRTC Broadcast Policy Monitoring Report 2006 at 41;

1999-2005: Radio (MicroBBM) CRTC *Broadcasting Policy Monitoring Report 2006* at 11.

⁵ See CRTC, *Broadcasting Policy Monitoring Reports*, various years.

⁶ After deducting the revenues for the largest TV ownership groups from private TV's total revenues, we calculated the average revenue for each remaining ownership group; since it is unlikely that the remaining ownership groups obtained the same revenues, we suspect that our results actually underestimate the HHI for private TV.

⁷ See CRTC, *Broadcasting Policy Monitoring Reports*, various years.

⁸ CRTC, *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, Public Announcement (Ottawa, 25 July 1978):

...the Commission has given serious consideration to the possibility of implementing a competitive transfer system whereby if control of a licensed undertaking were to be transferred, the situation would be treated as if the existing licence was being surrendered and a new one in its place being applied for, with interested parties entitled to submit competing applications. Such a procedure has been strongly advocated by a number of critics and intervenors. The Commission finds, however, that while there is much merit in theory in such a process, there are also such formidable obstacles to its implementation as to render it impracticable.

It is unclear whether these "formidable obstacles" still exist or are relevant today, particularly since the FCC has used and still uses a competitive renewal system. Clearly a competitive renewal procedure has not blocked US broadcasters' ability to operate.

⁹ CRTC, *The Issuance of Calls for Radio Applications*, (Public Notice CRTC 1999-111). It does not call for applications when it receives an application

- to provide the first commercial service in a market
- from the sole commercial operator in a market to operate a new station

- from the sole commercial operator in a market to operate a new station in the other official language
 - from the sole commercial operator in a market to convert the existing radio station from AM to FM, or
 - from one of two commercial operators in a market to convert an existing radio station from AM to FM.
- ¹⁰ Sources: Dominion Bureau of Statistics, Statistics Canada and CRTC (*Statistical and Financial Summaries*, various years).

¹¹ Richard Paradis, President, Canadian Association of Film Distributors and Exporters:

I would like to highlight the weak credibility of the argument whereby Canadian companies desperately need an injection of foreign capital to ensure their growth. This would not occur without Canadian ownership restrictions being dropped. In the last few years, a significant number of major transactions have occurred in the Canadian communication, broadcasting and media sectors in general. Nevertheless, every Canadian company involved in these transactions has easily managed to raise capital, which amounted to billions of dollars. Further, the majority of these companies raised this money entirely in Canada without needing to look for a foreign investment, which is authorized to a maximum of 33.33% for parent companies and 20% for licence holders.

Meeting of the Standing Committee on Canadian Heritage, (16 April 2002).

¹² C.C. Johnson, *The Canadian Radio-television and Telecommunications Commission: A Study of Administrative Procedure in the CRTC*, Study Paper (Ottawa: Ministry of Supply and Services, 1980) at 121.

¹³ John Charles Clifford, *Content Regulation in Private FM Radio and Television Broadcasting: A Background Study about CRTC Sanctions and Compliance Strategy*, (October 1983: Ottawa, Ontario), at ¶460, original underlining removed.

¹⁴ *Ibid.* at para. 461, original underlining removed.

¹⁵ *Policy Implementation*, supra note 39 at 22:

... has not revoked or suspended FM radio licences for detected non-compliance with content requirements. Indeed, the CRTC has not denied licence renewals in notorious situations such as the large Montréal FM radio market, where licensees' non-compliance with content requirements has been perhaps the most serious. The CRTC tends to be satisfied with reasonable assurances from licensees that they will improve their performance. In rare situations where assurances have not been forthcoming, the CRTC has refused to renew a few FM radio licences. ... When the CRTC has refused to renew licences, the same licensees, newly constituted, have always been given new licences for the same markets. Even the CRTC has explicitly recognized that such non-compliance threatens its integrity.

¹⁶ Task Force on Broadcasting Policy, *Report* (Ottawa, 1986) at 178.

¹⁷ M.L. Auer, "The CRTC's Enforcement of Canada's Broadcasting Legislation: "Concern", "Serious Concern", and "Grave Concern" 5:3 *Canadian Journal of Law and Technology* (November 2006) 115 at 123-125.

¹⁸ In CRTC, *Public Announcement* (26 February 1973), regarding Decision CRTC 73-71, the CRTC revoked the licence of Wawa Cable Vision Limited because the licensee (after several renewals granted to allow it to improve service) was "unable to provide an adequate service to the area licensed to it."

In CRTC, *Revocation of the Licence for the Cable Distribution Undertaking that was to Serve Saints-Anges, Quebec, Issued to Huges Roberge, Doing Business under the Name and Style of "Telecâble Saints-Anges Enr."*, Decision CRTC 91-883 (17 December 1991), the CRTC revoked the licence held by Huges Roberge because, although it had issued the licence in October 1988, the licensee had by 1991 failed to implement it. The CRTC therefore called the licensee to a public hearing in March 1991, where it promised to be in operation in October 1991 – but by the end of October 1991, it still had not implemented the licence.

¹⁹ CFBC-FM (Decision 77-418); CFCQ-FM (87-192); CFIN-FM (Decision 87-756); CFOU-FM (Decision 87-949); CHIN (Decision 70-72); CHNL-FM (Decision 81-894); CHOI-FM (Broadcasting Decision CRTC 2004-271); CHSM (Decision 89-523); CIGO (Decision 89-614); CION (Decision 87-754); CJLS (Decision 68-44); CJLX (Decision 73-19); CJMF-FM (Decision 84-209); CJRN (Decision 88-867), and CKLE-FM (Decision 87-753).

²⁰ In May 2007 it was said that the CRTC "must avoid suffocating the forces of the market ... we must give fuller play to the energy and creativity of market forces....", because in the past, the CRTC "took a heavily regulated approach in order to nourish our broadcasting system so as to allow it to fulfill the objectives of the Broadcasting Act in the face of the North American reality. We've been very successful

and as a result we have a healthy and flourishing system." Konrad von Finckenstein, quoted by Greg O'Brien, "Chair sets out his 're-balancing' act for broadcast" online cartt.ca (11 May 2007).

²¹ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (31 January 1983)

p. 10.

²² CRTC, *The Canadian Broadcast Standards Council*, Public Notice CRTC 1988-159: (22 September 1988)

²³ CRTC, Public Notice CRTC 1990-20.

²⁴ CRTC, *Amendment to the Television Broadcasting Regulations, 1987 to permit, by condition of licence, the airing of "informercials" during the broadcast day*, Public Notice CRTC 1994-139 (7 November 1994)

²⁵ CRTC News release: *CRTC encourages private, local television broadcasters to increase Canadian entertainment programming*, (24 March 1995) at p. 1.

²⁶ CRTC News release: *Canadian television programming – a future defined by Canadians for Canadians*, (6 May 1998) at p. 1.

²⁷ CRTC Information: *Did you know?* (11 June 1999).

²⁸ Andree Wylie, CRTC Vice-Chairperson, *Broadcasting Notes for an address to the Atlantic Association of Broadcasters Annual Conference* (11 September 1999).

²⁹ Canadian Association of Broadcasters, *Response to Public Notice CRTC 1995-205, Approach to Management Agreements Between Licensees of Radio Programming Undertakings*, (1 March 1996) at para. 8. "The result: greater productivity and a stronger competitive position. Stronger businesses are better able to innovate and provide high quality service and products."

³⁰ CHUM Limited Vice-President of Programming, CHUM Group Radio, CRTC Public Hearing *Transcript Hull, Quebec* (28 June 1999) Vol. 1 at para. 675:

... [t]hrough its association with the CHUM Radio Network, the [CHUM Limited's new FM station in London] will have access to numerous syndicated specials on Canadian performers, along with the use of an extensive library of recorded interviews with up-and-coming Canadian talent.

³¹ When it approved the 1985 SaskWest applications for CFSK-TV and CFRE-TV, the CRTC took "into consideration the fact that ... SaskWest ... will be able to achieve significant economies of scale in the operation of the two stations, particularly in the production of local programs." Decision CRTC 85-756.

³² K. J. Goldstein, "Who Controls Canada's Media" Remarks (13-15 February 2003) Annual Conference of the McGill Institute for the Study of Canada (Montreal) at 1: "... [M]edia consolidate ... simply to re-aggregate the fragments to maintain economies of scale."

³³ Rogers Communications Inc, *2002 Annual Report*. Rogers noted that its communications media are "... in an enviable position in that [they] can offer one-stop shopping to advertisers on both a local and national basis across various media."

³⁴ CHUM Limited told the CRTC in 1999 that

[o]ur staff in radio in London will definitely be separate from the television staff, although it's our plan to live at the same address. There is room for us thereI think there would probably be some cross-promotion between the two entities from time to time. ... (CHUM Limited Vice-President of Programming, CHUM Group Radio, CRTC Public Hearing *Transcript Hull, Quebec* (28 June 1999) Vol. 1 at para. 730).

... [t]hrough its association with the CHUM Radio Network, the [CHUM Limited's new FM station in London] will have access to numerous syndicated specials on Canadian performers, along with the use of an extensive library of recorded interviews with up-and-coming Canadian talent. (*Ibid*, at para 675).

³⁵ CKVU-TV, *Licence Renewal Application*, (1 June 1994) Schedule 25 at 22. In 1998 the CAB told the CRTC, however, that it should not link increased operating efficiencies to increased Canadian programming expenditures because "... such an approach would effectively penalize licensees for any improvement in financial performance." CAB, *Re: Canadian Television Policy Review Hearing - Public Notice CRTC 1998-44 - Canadian Association of Broadcasters - TV Submission - Requests for additional information*, (15 October 1998) at Appendix B, question 3.

³⁶ The announcers were Mel Kammis, Colleen Troy and Ken Allan Jr., whose same programs filled 60 hours of each station's 126-hour broadcast week. Website schedules of CISQ-FM and CFSR-FM.

³⁷ CRTC, PN CRTC 1993-113 (Ottawa: 28 July 1993): amends the Radio Regulations 1986 to eliminate minimum requirements for spoken word content

³⁸ CRTC, Ownership Study Group, *Ownership of Private Broadcasting: An Economic Analysis of Structure, Performance and Behaviour* (Ottawa, 1978) at 31:

"... the portion of broadcast hours devoted to news and orientation declined during prime time. The bigger the group, in terms of number of stations controlled, the smaller was the proportion of time devoted to news and orientation. In contrast, the group stations allocated more time to the category of light entertainment during prime time."

³⁹ Gordon Pitts, *Kings of Convergence: The fight for control of Canada's media*, (Canada: Doubleday Canada, 2002) at 319.

⁴⁰ *Ibid.*

⁴¹ In 1929, the Manager of the Trans-Canada Broadcasting Company "complained that sardines had a better time in a tin than most broadcasters had in Canada's share of the broadcast band. Seventy-four Canadian stations were jammed on seventeen channels, eleven of which were shared with the United States." Frank Foster, *Broadcasting Policy Development*, (FranFrost Communications, Ltd.: 1982) at 25.

⁴² The Minister responsible for broadcasting told the House of Commons that "there is a lot of broadcasting of jazz from the United States that is not worth listening to, and I should be pleased to stop it if I could; but ... when you are near the broadcasting point you cannot escape interference. I may say that I have in my home here in Ottawa one of the latest receiving-sets of the Marconi company, but when CNRO is broadcasting I can get nothing else" *House of Commons Debates* (31 May 1928) at 3626 (Mr. Cardin).

⁴³ Although previous international conferences had dealt with issues related to the use of radio in telegraphy, the first international conference to deal with present-day uses of radio frequency spectrum took place in 1927 in Washington, and was marked coincidentally by Canada's first insistence on its right to vote independently from Great Britain. Foster, *supra* note 41 at 21.

⁴⁴ The U.S. stations [with 680,000 watts in combined power in 1932] were ... better financed and a great deal more powerful than their Canadian counterparts [with 50,000 watts in combined power in 1932]." Negotiations between the two countries over channel allocations had broken down by 1928. D. Ellis, *Evolution of the Canadian Broadcasting System: Objectives and Realities, 1928-1968* (Ottawa: Department of Communications, 1979) at 1-2.

Money and wattage aside, the US courts had earlier decided that American stations that used Canadian channels without licensing authority were not guilty of "air piracy" because ambiguity in the *Wireless Telegraph Act* left the U.S. Secretary of Commerce unable to deny licence applications or to assign specific channels to individual radio stations. As a result, "U.S. stations were free to occupy other Canadian 'clear' channels – which they did." *Ibid.* at 14. Even "repeated warnings from the [U.S.] government and ... personal appeals from members of the President's Cabinet that national good faith and international goodwill were at stake" did not dissuade private American broadcasters from continuing to appropriate Canadian frequencies. *Ibid.* at 17.

In 1937 Canada organized the Havana Conference; its attendees (including the United States, Mexico and Cuba as well as other countries in the Americas) agree on the allocation of radio frequencies to reduce interference. "The CRTC's Origins" online: CRTC homepage <<http://www.crtc.gc.ca/eng/BACKGRND/Brochures/B19903.htm>> (date accessed 2 November 2002).

Yet lack of control over Canadian airwaves continued until 1938: by then, American broadcasters unable to secure wave lengths in the United States had "simply moved over to Mexico and established high-power stations there using exclusive Canadian channels. The result [was] that not one of the six channels allotted to [Canada] [was] free from interference from Mexican sources." *House of Commons Debates* (8 February 1938) at 246 (Mr. Howe).

⁴⁵ Foster, *supra* note 41 at 14.

⁴⁶ *Ibid.* at 23. Canada raised the problem of frequency interference with the League of Nations Assembly in Geneva on 15 September 1928, pointing out that it was "impossible for radio listeners in certain parts of Canada to hear some of our own stations while transmitting is going on in our neighbouring country.

⁴⁷ *Ibid.* citing NYT editorial of 8 April 1928.

⁴⁸ *Ibid.*, at 25, citing NBC President's speech reported in the *New York Times* of 30 August 1930.

⁴⁹ Royal Commission on Radio Broadcasting, *Report* (Ottawa: September 1929) at 6. Appointed under Order in Council P.C. 2108, the Commission was chaired by Sir John Aird (President of the Canadian Bank of Commerce), with Charles Bowman (editor of the Ottawa Citizen), Dr. Augustin Frigon (director-general of technical education for Quebec), and Donald Manson (chief inspector of radio for the Department of the Marine).

⁵⁰ *House of Commons Debates* (18 May 1932) at 3035 (Right Hon. R.B. Bennett) (underlining added). While 'interference' and 'influence' are today often read synonymously, the then-ongoing problems of spectrum interference and influence over programming content establish that they should be interpreted as separate issues of concern to the Canadian government.

⁵¹ "The CRTC's Origins" online: CRTC homepage <<http://www.crtc.gc.ca/eng/BACKGRND/Brochures/B19903.htm>> (date accessed 2 November 2002).

⁵² *House of Commons Debates* (8 February 1938) at 246 (Mr. Howe).

⁵³ Foster, *supra* note **Error! Bookmark not defined.**41 at 152. During committee hearings in Spring 1953, CFRB Toronto was described as an American station on Canadian soil, a description to which its licensees (the Sedgwicks) objected). *Ibid.* at 153

⁵⁴ Royal Commission on National Development in the Arts, Letters and Services, *Report*, (Ottawa, 1951) at 391 (para. 21).

⁵⁵ At this point the Federal Department of Transport, rather than the BBC, dealt with applications for cable systems: Foster *supra* note 41 at 182. In 1964 the radio regulations were amended to include cable television systems. *Radio Act Regulations*, C.R.C., c. 1371. When the BBG proposed to hold a hearing on cable television, the National Community Antenna Television Association of Canada said that the hearing was beyond the BBG's mandate, and threatened legal action against the BBG and each of its members if it made recommendations to the Minister that impaired cable's growth and development. The members responded at the hearing by stating that they did not intend to recommend anything to the Minister as a result of the hearing. *Ibid.* at 210. Cable was explicitly incorporated into the 1968 *Broadcasting Act*. "... the legislation indicates that community antenna television systems will also be subject to licensing by the Commission." *House of Commons Debates* (1 November 1967) at 3749 (Ms. LaMarsh).

⁵⁶ Exemptions granted by order in council (date indicated in parentheses) allowed Canadian Marconi (18 August 1959), Western Ontario Broadcasting Company Limited (16 February 1961), Central Ontario Broadcasting Company Limited (17 October 1963) and Television de Quebec (Canada) Limitée (18 Feb 1965) to operate broadcasting undertakings. *House of Commons Debates*, at 3114 (Question No. 397 – Mr. Grégoire; answered by Ms. LaMarsh). Western Ontario Broadcasting Company Limited held the licences for CKLW-AM, CKLW-FM and CKLW-TV in Windsor. It was owned by RKO Distributing Corporation of Canada Limited, owned in turn by RKO General Inc., which was owned by General Tire and Rubber Co. of Akron, Ohio. The stations' promotional literature described them as "Detroit stations". Foster, *supra* note 41 at 261.

⁵⁷ *Ibid.* at 210.

⁵⁸ *House of Commons Debates*, at 5740 (Mr. Grégoire).

⁵⁹ Judy LaMarsh, the Minister responsible, told the House of Commons that, ... 'a distinctly Canadian broadcasting system is essential to our national identity, unity and vitality in our second century' and ... 'in future, broadcasting may well be regarded as the central nervous system of Canadian nationhood.' It follows that the system must be effectively under Canadian ownership and control. It is simple enough to say that a single person owning or controlling a broadcasting undertaking must be a Canadian citizen, but the problem becomes much more difficult when we attempt to arrive at a statutory definition of what is meant by the effective ownership or control of a corporation. In practice, it has been found in other contexts that a statutory definition invariably opens the door to evasion. Consequently, in order to retain flexibility, and as forecast in the white paper, Parliament is now being asked to reserve to the government the power to give directions to the Commission aimed at preventing foreign control of Canadian broadcasting facilities. ...

House of Commons Debates (1 November 1967) at 3747 (Ms. LaMarsh).

⁶⁰ *Broadcasting Act*, 1967-68, S.C. c.25.s.1.

⁶¹ Stratavision, *Ownership Structure and Behaviour in the Canadian Broadcasting System*, Prepared for the Task Force on Broadcasting Policy (Toronto: 17 January 1986) at 6.

⁶² K. Acheson & C. Maule, "Canada's Cultural Policies – You can't Have it Both Ways' 4:3 *Can. For. Policy* (Winter 1997) at 76, note 26.

⁶³ G.A. Gottselig, "Canada and Culture: Can Current Cultural Policies be Sustained in the Global Trade Regime?" 5 (2000) *Int. J. of Comm. L. and Policy* online: IJCLP <http://www.digital-law.net/IJCLP/5_2000/ijclp_webdoc_3_5_2000.html> (date accessed: 19 October 2002), note 123.

⁶⁴ At the request of a Canadian service recently licensed to provide similar programming (country music television service).

⁶⁵ The US Trade Representative with whom CMT filed a Section 301 complaint supported the US service. The issue was only resolved after CMT "purchased a share of NCN [New Country Network] and the Canadian channel rebranded itself as "CMT Canada". Standing Committee, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting* (Ottawa: June 2003) at 529.

⁶⁶ Bureau of Public Affairs "U.S. Response to Recent Canadian Trade-Related Decisions" Volume 6, Number 2, *Dispatch Magazine* (U.S. Department Of State Dispatch) (9 January 1995) <<http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6no02.html>> (date accessed: 23 November 2002)

⁶⁷ Non-Canadians may own up to 20% of a Canadian broadcaster directly, and up to 33.3% of a Canadian broadcaster's parent company: $20\% + (0.33 * 80\%) = 26.6\% = 46.6\%$. See House of Commons, Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, (June 2003) at 389. Note that the report appears to round up from 46.64% to 46.7%.

⁶⁸ This refers to Shaw's decision not to carry some Canadian HDTV signals, contrary to the regulations. It took the CRTC more than a year and the formal announcement of a public hearing to examine Shaw's non-compliance before Shaw finally agreed to follow the rules.

⁶⁹ On 21 December 2007 CTVglobemedia applied to the CRTC to change its Discovery Channel licence to include game shows in up to 15% (25 hours/week) of its schedule. CTVglobemedia argues that "a trivia-based show intended to enrich viewers' base of knowledge" would make it "more attractive to its target audience" while still keeping with its mandate of programming that focuses on "the exploration of science and technology, nature and the environment and adventure." One commentator has already suggested that "This is all code for the fact that Discovery wants to import Cash Cab, a highly successful game show launched in the U.S. last year that has unsuspecting cab riders being offered money if they correctly answer trivia questions. It has versions all around the world, including on the U.S. Discovery Channel." See <<http://blog.fagstein.com/2008/01/07/discovery-channel-wants-game-shows/>>.

⁷⁰ *Direction*, s. 3, underlining added. We take finance to include debt.

⁷¹ Sources: Statistics Canada, *Focus on Culture*, Volume 13, No. 3. Catalogue no. 87-004, p. 15; Statistics Canada, *Focus on Culture*, Volume 11, No.4. Catalogue no. 87-004, p. 3; Statistics Canada, "Sound Recording" *The Daily* (26 October 2005) <<http://www.statcan.ca/Daily/English/051026/d051026a.htm>>; Statistics Canada, "Supplemental Table- Profile of the Canadian-controlled and foreign-controlled record production and integrated record production and distribution industry (survey portion), Canada, 2005".

⁷² WTO, *GATS – Fact and Fiction* (2001) <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm> at 2.

⁷³ *New York Times* (19 February 2002) cited in <<http://www.uiowa.edu/~c019090a/pentagonpropaganda.htm>> .

⁷⁴ WTO "Audiovisual Services: Background Note by the Secretariat" *S/CN/40* (15 June 1998).

⁷⁵ J.H. Jackson, W.J. Davey and A. O. Sykes, Jr, *Legal Problems of International Economic Relations: Cases, materials and text on the national and international regulation of transnational economic relations*, (St. Paul, Minn.: West Group) at 886.

⁷⁶ Statistics Canada, "Study: Multinationals in Canada" *The Daily* (13 November 2007) <<http://www.statcan.ca/Daily/English/071113/d071113b.htm>>.:

Foreign-controlled businesses operating in Canada make large investments in knowledge creation via investments in innovation, advanced technology and skilled labour, according to a new report assessing the activities of foreign multinationals.

These investments often translate into superior market outcomes, as foreign-controlled businesses often enjoy relatively high rates of productivity compared with many of their domestic competitors.

⁷⁷ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (New York: The Modern Library, 1937), Book IV, Chapter II, at 424.

⁷⁸ Italics and capitalization added. Smith noted that although innate British animosity towards Holland, the main target of the navigation legislation, may have led to this legislation, its regulations were "as wise, however, as if they had all been dictated by the most deliberate wisdom ...[which] would have recommended, the diminution of the naval power of Holland, the only naval power which could endanger the security of England." *Ibid.* at 431.

According to the American Trade Representative the GATS represents "... an unparalleled opportunity to shape the post-Cold War, globally integrated world to promote our values and our interests – while safeguarding our sovereignty." Robert A. Zoellick, "A Time to Choose: Trade & the American Nation" (Speech to the Heritage Foundation, Washington, DC, 29 June 2001) at 3.

⁷⁹ Richard G. Lipsey, Christopher T. S. Ragan & Paul N. Courant, *Economics*, 9th Canadian ed. (Don Mills: Addison-Wesley Publishers Limited, 1997) at 382 : "... there is no known economy in which the people have opted for complete free-market determination of all economic matters and against any kind of government intervention."

⁸⁰ *Ibid.*

⁸¹ See Gloria Cooper, "The Censors: New patterns in opinion control" *Columbia Journalism Review* (Jul/Aug 2004):

When the Sinclair Broadcast Group, owner of sixty-two television stations in thirty-nine media markets around the country, ordered its eight ABC affiliates not to air "The Fallen," the April 30 Nightline special in which Ted Koppel read aloud the names of the 721 U.S. military members killed up to that point in Iraq, it was hardly an isolated incident. Rather, it was but the latest in a series of political purgings by media behemoths that began seventeen months before, at the onset of the war. Let us connect the dots.

* March 2003. Natalie Maines, lead singer of the Dixie Chicks, tells fans during a London concert, "We're ashamed the president of the United States is from Texas," the group's home state. Cumulus Media, owner of 262 radio stations around the country, stops all of its forty-two country outlets from playing Dixie Chicks music. At a Cumulus-sponsored war rally in Shreveport, Louisiana, a bulldozer symbolically demolishes a pile of Dixie Chicks CDs. Many of the 1,225 radio stations owned by Clear Channel Communications also ban the Dixie Chicks; some also sponsor and promote rallies for the war.

* April 2003. At Clear Channel's WMYI in Greenville, South Carolina, Roxanne Walker, representing the liberal view on a political talk show, argues that the war in Iraq is not justified; on April 7, she is fired. At Clear Channel's KFYI in Phoenix, Charles Goyette, host of a drivetime talk show, welcomes to the discussions critics of the war; his contract is not renewed.

* February 2004. Shock jock Howard Stern, who appears in six Clear Channel markets, touts Al Fraiiken's anti-Bush book and confides to his eight-and-a-half million listeners, "I think this guy is a religious fanatic and a Jesus freak - I think I'm one of those 'anybody but Bush' guys now." Three days later, Clear Channel suspends Stern. On April 8, Clear Channel permanently drops his program from those markets.

⁸² Royal Commission on Newspapers, *Report* (Minister of Supply and Services Canada, 1981) at 163, quoting

Walter Lippmann, the dean of American newspaper columnists, [who] gave eloquent expression to the sense of mission:

The news of the day as it reaches the newspaper office is an incredible medley of fact, propaganda, rumor, suspicion, clues, hopes, and fears, and the task of selecting and ordering that news is one of the truly sacred and priestly offices in a democracy The power to determine each day what shall seem important and what shall be neglected is a power unlike any that has been exercised since the Pope lost his mind.

⁸³ Dalton Camp, "Our Democracy's Quiet Crisis", *The Toronto Star* (March 12, 1997)

⁸⁴ Christopher Pieper and Kristen Hughes, "Media-on-Media: The Framing of the Time-Warner/Turner-CNN Merger" (Prepared for the Western Social Science Association Conference, Mass Communication Division: 25 April 1997). Pieper and Hughes analyzed the content of stories between 1 January 1995 and 1 January 1997, about the merger from CNN, *Time*, *Newsweek*, *Broadcasting & Cable* and *The Nation*. The authors comment that of the results, the "[m]ost striking but least surprising is the strong preference for the business and financial frame across all media except *The Nation*. ... One of the major patterns that runs through all the [results] is a lack of discussion of the effects on American culture, threats to diversity, and the dangers of concentrated control. After excluding the business frame and the players and the personality frames, the most frequently occurring frames were financial benefits to the companies involved and the mere size of the merger."

⁸⁵ Steve Rendall and Tara Broughel, *Amplifying Officials, Squelching Dissent: FAIR study finds democracy poorly served by war coverage* <<http://www.fair.org>> (May/June 2003). The networks and channels were: ABC World News Tonight, CBS Evening News, NBC Nightly News, CNN's Wolf Blitzer Reports, Fox's Special Report with Brit Hume, and PBS's NewsHour With Jim Lehrer.

⁸⁶ Dante Toza, "Clear Channel Rewrites Rules of Radio Broadcasting" CorpWatch (8 October 2003) <<http://www.corpwatch.org/article.php?id=8728>>.

⁸⁷ Robert A. Hackett, *News and Dissent: The press and the politics of peace in Canada*, (Ablex Publishing Corporation: Norwood, NJ, 1991) at 29-30 [ignores citation].

⁸⁸ See CEP, *The Natural Conflict between Private and Public Interests: Why Canada's Media Ownership Policies Must Become Open, Accountable and Enforced*, Comment 128 on Broadcasting Notice of Public Hearing CRTC 2007-5 (Ottawa, 13 April 2007) and Broadcasting Public Notice CRTC 2007-41 (Ottawa, 13 April 2007) (Ottawa, 18 July 2007), Appendix 4 [available online at: http://support.crtc.gc.ca/applicant/applicant.aspx?pn_ph_no=2007-5&lang=E].

⁸⁹ Douglas Kellner, *Television and the Crisis of Democracy* (Oxford: Westview Press, 1990) at 169. Kellner suggests that "news personnel who wished to survive the cuts no doubt moderated critical reports that went against the interests and views of the new corporate managers."

⁹⁰ CanWest Global's Chief Strategy Officer, *Transcript*, CRTC Public hearing (Winnipeg, Manitoba) Vol. 1 (4 February 2002) at para 815:

... where you're going to see the kinds of cooperation between the National Post and the radio station -- if I might just pick one example, we know that this kind of a format skews to a certain upper income demographic, and therefore implicit in that is an interest in business news. There's an opportunity then for a [radio] reporter ... to get on the phone with the National Post reporter that has reported something on the aviation industry, ... and get a brief interview with the aviation expert on the business pages of the *National Post* or the *Financial Post*, and then ... fill that out with a local interview.

Andrew Newman & Andrew Bell, *Application for a New Commercial Radio Broadcasting License*, Schedule 17: Details of Local Programming (2002) at 1: "... [d]uring morning news hours, there are only 2 news announcers heard on the four NewCap stations [in Newfoundland]."

⁹¹ Tim Harper, "Last Post: U.S. papers end era" online: [thestar.com](http://www.thestar.com) (3 April 2007) <<http://www.thestar.com/printArticle/198805>>.

⁹² NAFTA-based trade agreements are now in force between Canada and Ukraine, Latvia, Philippines, Trinidad and Tobago, Barbados, Ecuador, Venezuela, Panama, Egypt, Thailand, Armenia, Uruguay, Lebanon, Costa Rica, Croatia and Romania. Foreign Affairs and International Trade Canada, "Listing of Canada's existing FIPAS" online: www.international.gc.ca (accessed 16 December 2007) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa_LIST.aspx?lang=en>.

⁹³ *R. v. Council of Canadians*, 2005 CanLII 28426 at ¶13 (Ont. S.C.J.), aff'd *Council of Canadians v. Canada (Attorney General)*, 2006 CanLII 40222 (Ont. C.A.).

⁹⁴ Luke Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly Off in All Directions*, Dialogue on Globalization, Occasional paper No. 19 (May 2005) at 4.

⁹⁵ United States Embassy, Economic Section "Economic trends and outlook" Chapter 11 in *Canada: Economic Trends and Outlook* Online: Tradeport homepage.

<<http://www.tradeport.org/ts/countries/canada/trends.html>> (date accessed: 23 September 2002).

⁹⁶ G.A. Gottselig, "Canada and Culture: Can Current Cultural Policies be Sustained in the Global Trade Regime?" 5 (2000) *Int. J. of Comm. L. and Policy* online: *IJCLP* <http://www.digital-law.net/IJCLP/5_2000/ijclp_webdoc_3_5_2000.html> (date accessed: 19 October 2002), note 125 [hereinafter *Canada and Culture*].

⁹⁷ United States Embassy, Economic Section "Economic trends and outlook" Chapter 11 in *Canada: Economic Trends and Outlook* Online: Tradeport homepage.

<<http://www.tradeport.org/ts/countries/canada/trends.html>> (date accessed: 23 September 2002)

⁹⁸ European Audiovisual Observatory, *Statistical Yearbook 200: Film, television, video and new media in Europe* (European Audiovisual Observatory: Strasbourg 2001) Table T.8.1 at 151 [hereinafter *EAO Observatory*].

⁹⁹ Under s. 31.(2) of the 1991 Act,

...[a]n appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

¹⁰⁰ *VT4 v. Flemish Community of Belgium* (5 June 1997), C56/96, cited in "Audiovisual Policy – Legislation, caselaw & documents" European Commission homepage <http://europa.EU.int/comm/avpolicy/legis/key_doc/caselaw.en.htm>.

¹⁰¹ *Konsumentenombudsmannen v. Agostini Förlag and TV-Shop I Sverige* (9 July 1997), cited in "Audiovisual Policy – Legislation, caselaw & documents" European Commission homepage <http://europa.EU.int/comm/avpolicy/legis/key_doc/caselaw.en.htm>.

¹⁰² *Yahoo! Inc. v. La Ligue Contre Legitimate expectation Racisme et L'Antisemitisme* 169 F. Supp. 2d 1181 (N.D. Cal. 2001), emphasis in boldface added.

[n]o legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. ... The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by the "comity of nations." Comity "is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other." States [*sic*] courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests. ... **Although France has the sovereign right to regulate what speech is permissible in France, this [U.S.] Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders** Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment.

¹⁰³ Under s. 32. (2)

"Every person who contravenes or fails to comply with any regulation or order made under this Part is guilty of an offence punishable on summary conviction and is liable

(a) in the case of an individual, to a fine not exceeding twenty-five thousand dollars for a first offence and not exceeding fifty thousand dollars for each subsequent offence; or

(b) in the case of a corporation, to a fine not exceeding two hundred and fifty thousand dollars for a first offence and not exceeding five hundred thousand dollars for each subsequent offence."

¹⁰⁴ *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 F.C. 38 at 19.

¹⁰⁵ *United Mexican States v. Marvin Roy Feldman Karpa* (2005), 248 D.L.R. (4th) 443, 2005 CanLII 249 (ON C.A.), aff'g 2003 CanLII 34011 (Ont. S.C.J).

¹⁰⁶ *Desputeaux v. Éditions Couette (1987) Inc.*, [2003] S.C.J. No. 15 at ¶¶66-69.

¹⁰⁷ Decima, "Canadians continue to oppose foreign control of telcos, cablecos: Decima survey" 23:1 Network Letter (13 January 2003).

¹⁰⁸ CEP, ACTRA and Friends of Canadian Broadcasting, "National security & cultural sovereignty trump foreign ownership of Canadian media - Keep it Canadian" News Release (5 December 2007). The survey data were gathered between November 15th to November 25th 2007 through Harris/Decima's weekly teleVox, the company's national omnibus survey. Results are based on a sample of 2,052 Canadians, and the corresponding margin of error was $\pm 2.2\%$, 19 times out of 20.

¹⁰⁹ *Direction on Ineligibility of Ownership* 1997. Order-in-Council P.C. 1997-486 dated and registered with the clerk of the Privy Council on 8 April 1997, s. 2.

¹¹⁰ *PrimeTime Canada, on behalf of a company to be incorporated*, Decision CRTC 98-173, at paras. 11-12.. Prime Time Canada's "sole, initial activity would have been to distribute U.S. 4+1 signals. PT 24 [a non-Canadian company] would have been the exclusive supplier of these signals and PTC would not have been able to distribute other U.S. 4+1 or Canadian signals unless the U.S. company agreed. Any action that would have resulted in a licence amendment would have required PT 24's approval. The presence of PT 24's nominee would have been required as part of the quorum of the licensee's proposed board of directors and PT 24 would have had a veto over the appointment and renewal of PTC's CEO. ... 12. In view of the foregoing, the Commission finds that PT 24 would have been in a position to exercise effective control of PTC. The Commission, therefore, has determined that the applicant would have been effectively controlled by a non-Canadian. By virtue of the Direction, PTC is, therefore, deemed to be a non-Canadian, and, accordingly, is not eligible to hold a Canadian broadcasting licence".

¹¹¹ In 2000, for instance, the CRTC approved CTV's acquisition of TSN, RDS and the Discovery Channel on condition that a clause in a Proposed Amended Shareholders Agreement, "whereby the sole minority foreign shareholder would have, in effect, the right to choose who would be the majority Canadian partner of NetStar, would potentially affect who, among Canadian parties, could bid for control of the company in the future" was removed. *CTV Inc. on behalf of The Sports Network Inc. (TSN), Le Réseau des Sports (RDS) Inc. (RDS), and 2953285 Canada Inc. operating as The Discovery Channel*, Decision CRTC 2000-86.

¹¹² CRTC, *Persona Communications Inc.* Broadcasting Decision CRTC 2004-284 (21 July 2004).