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Stephanie Feldman
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“Sunglasses at Night”: A Critical Analysis
of Canadian Content Rules

Prof. Sunny Handa
McGill Faculty of Law

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Unbeknownst to many, Canadian content has actually achieved some measure of success in recent years; abroad, that is. Named the third best Canadian TV show of the decade (2000-2010) by *Maclean's*, *Trailer Park Boys* has been recognized as “[o]ne of the most influential and successful comedy shows of the era.”¹ However, the show has earned criticism for losing its Canadian character in an attempt to gain popularity outside the country, which has been noted as a common feature of successful Canadian programming.² Other Canadian television shows like *Rookie Blue* have similarly been criticized for achieving international success by downplaying their “Canadianess.”

Canadian-made and produced television programming such as the *Trailer Park Boys* and *Rookie Blue* may have found success abroad, but the popularity of Canadian broadcasting in Canada remains as low as ever. In fact, there were no Canadian entries on the Canadian Media Producers Association’s top ten most popular Canadian television shows.³ To make matters worse, that same study demonstrated that the television audience share of English Canadian programming during peak-viewing period was found to have steadily declined over the past five years across all TV genres.⁴ Obviously, current state of regulation in this industry is not viable. If Canadian content continues on this path, it is likely to fade into irrelevance within a few more years.

¹ Jaime Weinman, “Top 10 Canadian TV shows of the decade”, *Maclean's* (10 December 2009), online: <<http://www.macleans.ca/culture/top-10-canadian-tv-shows-of-the-decade>>.

² Liam Britten, “Trailer Park Boys new success comes from being less Canadian, says expert”, *CBC News* (31 March 2016), online: <<http://www.cbc.ca/news/canada/british-columbia/trailer-park-boys-canadian-1.3515556>>.

³ Canadian Media Production Association, “Profile 2012: An Economic Report on the Screen-based Production Industry in Canada”, online: <<http://cmpa.ca/sites/default/files/documents/industry-information/profile/Profile2012Eng.pdf>>.

⁴ *Ibid* at 55.

Canadians ought to be invested in the success of Canadian content. The federal government devoted \$4.1 billion to Canadian content in 2012-2013 and the industry boasts some 60,000 jobs.⁵ More importantly, the *Broadcasting Act* statutorily entrenches that the creation and presentation of Canadian programming is the responsibility of “each element of the Canadian broadcasting system.”⁶ Given its central place in the promotion of Canadian identity, Canadian content rules should and could do a better job of embodying the aforementioned policy objective of the Act.

This paper will outline the main challenges interfering with the viability of Canadian content rules; namely, the preponderance of new technologies and the challenge of defining what exactly is “Canadian.” Through these examples, it will be demonstrated that Canadian content rules are not viable in their current form and that the Canadian Radio-television and Telecommunications Commission (CRTC) must adapt to changing circumstances in Canadian society if it wishes to ensure the success of *Broadcasting Act*’s related policy objectives.

I. Legislative Framework

To understand why the rules regulating Canadian content are no longer viable, it is necessary at the outset to outline the functioning of the existing rules and why they came into existence. The principal statute regulating this area of communications law is the *Broadcasting Act*, which was enacted in 1991 to replace the existing version of that legislation. Even before the *Act*, broadcasting law has always been concerned with the promotion of Canadian content. In 1929, the Aird Commission Report was accepted by

⁵ James Bradshaw, “CRTC rewrites Canadian content quotas on television”, *The Globe and Mail* (12 March 2015), online: <<http://www.theglobeandmail.com/report-on-business/crtc-to-relax-canadian-content-rules-on-television/article23420352/>>.

⁶ *Broadcasting Act*, SC 1999, c 11, s 3(1)(e).

Parliament and the CRTC's predecessor, and was later codified in law.⁷ It came to represent the policy of "restricting freedom to assure fairness," and this came out in the resulting legislation.⁸ In a 1935 paper to the Conference on Canadian-American Affairs, Graham Spry, the former president of the Canadian Radio League explained that "[g]reater in resources, in population and in talent, the United States is inevitably superior in radio facilities."⁹ Spry also expressed that Canadians were "anxious to preserve and develop their own nationality in their own way."¹⁰ The resulting legislation came in response to this sentiment, and the current legislation reflects the same goal of protecting Canadian interests in the face of American competition.

In sum, the rules regulating Canadian content rely on a points system to establish adequate "Canadianess" for the purposes of the ensuing funding, scheduling parameters and eligibility for licensing.¹¹ A production had to earn at least six points on the basis of whether "key creative functions" were being performed by Canadians.¹² However, whether the programming had any distinctive Canadian features in its content is not taken into account by these rules. As long as some of the key people responsible for the production are Canadian, the programming may be considered "Canadian content" even if the programming in question is a documentary on the American presidential election.

⁷ Daniel J. Baum, "Controversial Broadcasting in Canada" (1970) 8 Osgoode Hall LJ 159 at 160.

⁸ *Ibid* at 161.

⁹ Graham Spry, "Radio Broadcasting and Aspects of Canadian-American Relations" (Conference on Canadian-American Affairs delivered at the Lawrence University, Canton, New York, 17-22 June 1935) published for the Carnegie Endowment for International Peace by Ginn and Co at 106.

¹⁰ *Ibid*.

¹¹ Halsbury's Laws of Canada (online), *Communications Law*, "Canadian content" at HCS-178 "Regulation of Canadian Content".

¹² Canadian Radio-television and Telecommunications Commission, "Public Notice CRTC 1984-94", online: <<http://www.crtc.gc.ca/eng/archive/1984/PB84-94.htm>>. This key granted two points each for a Canadian writer or director, and one point each for Canadian leading performer, second leading performer, head of art department, director of photography, music composer and editor.

Once it has been established whether the programming in question constitutes Canadian content, there are additional rules on when and how much time broadcasters must devote to it. Generally, broadcasters must devote at least 60% of their scheduling to this content, with additional rules requiring broadcasters to devote a certain amount of valuable evening broadcast time to Canadian content.¹³ The CRTC has demonstrated a willingness to adapt these rules, with some material changes made in 2000 and in the years since. This is not intended to be an exhaustive review of all of the rules pertaining to Canadian content but some context to colour the analysis that follows.

II. Challenges for Canadian Content Rules

a. New Technology in Broadcasting: “Started from the Bottom Now We’re Here”

Canadian broadcasting is a constantly evolving area, and the CRTC must adapt quickly to accommodate new technologies such as over-the-top (OTT) video services and other new media undertakings. As of last April, nearly 40% of Anglophone Canadians were Netflix subscribers.¹⁴ A recent study found that two-thirds of Netflix users share their account credentials with another person, so that number is likely at least double.¹⁵ Furthermore, thirty-five per cent of Anglophone Canadian Netflix subscribers have figured out how to access American content that is not available on the Canadian version of the website by

¹³ Television Broadcasting Regulations, 1987, SOR/87-49, s 4(7).

¹⁴ “Number of Netflix paying streaming subscribers in Canada from 4th quarter 2011 to 4th quarter 2015 (in millions)”, online: <<http://www.statista.com/statistics/324066/canada-netflix-subscribers/>>; Peter Henderson, “Watching U.S. Netflix in Canada? Not for much longer”, *Global News* (15 January 2016), online: <<http://globalnews.ca/news/2454273/watching-us-netflix-in-canada-not-for-much-longer/>> [Henderson].

¹⁵ Paul Sawers, “Two-thirds of Netflix users share their account credentials, new study claims”, *Venture Beat* (22 July 2015), online: <<http://venturebeat.com/2015/07/22/two-thirds-of-netflix-users-share-their-account-credentials-new-study-claims/>>.

using a third-party online service to mask their Canadian IP numbers.¹⁶ Although Netflix has recently said that it intends to “crack down” on this practice, it is unlikely to do so with any force given the economic incentives for Netflix to keep its customers happy.¹⁷ On the other hand, according to Canadian Media Research, the CBC’s TV ratings have declined by 40%, even before taking into account its recent loss of NHL broadcasting.¹⁸ Such a large number of Canadians accessing unregulated programming would seem to suggest that Canadian content rules are not reaching the forms of media that Canadians consume anymore and are thus outdated. As a result, these technological developments have contributed to the fragmentation of broadcasting.¹⁹ Fragmentation refers to the increase in the number of both regulated and unregulated sources, thereby increasing the CRTC’s regulatory burden and making it more difficult for the CRTC to keep an eye on networks, programming undertakings, and broadcasting distribution undertakings.

In its inception, it made sense for the CRTC to focus on regulating radio broadcasting because it was the only medium which existed at the time and there was limited availability on the radio spectrum for programming. However, scarcity of spectrum is not an issue on the internet. Although the Federal Court of Appeal ruled that internet service providers did not participate in broadcasting, in reality they now do.²⁰ The CRTC

¹⁶ Michael Oliveira, “One-third of Canadian Netflix subscribers are streaming from U.S. site”, *The Star* (14 July 2014), online: <http://www.thestar.com/entertainment/television/2014/07/16/onethird_of_canadian_netflix_subscribers_are_streaming_from_us_site.html>.

¹⁷ *Henderson, supra* note 15.

¹⁸ Philip Cross, “CBC: Not the public’s broadcaster after all”, *Financial Post* (11 December 2014), online: <<http://business.financialpost.com/fp-comment/cbc-not-the-publics-broadcaster-after-all>>.

¹⁹ Canada, Library of Parliament, “Canadian Broadcasting Policy”, by Michael Dewing, Legal and Social Affairs Division (Ottawa: Library of Parliament, 23 June 2011), online: <<http://www.lop.parl.gc.ca/content/lop/researchpublications/2011-39-e.htm#a8>>.

²⁰ *Canadian Radio-television and Telecommunications Commission (Re)*, 2010 FCA 178 at para 59, 322 DLR (4th) 337.

has even taken note of this development, as evidenced by former CRTC Chairperson Konrad von Finckenstein's remark that "the control of access as a means of guaranteeing the supply of Canadian content is becoming outdated."²¹

Platforms like Netflix and Hulu are presenting new challenges to the task of ensuring Canadian voices are heard. "As convergence and the computer age shift the power of choice directly into the hands of the consumer, broadcasting regulations with respect to Canadian content faces possible extinction" according to one scholar in the field.²² If the CRTC does not adapt quickly enough, Canadian content rules will become obsolete because no one will be consuming regulated forms of media undertakings anymore.

The problem with "new media" is that it has become the primary medium by which many Canadians consume programming. The CRTC's response to grant new media an exemption from regulation under the *Broadcasting Act* leaves Canadians free to consume whatever they wish, even if it is not Canadian content. Although the *Broadcasting Act*'s policy clearly states that "each element of the Canadian broadcasting system shall contribute [...] to the creation and presentation of Canadian programming", the CRTC has been understandingly unwilling to regulate this particular "element."²³ Canadians have become enamored by OTT, and it is unlikely that services like Netflix would comply with any rules set out by the CRTC regulating its content. The likely result if the CRTC were to try and regulate the area is that Netflix would become unavailable in Canada, as has become the case for other online services like Pandora. The CRTC has demonstrated a willingness to listen to the Canadian public through its "Let's Talk TV" consultations and the public

²¹ *Supra* note 19.

²² Maureen Tai Suet Yee, "Protecting Our Culture: A Comparative Study of Broadcasting Content Regulations in Malaysia and Canada" (1997) 1 *Sing J Intl & Comp L* 468 at 493.

²³ *Broadcasting Act, supra* note 7.

backlash would almost certainly be intense should new media fall under the rules for Canadian content.

The CRTC's current policy has been to ignore new media by granting it an exemption. However, this response will only serve to exacerbate the problem of less Canadian content in the marketplace, if one perceives this as a problem worth solving. Some have suggested that the solution is for the CRTC to focus less on the production of Canadian content, and more on protecting its regulated companies.²⁴ This solution might not address the issue at hand, which is that Canadians do not consume broadcasting in traditional ways anymore.

b. What is "Canadian"? The Sinking of the Edmund Fitzgerald

The current points system for regulating Canadian content achieves the ulterior economic objective of promoting the work of Canadians in the film industry, instead of encouraging the production of programming which promotes Canadian cultural content. As an example, programming can be considered "Canadian content" under the current system if the leading performer, second leading performer, head of the art department, director of photography, music composer and editor are all Canadian citizens. It seems unlikely that the impact of this choice of nationality for these individuals would have a substantive impact on the content of the programming. If Justin Bieber starred in a romantic comedy that was produced and written by Americans, it is unlikely that the film would contain any tangible Canadian elements. This criticism has also been applied to the Canadian ownership rules, which "presumes that station owners are involved in the day-to-day programming decisions

²⁴ Michael Rimock, "Regulatory Issues Concerning New Media Alternatives to Television" (2013) 11 Can J L & Tech 335 at 5 (WL).

of their stations.”²⁵ Similarly, the director of photography of a programming undertaking is unlikely to be involved in any substantive way in the inclusion of Canadian elements.

A further criticism of the viability of Canadian content regulations may center around this exact aim. Why are broadcasters exclusively responsible to contributing to the elusive project of national identity building? Canadians consume mediums other than broadcasting, and many of these are conspicuously absent from contributing to this goal. For example, there are no regulations requiring Canadian bookstores to sell a statutorily defined amount of books deemed “Canadian.” The Canadian version of iTunes is not compelled by law to display a disproportionate amount of music by Canadian artists. Yet somehow, the type of programming regulated under the *Broadcasting Act* has been exclusively deemed “vital to Canadian unity and other interests.”²⁶ Other forms of media need not apply.

Some have argued that the rules on Canadian content have failed to contribute in any measurable way to the *Broadcasting Act*’s lofty objectives, such as contributing to “shared national consciousness and identity.”²⁷ This particular objective would seem to imply that programming ought to contribute to national unity, which was in fact explicitly defined as part of the broadcasting policy for Canada in the original *Broadcasting Act* of 1968.²⁸ Although national unity was removed from the stated broadcasting policy, some have gone as far as to argue that despite Canadian content rules, “the nation is in state of greater disunity than it has ever been before.”²⁹ It may be impossible to quantitatively

²⁵ Jeffrey Kowall, “Foreign Investment Restrictions in Canadian Television Broadcasting: A Call for Reform” (1992) 50 U Toronto Fac L Rev 61 at 89 (Hein Online).

²⁶ *Ibid.*

²⁷ *Broadcasting Act*, supra note 7 at s 3(1)(m)(vi).

²⁸ *Broadcasting Act* (1968), 1967-68, c 25, s 2(g)(iv).

²⁹ *Supra* note 25.

measure Canadian national unity but taking into account the various sovereignty movements that have gripped parts of the nation (most notably Quebec and the West), the sheer size and diversity of the country from coast to coast to coast, it seems unlikely that broadcasting can contribute in any impactful way to this goal and the Canadian content regulations serve only to constrain networks in what they can broadcast and negatively affect the general quality of programming delivered into Canadians' homes.

Radio broadcasters are particularly disadvantaged when faced with the challenging task of espousing enough "Canadianess" to satisfy the CRTC. The quota for Canadian musical content is currently pegged at thirty-five per cent, which falls short of the *Broadcasting Act's* stated policy of being predominantly Canadian.³⁰ "Ethnic licensees have mounted a credible argument that no amount of regulatory prodding would produce enough Canadian music content of interest to an ethnic audience without diluting the ethnicity of the broadcasting."³¹ These radio stations are obligated to play at least seven per cent Canadian content, which can be challenging for stations which base themselves around the promotion of cultural content other than Canadian content.³² Given the *Broadcasting Act's* recognition of the "multicultural and multiracial nature of Canadian society," it seems contradictory to make it more difficult for ethnic broadcasters to operate these kinds of undertakings. Furthermore, the internet has changed the music industry to the extent that the success of Canadian pop stars no longer depends on radio airplay to the

³⁰ Liora Salter & Felix N. L. Odartey-Wellington, *The CRTC and Broadcasting Regulation in Canada* (Toronto: Thomson Carswell, 2008) at 504 [Salter]; *Broadcasting Act*, *supra* note 7 at s 3(1)(f).

³¹ Salter, *ibid* at 506.

³² *Ethnic Broadcasting Policy* (16 July 1999), Public Notice CRTC 1999-117.

extent that it may have in the past.³³ Justin Bieber was discovered by Usher on YouTube and Drake was discovered by Lil Wayne, not on CBC Radio 2.

V. Conclusion

The viability of Canadian content rules has been under increasingly threat over the past few decades with the increasing prevalence of new technologies and the difficulty in ensuring that Canadian content reflects the *Broadcasting Act's* policy objectives. These challenges and many others have pushed Canadians to seek broadcasting content in unregulated forms of expression. In facing all of the aforementioned challenges, the CRTC must stop wearing “Sunglasses at Night,” in the infamous words of Corey Hart.

The federal government recently allocated \$675 million over the next five years for the CBC to support Canadian content.³⁴ Furthermore, the Minister of Canadian Heritage announced that there would be public consultations on issues relating to Canadian content. However, the problems in this area run deeper and the CRTC has two main options to consider; either it must bring new media into the regulatory framework and subject all broadcasting undertakings to Canadian content rules, or this area of regulation must be liberalized and the CRTC must take a hands-off approach towards the content of programming.

Market forces have already dictated that the second option ought to prevail. Given that the average Canadian consumes very little Canadian content on a regular basis, this approach ought to be adopted. If the rules were relaxed to allow for more freedom, those

³³ *Salter, supra* note 30 at 507.

³⁴ Ian Vandaele, “More funding for StatsCan, CBC – What you may have missed in the budget”, *Business News Network* (22 March 2016), online: <<http://www.bnn.ca/News/2016/3/22/Things-you-may-have-missed-in-the-federal-budget.aspx>>.

who create Canadian content would be forced to be competitive and improve the quality of their content to compete with international broadcasters.

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