

Managing the Good Governance Network:
Canadian Media Access and Ownership After Convergence

Chris Hope

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Professor Liora Salter

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Osgoode Hall Law School
York University

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Managing the Good Governance Network: Canadian Media Access and Ownership After Convergence

*Since this paper essentially turns on the precision of language in the regulation of the broadcasting industry, it is important to begin by clarifying the meaning I attribute to two key words that have received many interpretations through the history of Canadian broadcast regulation. The first term is “**objective**,” and the second, “**democracy**.”*

“Objective” appears here in two contexts. With reference to information, I will attribute the meaning “unfiltered” or “without political colour or bias.” With reference to the scope of viewpoints in issue coverage I equate “objective” with “the diversity of viewpoints” necessary for the “unbiased coverage” of events or issues. I refer to “democracy” as a facilitator of “good governance,” as it should remain in properly functioning democratic systems.

Introduction

As Marshall McLuhan stated in *Understanding Media*, once access to information is established, the speed of objective information becomes the essential force of democracy:

As the speed of information increases, the tendency is for politics to move away from representation and delegation of constituents toward immediate involvement of entire community in central acts of decision.¹

Today, the media delivers at a speed barely comprehensible at the time of McLuhan’s writing. Unfortunately, power, politics and the corporate pressures of the media marketplace remain one step ahead of the information, undermining the full representation of viewpoints in the course of delivery.

¹ Marshall McLuhan, *Understanding Media, 10th ed.* (Cambridge, MA: MIT Press, 2002) at 204.

In Canada, the struggle for media “access” has never been more apparent than in the arena of convergence, an epic battle from which Canada’s first media empires have emerged, and, in the opinion of many regulation-watchers, the CRTC hasn’t.

Does the Canadian broadcasting system provide the sufficiently objective knowledge necessary to allow Canadians to make well-reasoned decisions regarding the important broad political and social issues that affect them? This appears to be the key question in measuring the success of the media in reflecting a diversity of viewpoints. In response, the CRTC has answered with many interpretations of “access” over the years, and an equal number of regulatory responses to protect it.

One year ago I prepared a paper entitled: “Chasing Asper: The CRTC’s Changing Stance on Convergence Through the Evolution of the Canadian Media Industry.”² The paper documented the CRTC’s inconsistency in dealing with convergence issues over a large number of simultaneous applications, and provided a broad political, personal and jurisdictional context for the activities surrounding convergence. In contrast, this paper provides a policy-specific analysis of the Commission’s anticipation of convergence and focuses on the evolution of the key concept of “broadcasting system access.”

It is through the notion of “access” that the Broadcasting Act protects the diversity of editorial opinions that support the Canadian broadcasting system. It is the ability to receive the resulting balance of opinion that is key to the functioning of Canadian democracy.

Through an in-depth analysis of the three major convergence decisions, I will track the Commission’s contemporary interpretation of “access,” providing specific examples to

² Chris Hope, “Chasing Asper: The CRTC’s Changing Stance on Convergence Through the Evolution of the Canadian Media Industry” *Friends of Canadian Broadcasting* (December 2002), online at: Friends of Canadian Broadcasting <<http://www.friends.ca/Resource/Publications/>>

demonstrate the subtle shift in meaning that has occurred over the decisions. I will then discuss the implications of the new interpretation.

To bring the discussion of accessibility of the broadcasting system to the very structure of the CRTC's hearing process, I will investigate the seldom discussed legal aspects of the issue of access as it relates to the licensing process itself, and determine what effect – if any – the shifting tides of government accountability could have on CRTC procedure as the federal government transforms itself under a new leader.

Since the issue of the prevention of “bias” runs parallel to the CRTC's notion of the protection of editorial viewpoints, I will investigate the link between ownership and content that exists in the Canadian media industry and attempt to determine the roots of the resistance to the CRTC's basic requirement of structural separation.

Finally, through the application of a mix of contemporary communications and media theory, I will consider the “real” effects of modern access within the ultimate framework – the Canadian democratic process.

This discussion is timely since, as of this writing, the Standing Committee on Transport and Communications continues to conduct hearings with a mandate to investigate the Canadian media industry, in particular:

The current state of Canadian media industries; emerging trends and developments in these industries; the media's role, rights, and responsibilities in Canadian society; and current and appropriate future policies relating thereto.³

Since it is widely recognized that “convergence” is of overwhelming concern in the broadcasting industry, the Committee is often referred to simply as the Committee on “media concentration”.⁴

The report of the Committee is due for release in early 2004.

³ Under the Orders of Reference for the 37th Parliament 2nd Session, issued March 19, 2003. Available online at: <http://www.parl.gc.ca/common/Committee_SenOrders.asp?Language=E&Parl=37&Ses=2&comm_id=19>

⁴ Ian Jack, “Media ownership diverse, despite mergers, CRTC says.” *Financial Post* (26 September 2003).

The Origin of “Access”

i) In the Beginning

According to CRTC chair Charles Dalfen, from its inception, the CRTC has been consistent in supporting access to the broadcasting system through insuring diversity of programming. Vice-Chair from 1976-1980 prior to assuming his current role as chair in November 2001, Dalfen has a unique and intimate knowledge of the Commission’s policy initiatives of the past, and has enjoyed the ability to audit its success from arms-length for a significant period in practice. In Dalfen’s opinion, the CRTC’s demand for “diversity programming” has been the cornerstone of the Commission’s stance through convergence he states:

“...regulating cross-media ownership was never part of the CRTC’s mandate – it is the diversity of voices that has always been the primary consideration.”⁵

Dalfen’s comments provide a revealing insight into the CRTC’s policy reflection through recent decisions involving convergence issues. Yet a brief overview of the CRTC’s past practice, with a particular emphasis on its early operations, provides evidence of the Commission grappling with a number of ownership issues before evolving the obligations it imposes on the media industry to specifically include the protection of the “diversity of voices”.

⁵ CRTC Chair Charles Dalfen, interview by author (16 July 2003) CRTC, Ottawa. [unpublished; transcript on file].

ii) The Evolution of Diversity

To set the context for a detailed modern analysis, it is important to briefly set out the milestones in the CRTC's specific consideration of the issue of ownership and its effects on the general notion of access:

Broadcasting Act 1968

The 1968 Act contains no obligation for the specific protection of "access" or "diversity," nor does it specifically address the challenges of cross-media ownership.

Early Consideration of Cross-Media Ownership

The concept of concern for the protection of viewpoints in cross-media ownership appears to have originated in October 1968 with the CRTC's short term licence of CHSJ in Saint John, New Brunswick.⁶ Following the decision the CRTC announced that it would consider as a factor the extent of the range of "media" holdings of future applicants serving the same communities.

Toward a Definition of "Access"

In June 1968, when addressing the extent of ownership in the renewal of CTV licences, the Commission restated its network ownership policy regarding the concentration of the control of broadcast interests (originally released by the Board of Broadcast Governors in 1966)⁷:

No one person would be authorized to hold shares directly or indirectly in more than one company licensed to operate an affiliated station... the Commission will not approve any subsequent arrangement whereby any person might, in any way, participate in the control or management of more than one company licensed to operate an affiliated station.⁸

⁶ "Ottawa hints at crackdown on newspaper-TV monopoly." *Toronto Star*, 19 October 1968.; In the decision the Commission noted that financier K.C. Irving already owned the only television station in Saint John as well as both of its newspapers.

⁷ As referred to in CRTC Decision 69-322

⁸ Ibid.

Significantly, after a public hearing in Vancouver in October 1969 the Commission revoked the former policy, paving the way for exceptions where broadcasters could offer something “extra” provided it was in the public interest to do so.⁹ “Extras” included the first statement of the key “access” issue: “safeguarding community interest through local participation.”¹⁰

The Davey Committee Report¹¹

In 1970, the Special Committee of the Senate on Mass Media, chaired by Senator Keith Davey tabled its report on cross-ownership in Canada’s media. The report warned against the permission of vast conglomeration among media and/or non-media companies and recommended a change in the *Broadcasting Act* to protect the public interest in cases of concentration.¹²

The Royal Commission on Corporate Concentration¹³

In 1978, the Concentration Commission studied concentration of ownership in a broad context, and provided specific recommendations regarding the CRTC. Because of the dangers the Royal Commission perceived regarding media concentration and, “...*the absence of legislative or regulatory instruments available to deal with this problem,*”¹⁴ the Commission recommended enactment of specific legislation to expand the regulatory power of the CRTC to include the separation of print interests and broadcasting outlets in the same market.

⁹ Public Announcement – CRTC Decision 69-402

¹⁰ As stated in section VIII under “Community Participation” in the 1969 Annual Report of the CRTC.

¹¹ Canada, Special Committee of the Senate on Mass Media, *The Davey Report* (Excerpts available online at: <www.pch.gc.ca/progs/ac-ca/progs/esm-ms/prob4_e.cfm#2.1>; originally published in 1970), (Chair: Senator Keith Davey).

¹² Ibid.

¹³ As quoted in: *Our Cultural Sovereignty – The Second Century of Canadian Broadcasting: Report of the Standing Committee on Canadian Heritage*, by Clifford Lincoln, Chair (Ottawa: Communication Canada, 2003) at 386.

¹⁴ Ibid.

The Kent Report¹⁵

In 1981, Royal Commission on Newspapers Chair Tom Kent concluded that cross-media ownership serving the same markets (where 50%+ of the population could receive both the papers and the broadcasts) posed a direct threat to the freedom of consumers to receive a balance of editorial perspectives. The Report led directly to an order-in-council¹⁶ and in 1982, the CRTC was instructed to deny licenses to broadcasters belonging to daily newspaper conglomerations.¹⁷ This legislation was repealed in 1985.

The Task Force on Broadcasting Policy¹⁸

In 1986, Task Force co-chairs Gerald Caplan and Florian Sauvageau recommended the development of CRTC policy directly addressing the issue of the “acceptable threshold” for conglomerate ownership. This resulted in official consideration of issues of vertical integration and the development of the “one station/one language/one market” rule in subsequent decisions.

Broadcasting Act 1991¹⁹

In the discussion of access, s.3(1)(d)(ii), s.3(1)(d)(iii), and s.3(1)(i)(iv) provide the definition that has since received numerous interpretations:

3. (1) It is hereby declared as the broadcasting policy for Canada that
 - (d) the Canadian broadcasting system should
 - (ii) 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,
 - (iii) 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...

¹⁵ Canada, Royal Commission on Newspapers, *The Kent Report* (Excerpts available online at: <www.pch.gc.ca/progs/ac-ca/progs/esm-ms/prob4_e.cfm#2.1>; originally published in 1981), (Chair: Senator Tom Kent).

¹⁶ Order in Council P.C. 851735

¹⁷ Supra note 13 at 387.

¹⁸ Ibid.

¹⁹ *Broadcasting Act*. [S.C. 1991, c.11, s.1]

- (i) the programming provided by the Canadian broadcasting system should
 - (iv) **provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern**
[emphasis added]

In drafting the new *Act*, Parliament looked to the policy recommendations over the life of the previous *Act*, since, particularly with regard to protection of the public interest in cases of conglomeration, the noted sections essentially mirror the recommendations of the *Davey Report* tabled over twenty years earlier.

iii) The Context of Convergence

The late 1990's witnessed a coincidence of events that would radically alter the extent to which the CRTC now accepts convergence. One such event was the shift in market circumstances allowing for unprecedented print and broadcast acquisitions by rapidly expanding media companies. The other saw the CRTC's operations strained through a state of internal political flux.²⁰ This combination of factors accelerated the evolution of the CRTC's interpretation of the boundaries of its policy enforcement in favour of a more "market friendly" regulatory model.

With the release of the CRTC's *Information Highway Report* in May 1995, its *Commercial Radio Policy* in 1998, its *Television Policy* in 1999 and the various decisions dealing with convergence issues, it appears the importance and definition of "access" changed. Originally it was conceived as regarding the protection of a spectrum of editorial voices through insuring a diversity of ownership, but in time it has become concerned with concentration of ownership with a periodic undefined "bias-check" by the Commission, with an increasing reliance on the public complaints process to trigger action against offending licensees.

To illustrate this shift, a brief summary of the decisions through which large-scale convergence between print and national broadcast media networks was for the first time permitted is necessary, with a specific emphasis on the Commission's statements regarding "access".

²⁰ Supra note 2 at 11.

The Policy

A review of the CRTC's policy statements immediately anticipating convergence reveals the tensions the Commission sought to balance: the necessity of a "strong and competitive industry," and the access Canadians have to programming that is "reflective of their communities and their country.

"Competition and Culture on Canada's Information Highway: Managing the Realities of Transition" – The Information Highway Report 1995²¹

As the first general statement of CRTC policy looking ahead to the "new" model of mass-media convergence, the *Information Highway Report* eagerly anticipated the "economies of scope"²² that were projected through vertical integration models. With regard to increasing the choice, diversity and quality of programming, the Commission stated:

"...a more competitive model for both distribution and programming services will allow this to occur."

The extent of the freedom for competition to create opportunities for new and better "access" was bounded only by the traditional concept of structural separation:

...structural separation should generally be required of any distributors that are in a position to exercise undue preference in the respect of programming services. Economies of scope arising from the integration of program and production functions are negligible, and would be offset by the preferences that may benefit those that develop and supply programming on an integrated basis.

The Commission placed blind faith in the benefits of vertically integrated "economies of scope" – a belief that would quickly evolve into focused regulation in practice.

²¹ Canada, Canadian Radio-television Telecommunications Commission, *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition* (Ottawa: Queen's Printer, 1995), [online at: <<http://www.crtc.gc.ca/ENG/HIGHWAY/HWY9505.HTM?Print=True>>]

²² (soon to be referred to as "scale")

“Commercial Radio Policy” – Radio Report 1998²³

The *Radio Report* presents a Commission ready to negotiate. While it re-states “one station per market rule” and emphasizes the importance of “the cultural objectives set out in the Act,” the CRTC uses the report as an opportunity to note an official flexibility on the imposition of obligations and the ability to make exceptions on “a case-by-case basis.” The Commission itself notes this approach to be far more lenient than the strictly “defined and regulated”²⁴ era of the past.

The defining moment in the construction of the policy would come with the publication of the CRTC’s new TV policy framework.

“Building on Success: A Policy Framework for Canadian Television” – TV Policy 1999²⁵

The TV policy provided the framework through which convergence would flow. The policy contained several key statements that were almost immediately applied in convergence decisions. Significantly, for the sake of procedural efficiency and regulatory coherence, the Commission foreshadowed the challenges of renewals after convergence and effectively adapted its hearing framework to match the task of regulating conglomerations rather than individual interests. The policy granted recognition of “the largest multi-station ownership groups,”²⁶ allowing the totality of their broadcast license renewals to be considered in single decisions.

The Commission’s primary tools of protection for public access to the broadcasting system are summarized in sections 17-19 of the policy. The sections provide policy initiatives that would quickly be leveraged against each other in decisions involving multiple broadcast interest ownership within single markets:

²³ Public Notice CRTC 1998-41

²⁴ Stated in this context with regard to regulations regarding radio formatting – abandoned by the Commission in 1990. Ibid.

²⁵ Public Notice CRTC 1999-97

²⁶ Stated at the time of the report to be: CTV, TVA, Global and WIC.

Ownership Policy

17. The Commission will continue its current policy which generally permits ownership of no more than one over-the-air television station in one language in a given market.

18. This policy ensures the diversity of voices in a given market, and helps to maintain competition in each market. Most of the participants indicated that the Commission's current approach worked well and did not recommend any change.

Vertical Integration

19. Where an independent producer applies (whether alone or with other partners), either to purchase an interest in, or to obtain a licence for, a broadcasting undertaking, the Commission will expect the applicant or applicants to address the issues arising from the vertical integration of a production company and a broadcaster, and propose appropriate safeguards.

The Players

Arguably the most controversial of Canadian convergence stories, CanWest/Global's strategic acquisition run from 1997-2000 allowed the company to side-step many of the CRTC's traditional controls in cases of cross-media ownership.²⁷ In brief, CanWest/Global under then-President Izzy Asper achieved a number of significant exceptions to rules implemented by the Commission to ensure diversity over a rapid succession of significant broadcast interest acquisitions. On its completion of control of essentially two television networks,²⁸ CanWest acquired the Hollinger newspaper chain, a media group focused to an owner-centred editorial power structure by previous owner Conrad Black.

As the millennium passed, CanWest emerged with the largest conglomeration of multi-media interests to that point in Canadian history, and the CRTC found itself unable to address the issues of cross-media ownership within the CanWest network that immediately arose *after* the Hollinger transaction.

Meanwhile, in January 2000, as CanWest contemplated its bid for Hollinger, Bell Canada Enterprises (BCE) C.E.O. Jean Monty looked south to the AOL/Time-Warner merger, the largest

²⁷ Supra note 2 at 4.

²⁸ Through Broadcasting Decision CRTC 1995-99 and 2000-70, Asper was granted licenses for secondary stations in Toronto and Vancouver. Asper was granted these licenses in violation of the CRTC's one-station-per market rule on the promise that the stations would provide increased diversity and local reflection in the markets that would not have otherwise have been provided.

convergence deal in history, and accelerated BCE's convergence strategy to move from its specialization in distribution and transmission to a completely integrated content producer and distributor.²⁹ BCE purchased the CTV Network in February 2000, and the Globe and Mail newspaper chain in September 2000, successfully overtaking CanWest as the leading player in the converged market.

The principal difference between the CanWest and BCE deals was the timing of the acquisition of the newspaper assets of each company compared with the timing of their broadcast asset "change of control" approvals before the CRTC. While CanWest gained its print media assets immediately after its broadcasting takeovers were accepted by the CRTC, BCE's approval for the takeover of CTV wasn't granted until December 2000, three months *after* its acquisition of the "Globe and Mail". While the CRTC was unable to address the extent of CanWest's then-prospective holdings in its approval of CanWest's TV acquisitions, in its approval of BCE's takeover of CTV, the CRTC announced the detailed concept of "structural separation" within vast media holdings for the protection of diversity that would quickly evolve into the most contentious issue of the rapidly approaching licence renewals of the converged companies.

The third major player in the first round of the Canadian quest for convergence was Quebecor. In contrast to the structure of both CanWest, and CTV/BCE, Quebecor's convergence strategy was built upon an existing force in publishing and print journalism with a strategic move outward through broadcast acquisitions. In September, 2000 Quebecor purchased Vidéotron, Quebec's largest³⁰ cable television and data service³¹ provider and in a separate deal, TVA, a complete French-language national television network. Coupled with Quebecor's principle

²⁹ Gordon Pitts. *Kings of Convergence – The Fight for Control of Canada's Media* (Toronto: Doubleday of Canada, 2002) at 116.

³⁰ This is disputed; various sources alternately claim Vidéotron and Cogeco as Quebec's industry leader at the time.

³¹ At the time of the acquisition, the potential for services beyond standard television transmission were emphasized.

holdings, the Sun chain of newspapers, Le Journal De Montreal – Quebec’s most circulated paper, Quebecor became Canada’s third fully integrated cross-media player. This fact was well-recognized when the CRTC decided to allow the re-organization of Vidéotron in May 2001, stating that it would defer the imposition of commitments until the completion of the renewal hearings for the broadcast licences of all three major conglomerates over the coming months.³²

While it may appear that through strategic acquisition processes it is generally possible to circumvent the CRTC’s specific cross-media ownership obligations for licencees, the approval of corporate control and restructuring is merely a component of the Commission’s regulatory process. Denial by the CRTC, at the level of uncontested ownership transfer, is less likely than any other in appearances before the Commission. The CRTC denies integration or restructuring only where it perceives mergers to represent significant, immediate threats to the health of the Canadian broadcasting system. According to CRTC Broadcasting Vice-Chair Andrée Wylie, the Commission is reluctant to simply block large-scale integration through the prevention of corporate re-structuring because the CRTC perceives its mandate for action at this level to be, at best, used sparingly:

“Transfers are difficult. When they come to us already (done), it’s very difficult to say no to a transfer because it is a real incursion into market forces in the sale of them.”³³

Reviewing the reaction of the CRTC to the applications above, it appears the reluctance to interfere in transfers at the time was extreme; they were individually approved with little more than the inclusion of a restatement of the Commission’s goals for the system. Instead of imposing rigid policy commitments at the transfer of ownership phase of the convergence decisions, the Commission worked with the objective of obtaining and enforcing new commitments coherently through all three renewals in upcoming licence renewal hearings:

³² Broadcasting Decision 2001-384

³³ CRTC Broadcasting Vice-Chair Andrée Wylie, interview by author (14 July 2003) CRTC, Ottawa. [unpublished; transcript on file].

“...the Commission stated that, when it considered CTV’s, CanWest Global’s and TVA’s license renewals in the spring of 2001, it intended to take advantage of this opportunity to impose in a coherent way any safeguards it considered appropriate to insure that diversity of voices would be protected.”³⁴

The extent of the commonality of the issues faced by the CRTC in the renewals is apparent not only in the similarity of the Commission’s stated intent in each of the renewal decisions, but in their timing: Quebecor received its renewals on July 5th, and on August 2nd 2001 the CTV and Global renewals were simultaneously released. Although the conditions in each case were extensive, all three received the maximum licence term of seven years.

The Big Guys

After nearly seven years of heated policy discussion, in the summer of 2001, the regulation of Canada’s biggest-ever media groups came down to just three broadcasting decisions.

Quebecor was the first and, to the credit of the team behind the application, the CRTC’s decision³⁵ reads as though the applicants not only anticipated but thoroughly addressed each of the Commission’s concerns with the vertical integration of the company. With only minor alterations³⁶ the Commission welcomed Quebecor’s voluntarily submitted Code of Professional Conduct which, judging by the Commission’s own reading in the renewal, contained precise, rigorous commitments to structural and managerial separation within its operations.

It is important to note that both the Commission in its review of the application and Quebecor in the construction of its commitments recognize the concept of “access” as regarding the expectation to meet “the demands and reflect the concerns of the communities they serve.”

³⁴ With regard to the transfer of control of TVA to Quebecor Media Inc., Supra note 32.

³⁵ Broadcast Decision 2001-385

³⁶ Which were reviewed and approved specifically in Broadcasting Decision 2001-384

Further, under the heading of “diversity of voices,” Quebecor specifically emphasizes the “editorial independence” of each of its news agencies.

In sharp contrast to the seemingly cordial relationship between Quebecor and the CRTC, the path to the approval of the CTV/Global applications was neither as clear nor as complementary. Not only would both corporations flatly reject the CRTC’s suggested adoption of the terms of Quebecor’s self-imposed code of conduct, but prior to the application hearings, CTV President Ivan Fecan teamed with Global President Leonard Asper to draft an open letter to the CRTC in which they harshly criticized its imminent licence restrictions, questioning the Commission’s legal right to enforce structural separation, and suggesting a “voluntary code of conduct” of their own, which clearly ignored most of the CRTC’s policies for cross-media ownership.³⁷ This criticism added fuel to an ongoing war of words between the CRTC and the Competition Bureau over which regulatory body had jurisdiction over cross-media acquisitions and, perhaps wishing not to proceed to the courts on that issue, the CRTC proceeded to the renewals, cautiously accepting most of Asper and Fecan’s “code”.³⁸ The CRTC released back-to-back decisions for CTV and Global³⁹ containing an identical list of required commitments.⁴⁰

Both decisions provide a definition of the concept of “access” that differs markedly from that stated in Quebecor. Where in the name of “access” Quebecor committed to the concepts of giving attention to community voices and the “editorial independence” of newsrooms, the CTV/Global decisions contain a subtle – but striking – difference in the interpretation of both “access” and “diversity”.

³⁷ For more see: Antonia Zerbisias, “Networks Balk at New Rules for Licences,” *The Toronto Star* (26 April 2001).

³⁸ *Ibid.*

³⁹ CTV: CRTC Broadcasting Decision 2001-457, Global: CRTC Broadcasting Decision 2001-458

⁴⁰ This could only have been considered a boon by Global since with the overlapping footprints of CHAN/CHEK in Vancouver and CHCH/Global (CIII) in Toronto, Global is clearly a leader in terms of broadcast market penetration.

The commitments in the applications strategically avoided joining the notions of diversity and access with the protection of a spectrum of opinion or viewpoints by continually defining “diversity” and “access,” referring to them exclusively within the limited context of ethnicity and culture:

Reflection of diversity in programming

56. The licensee’s plan should address the presence of people from diverse backgrounds both in programming that the licensee produces and in programming that the licensee acquires. As well, the plan should address the way that cultural minority groups including Aboriginal peoples are portrayed in programming. More specifically, with respect to news programming, the licensee should identify mechanisms to assess progress in the following areas:

- The use of people from minority groups as sources regardless of whether the issue being discussed is particularly related to a minority community
- Ensuring that stories about ethnic communities do not appear solely within the context of coverage of cultural celebrations or reporting of negative stories
- Ensuring that on-air personalities reflect the diversity of the community that the station serves
- Ensuring that reporters and journalists from minority communities are not assigned exclusively to covering stories of principal concern to cultural groups

Community involvement

58. The plan should set out mechanisms that the licensee will put in place to ensure that it receives effective input and feedback from its community with respect to the reflection of cultural diversity, including Aboriginal cultures, in its programming.

While the cumulative effect of the CRTC’s review of policy in the CTV/Global decisions appears to strengthen a unified notion of the access and diversity that is to be protected, the fact remains that it is only the Commission’s interpretation of CTV/Global’s obligations that bring “access” and “diversity” beyond a purely ethnic context. The obligation to represent “editorial opinions” and “values” as explicitly stated in Quebecor is conspicuous by its absence in both decisions, as is the glaring lack of any commitment to structural separation in the stated commitments of the broadcasters.

The CRTC does reiterate its obligations under s.3(1)(d)(ii) and s.3(1)(i)(iv) of the Act in the decisions, stating:

In light of the policy objectives set out in the Act, the Commission considers that it has a responsibility to ensure that a sufficient diversity of broadcasting news and information voices remains as convergence continues to take place between broadcasters and related industries.⁴¹

⁴¹ CTV: paragraph 103, Global: paragraph 114

But for the purpose of active regulation, the fact that the CTV/Global applications do not contain this commitment by their own accord – and in fact remained openly hostile to the CRTC’s impositions of structural separation clauses, the CRTC’s subsequent maximum generosity in the licence approvals raises serious questions as to the Commission’s intent to enforce its own *imposed* obligations. This argument is supported by the fact that, presenting to the Senate Committee on Transport and Communications on September 25, 2003,⁴² CRTC Chair Charles Dalfen noted that offenses against license terms are usually dealt with by granting only short-term license *on renewal*, and that, to his knowledge, the Commission had never revoked a license for infractions, choosing instead to amend conditions of licence after major infractions may be proven. Dalfen added that licence amendments may only be registered five years after a licence has been granted.⁴³

When taken in their entirety, the CTV/Global decisions provide only dubious protection for editorial independence or freedom of opinion, effectively morphing the definition of “access” and “diversity” before the eyes of the Commission into “the same thing, presented by many cultures.”

There is one final addendum to the convergence story that provides either a bit of irony or a fantastic example of strategic planning.

In 1995 Charles Sirois appeared before the Information Highway Committee with a warning to the CRTC to remain diligent in the enforcement of structural separation stating:

⁴² Canada, Parliament, Proceedings of the Standing Committee on Transport and Communications (*Hansard*), No. TR 1220 (25 September 2003) [online at: <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/Com-e/trans-e/13evb-e.htm?Language=E&Parl=37&Ses=2&comm_id=19>]

⁴³ *Supra* note 42; note: the “5-year rule” has its origins in s.9(1)(c) of the *Broadcasting Act* which states: “...the Commission may, in furtherance of its objects, amend any condition of licence on application of the licensee or, where five years have expired since the issuance or renewal of the licence, on the Commission’s own motion...”

“Technology makes possible the separation of service provision from infrastructure operation. But what technology makes possible, government policy should turn into a requirement.”⁴⁴

At the time Sirois was the CEO of Teleglobe, a subsidiary of BCE, and a close person friend of BCE President Jean Claude Monty.⁴⁵ Whether or not his submissions had any effect on the committee, subsequent CRTC policy statements virtually restated Sirois’ concerns. “Structural separation” was at the forefront of the Commission’s consideration when BCE, Sirois’ own parent company, vehemently opposed the concept in the first major renewals. The irony of this double standard could not have been lost on Quebecor – the only major applicant to voluntarily implement Sirois’ recommended separation.

iv) Freedom to 2006: A Time to Test the Limits

According to the *Broadcasting Act*,⁴⁶ short of a mandatory order against their activities, CTV and Global are virtually beyond the reach of the CRTC until five years pass in their current licence terms.⁴⁷ In the meantime, they can practically embrace their own renditions of “editorial freedom”. Beyond the sheer opportunity for minor *Broadcasting Act* “access” violations the five-year grace period provides, the result of even subtle bias at this level could actually have severe effects right through the Canadian system of democracy.

Early in the twentieth century, legendary American journalist Walter Lippmann perceived “a revolution in the practice of democracy as the manufacture of consent became a self-conscious art and a regular organ of popular government.”⁴⁸ The often-cited “propaganda

⁴⁴ Supra note 21.

⁴⁵ Supra note 29 at 105.

⁴⁶ *Broadcasting Act* s.12 (under “Mandatory Orders”)

⁴⁷ (i.e. August 2006) *Broadcasting Act* s.9(1)(c) (under “General Powers”)

⁴⁸ Quoted in: Noam Chomsky, foreword, *The Myth of the Liberal Media*, by Edward Herman (New York: Peter Lang Publishing Inc., 1999) xi.

model” later extrapolated from this theory by authors Edward S. Herman and Noam Chomsky⁴⁹

builds on the premise stating:

...the dominant media are firmly embedded in the market system. They are profit-seeking businesses [...] funded largely by advertisers who are also profit-seeking entities, and who want their ads to appear in a supportive environment.⁵⁰

According to the theory, a balance is struck between the media, its corporate interests and the government in power, with the government retaining the upper hand through its over-arching regulatory control. Convergence in Canada has fundamentally altered this equation.

Converged media players in Canada are at the moment virtually free to do as they please – and they know it. The balance of power in the Canadian broadcasting system is suddenly in corporate hands, setting the stage for a vast percentage of the nation’s media to unite in support of strategically presented corporate interests. Increasingly, these interests are dictated by corporations and their multinational affiliates,⁵¹ politically limited in their actions only through the legislative power of governments that their media agencies report on.

⁴⁹ Stated in: Noam Chomsky and Edward Herman, introduction, *Manufacturing Consent*, 2nd ed. (Toronto: Random House, 2002) xi-xix., re-stated in: Herman, *The Myth of the Liberal Media* 23-28.

⁵⁰ Herman, *The Myth of the Liberal Media* 260.

⁵¹ It should be noted that although it is beyond the scope of this paper, U.S. and foreign influence remains at the forefront of public debate on the consequences of convergence in concert with the issue of the domestic concentration of power. See: Richard Blackwell, “Asper wants Martin to back foreign control.” *Globe and Mail* (14 November 2003).

v) Diversity Through Informality

In a full discussion of the issue of access and the private interest pressures exerted on the CRTC, it is interesting to turn briefly to another area in which “access” is a critical though seldom discussed factor: the hearing process itself, and the legal context within which it operates.

In administrative tribunal terms, the hearing process employed by the CRTC is informal.⁵² As determined by the CRTC Rules of Procedure:⁵³

- it is an “open” process whereby anyone who wishes to can apply when broadcasting licences are offered by the Commission; the first step is a written submission
- if the paper submission meets the Commission’s criteria, applicants are invited to appear before the Commission to address their applications
- Commissioners and Commission Counsel question applicants on their written and oral representations
- interveners are given standing before the Commission
- applicants are permitted the opportunity to reply.

With the extremely heavy caseload the Commission considers, and the speed with which it delivers its decisions, it is widely acknowledged that the legal framework through which the CRTC operates could hardly be more efficient.⁵⁴

Yet despite its efficiencies, the procedural simplicity of the CRTC hearing process has not been without its detractors. From the criticism of hearing participants frustrated by decisions they perceive to have been rendered subjectively, to articles in Canadian legal scholarship, it is important to note the legal pressures the CRTC has faced, and to examine the actual effects on

⁵² The CRTC is granted the power to make rules under s.21 of the Broadcasting Act which states:

21. The Commission may make rules

(a) respecting the procedure for making applications for licences, or for the amendment, renewal, suspension or revocation thereof, and for making representations and complaints to the Commission; and

(b) respecting the conduct of hearings and generally respecting the conduct of the business of the Commission in relation to those hearings.

⁵³ C.R.C. 1978, c.375; as amended by SOR/2000-357, September 18, 2000, *2000 Canada Gazette Part II*, p.2265

⁵⁴ David J. Mullan, ed., *Administrative Law: Cases, Text and Materials (5th ed)*. (Toronto: Emond Montgomery, 2003) at 467.

applicants if those legal pressures succeeded in influencing a change in the CRTC hearing process. It is at this juncture that the classic “tension” of administrative law, the conflict between procedural efficiency and ensuring a just outcome to that procedure, directly affects the access of individuals to the procedure itself.

vi) Pressure to Formalize

In a working paper released by the Commission in 1978 entitled “*Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*,”⁵⁵ the CRTC answered calls for the permission of the routine cross-examination of competing parties in Commission proceedings by reaffirming its commitment to the simple hearing process. The report emphasized that cross-examination could occur at the hearing level, but the right to this additional procedural step remained at the discretion of the Commission:

“(The Commission) will permit cross-examination in a case where a party made a timely request and could satisfy the Commission that it was warranted in the circumstances.”⁵⁶

The policy consideration behind this statement is twofold. First, the limited use of cross-examination allows the preservation of the Commission’s efficiency in dealing with a heavy case load. The second, of key importance to the issue of access, is the effect of procedural elaboration on “who” would appear before the Commission.

The general right to competing-party cross-examination would effectively formalize CRTC proceedings, necessitating the retention of legal representatives by competing applicants who would appear at the hearings. The significant expense of this step, and the pervasiveness of the notion that the highest price representation equates with the higher probability of success

⁵⁵ Canada, Canadian Radio-television Telecommunications Commission, *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters* (Ottawa: CRTC, 1978); excerpt also available at supra 54 at 470.

⁵⁶ Ibid.

would prove to be a significant barrier to many; in particular small or community broadcasters lacking in resources.

The specific tension between the arbitrary yet efficient and accessible informal hearing process and the inefficient yet more certain formalized process was further examined in a study prepared for the Law Reform Commission in a 1980 simply entitled, “*The Canadian Radio-television and Telecommunications Commission*.”⁵⁷ The report formally argues for the right of cross-examination on the basis of factual accuracy:

“... the Commission should adopt more strictly a role of pure adjudicator and allow the parties to thoroughly test each other’s evidence and positions through cross-examination. If parties are not permitted this right in a serious contest, they are restrained from fully presenting their case and the Commission may be deprived of evidence that could be helpful or even of critical importance to it, in reaching its decision.”⁵⁸

The Law Reform report ignored the critical issues of access and efficiency, and as a result received little notice from the CRTC. The informal procedure reaffirmed by the Commission in the 1978⁵⁹ report continues to the present.

vii) The New Rhetoric of Accountability

For the moment the governing party remains, but commentators are speculating that the ‘politics’ of the government will radically change as Paul Martin takes charge of the duties of the Prime Minister. Martin referred to few concrete issues in his bid for the leadership of the party – however, he often repeated two concepts that could, through the application of specific policy initiatives prove relevant in the future of the CRTC hearing process. The first is increasing the accountability of the government, and the second – in apparent conflict with the first, is across-the-board government budget cuts.

⁵⁷ Canada, Law Reform Commission of Canada, *The Canadian Radio-television and Telecommunications Commission* (Ottawa: 1981); excerpt also available at supra 54 at 469-470.

⁵⁸ Ibid.

⁵⁹ As laid out in Section 29 of the CRTC Rules of Procedure, supra note 53

If Martin follows through on initiatives requiring “greater accountability” through all departments of government, moving the CRTC toward a “fairer” formal process would not be inconceivable. Larger applicants would no doubt support this change since the advantage of the highest priced counsel would be theirs. This would also fit within Martin’s decidedly “business-oriented” national agenda. In addition, it is no secret that the Asper family retains significant ties to the Liberal Party itself⁶⁰ and, arguably, has the most to gain (because of its resource base) from the change in procedure.

The origins of Martin’s “accountability” however, may not come from measures as drastic as the actual reorganization of agencies such as the CRTC. Politic watchers unanimously suggest that Martin’s “economizing” of government departments will take precedence over the cost of grand initiatives, and the formalization of the CRTC hearing process, though it would allow the claim of “less arbitrary” decision-making in government agency operations, would be extremely costly when considering the expansion of staff alone to deal with the resource requirements for the added step.

While the increasing complexity of media regulation and political tides may create a demand for the appearance of less subjectivity in the CRTC hearing process, in the current political climate the governmental concern with “fiscal responsibility” is ultimately likely to delay the debate for procedural formality until well beyond the foreseeable future.

⁶⁰ “CanWest appoints Frank McKenna interim Chairman of the Board.” *Canada Newswire* (17 October 2003). Available online at: <www.newswire.ca/en/releases/archive/October2003/17/c2011.html>

Tell-a-Vision: How Ownership Affects Content

viii) The Problem with Editorial Economy

Conservative media theorists accept the presumption that the media should remain free from government regulation for the purpose of maintaining its ability to act essentially “as a partisan gadfly, investigating and criticizing the government in an aggressive way.”⁶¹ In many cases the belief is absolute with warnings that “even so-called structural steps aimed at opening channels for freer expression would put government in the intolerable role of ‘super-gatekeeper’.”⁶² Media baron Rupert Murdoch famously proclaims that deregulation of the news media is the key to bringing the public “freedom and choice rather than regulation and scarcity.”⁶³

The common thread throughout calls for deregulation in the Canadian media industry⁶⁴ can be summed in the age-old nationalistic free-market mantra: what’s good for business is good for the country.⁶⁵ Unfortunately in the case of the news media, the demands of “business” fall in direct opposition to the needs of “the people”. The efficiencies won in the economizing of organizational structures through the centralization of news production come at a high price to the diversity of the news covered. With a knowledge of a range of opinions on issues remaining the lifeblood of modern informed democracy,⁶⁶ the profits of news centralization come at the price of neglecting to effectively inform audiences of the events that are unfolding around them.

⁶¹ Political theorist Stephen Holmes as quoted in: James Curran, *Media and Power* (New York: Routledge, 2002) at 218.

⁶² Ibid.

⁶³ John Keene, *Media and Democracy* (Cambridge: Basil Blackwell Inc., 1994) xi.

⁶⁴ With particular reference to the statutorily regulated broadcasting industry since the Canadian newspaper industry remains ‘regulated’ only by sales figures.

⁶⁵ As paraphrased from the 1950’s quote by then-GM President Charles Wilson. [Full context available online at: <<http://www.chroniclesmagazine.org/Chronicles/May2002/0502Hartman.html> >]

⁶⁶ Takashi Inoguchi & Edward Newman & John Keane, eds., *The Changing Nature of Democracy* (New York: United Nations University Press, 1998) at 1.

The dilemma boils down to two elements: what's good for the media business is not necessarily good for democracy, and it is democracy that is absolutely necessary for the good of all Canadians.

While it is easy to criticize owners and media empires for their direct influence on the creative output of their companies, the line between ownership and content is not always a clear one. Due to the rigid structural separation and independence of news and editorial staff mandated by the CRTC in past license hearings, it is difficult to find a contemporary example of obvious and continuous bias among Canadian radio and television groups. However, the print media in Canada remains unregulated.⁶⁷ As a result, events affecting the newspaper interests of owners also holding radio and television network licenses serve as a revealing case study of the real effects of the influence of ownership.

⁶⁷ Although it remains subject to general business regulation schemes such as under the Competition Bureau.

ix) CanWest as CaseStudy

The most publicized (in certain newspapers) instance of an owner enforcing rigid editorial control came in late June 2002 when Russell Mills, Editor of the “Ottawa Citizen” was swiftly fired after the publication of an editorial in which he harshly criticized the Liberal government; a government that enjoyed the open support of paper owners Israel and Leonard Asper.⁶⁸ Although the firing was rationalized on a number of fronts by the Aspers, it quickly became apparent that political ideology was the true motivation behind it.⁶⁹ Mills’ dismissal was surprising in light of the scrutiny the Aspers had recently faced when journalists and employees openly complained of the “rigid editorial policies” that were suddenly foisted upon them when the Aspers took control of their publications.⁷⁰

Even after the Mills episode, Leonard Asper only thinly veils the true source of the editorial control of CanWest’s newspaper holdings. When challenged in a March 2003 television interview on the fact that the National Post provided a distorted view of the world by failing to report on the massive anti-war demonstrations that had appeared on the cover of both The Globe and Mail and the Toronto Star the previous weekend Asper replied:

“Dissimilarly I would argue that if people relied on the Toronto Star or the Globe and Mail for their information they might get an equally distorted view – or the CBC for that matter or the BBC – of what the peace marchers were all about. [...] Do you think sixty to one hundred million people actually have an idea what this Iraq situation is all about?”⁷¹

⁶⁸ Israel Asper effectively handed control of his TV interests over to his son Leonard in 1999 [see supra note 29 at 80.], subsequently spreading control of his holdings among his two sons and daughter. By all accounts Israel clearly retained a hands-on influence over the extent of the family’s operations until his death in October 2003.

⁶⁹ See: Russell Mills, “Under the Asper Thumb – To Comment on the Conduct of Elected Officials is at the Core of Journalism in Democratic Countries Says Ousted Publisher Russell Mills,” *The Globe and Mail* (19 June 2002)., Larry Zolf, “Let’s Look at the Optics Please,” *CBC News* (21 June 2002).; online at: <friendscb.ca/articles/CBC/cbc020621.htm>, John Honderich. “When All is Said and Done, I Believe Russ,” *The Toronto Star* (22 June 2002)., and Peter Worthington, “Aspers Take a Page from Orwell’s 1984,” *The Toronto Sun* (24 June 2002).

⁷⁰ “CanWest Global Furor an ‘Overreaction’,” *Canadian Press* (15 June 2002)., Graham Fraser, “Aspers Say They Won’t Dictate New Coverage – CanWest Global ‘Fence-Mending’ at Ottawa Citizen,” *The Toronto Star* (12 July 2002)., and Antonia Zerbisias, “A Tricky Dance for Asper Journalists,” *The Toronto Star* (26 Sept. 2002).

⁷¹ Leonard Asper, interview, *Talk Politics*, Host: Ken Rockburn, CPAC, (21 March 2003).

When pressed as to why the very fact that sixty to one hundred million people demonstrating was not itself worthy of coverage Asper replied simply:

“It’s the editor’s choice.”⁷²

The scope of “the editor’s choice” in the case of the National Post is perhaps best analyzed in the context of the comments of CanWest Chief Strategy Officer Ken Goldstein. Speaking before the Standing Committee on Canadian Heritage on the issue of ownership and diversity of views in November 2002, Goldstein stated:

There is nothing in the structure of cross-media ownership that has any structural impact on the expression of diverse opinions. It is a matter of corporate culture, not a matter of corporate structure.⁷³

The uniform influence of the “corporate culture” in the case of the National Post appears to assist the notion that internal and political censorship is acceptable within media organizations. With logic harkening back to the era in which papers were “partisan rags,”⁷⁴ those who dissent from the editorial views dictated by Post-owner Leonard Asper are seemingly encouraged to find work with ‘the competition’. In an era when the spectre of convergence stretches endlessly, the ‘competition’ – especially in ideological terms – is becoming increasingly hard to find.

⁷² Ibid.

⁷³ Supra note 13 at 399.

⁷⁴ Jeffery B. Abramson, “Four Criticisms of Press Ethics,” *Democracy and the Mass Media*, ed. Judith Lichtenberg (New York: Cambridge University Press, 1990) at 252.

Conclusion

As the Canadian broadcasting media settles into the “500 channel universe”, those relying on the media must again be reminded: an assortment of the same thing allows no choice at all.⁷⁵ The perception of contrast generated by a plethora of choices is even more damaging to an informed democracy than an overt lack of choice. Even the media-savvy may now turn to the Canadian media assuming they are extrapolating “the truth” from several different perspectives when in fact they are only assimilating multiple versions of the same journalistic source.

Following the convergence decisions it appears the CRTC may yet be persuaded to more adopt a diverse opinion-based definition of “access.” The “Ownership and Diversity” section of the 2003 Heritage Committee Report begins with a quote from the Centre d’études sur les médias:

Diversity is considered an essential component of democratic pluralism in modern society. It is the various components of the media universe which make it possible to establish a tangible link between diversity and pluralism, while reflecting the various points of view and opinion trends in society and providing access to relevant information. In return, this enables citizens to participate in public affairs in an informed manner.⁷⁶

The Committee clearly recognizes the essential function of “access” as the duty to provide a diversity of viewpoints in the form of editorial opinions to the public, supporting a more rigorous enforcement of the *Broadcasting Act* mandate for the protection of diversity by the CRTC.

Regardless of the regulatory framework, the simple fact remains that objective reporting is hard work. The “truth” requires the combining and reconciling of opposites⁷⁷ and the consultation and careful analysis of secondary sources. Instead of adding to the quality of journalism by bringing diverse groups together to complete this synthesis of information, the enforcement of the business model of convergence has clearly demonstrated a trend toward the

⁷⁵ David Taras, *Power and Betrayal in the Canadian Media*. (Peterborough: Broadview Press, 2003) at 2.

⁷⁶ Supra note 13 at 397.

⁷⁷ Supra note 63 at 18.

cutting back of personnel and the expansion of the responsibilities of existing staff.⁷⁸ The convergence model of journalism⁷⁹ is closely aligned to the “productivity model” of industry with little regard for the elements that are crucial for a proper review of the facts.⁸⁰ Simply put, there just isn’t time for objectivity in the unrestricted convergence model of production.

With the continuing expansion of the Internet, and the “direct access” to politics through parliamentary broadcasting services such as CPAC, Canadian society has achieved the speed of information access that should facilitate McLuhan’s vision in *Understanding Media* vision of direct objective democracy. Yet, due to the sheer volume and density of the information and the time constraints of modern life, “old media” still plays a vital role in processing and summarizing the information. As a result, the notion of access allowing the diverse representation of opinion in the media has evolved as the key principle of objective communication in Canadian society.

Contrary to the dictates of business models, the quality and accuracy of “the news” relates directly to the tangible support for the structure of “access” throughout media organizations. Good journalism comes at a high capital cost, but the price of bargaining it away is the integrity of the Canadian system of democracy.

⁷⁸ Supra note 51.

⁷⁹ In early 2001 CanWest CEO Leonard Asper stated his perception of the ‘benefits’ of convergence: “In the future, journalists will wake up, write a story for the Web, write a column, take their cameras, cover an event and do a report for TV and file a video clip for the Web. What we have really acquired is a quantum leap in the product we offer advertisers and a massive, creative, content-generation machine.” As quoted in: Antonia Zerbisias “Ready or Not, CRTC Takes on Media Convergence,” *The Toronto Star* (14 April 2001).

⁸⁰ Neil Postman and Steve Powers, *How to Watch TV News* (Toronto: Penguin Canada, 1992) at 47.