

...what you ask for: Thoughts on the Canadian Broadcasting Act in the New Era

**Liora Salter FRSC
Osgoode Hall Law School, York University**

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The full text of the paper upon which this speech is based follows in a print version.*

It has been forty-seven years since I, green and earnest to a fault, walked along the second floor corridors of the building across from the old railway station and the Chateau, the then offices of the newly created Canadian Radio Television Commission. I knocked first on the office doors of Commissioners Therrien, Boyle and Juneau, and finally was offered coffee by Commissioner Pearce. All listened intently to a proposal for an Aboriginal radio station that would serve six communities in Northwestern Ontario, operating out of a van and hooked up in each community to wires strung as antennas between pine trees.

What is interesting about those long-ago events is not the trip down memory lane. It is not a statement about how much things have changed, which needless to say they have. What matters is that the CRTC actually licensed such a station operated by twenty-year old Aboriginal people eager to serve their own communities. This station still exists today, albeit somewhat different than originally envisioned and as part of a large network of stations serving First Nations throughout the country.

This speech concerns the Broadcasting Act today, but in order to make my point about the Act, I need first to talk about the CRTC, the regulatory agency created by the Act. I sometimes charitably call it “the little agency that could”. Using a few CRTC decisions, I want to argue that the CRTC has been and in many ways is still unique, not the least because it functions as not one agency but several differently-oriented bodies. I then will make mention of why the Broadcasting Act is also unique in light of broadcasting regulation in other countries, a point I will expand upon in the text version of this speech. I will spend a few moments talking about the reasonable and unreasonable expectations of legislation as a prelude to the argument advanced here: Notwithstanding the monumental changes now afoot in the realm of broadcasting, one should be very careful about suggesting that the Act be revised or replaced. The result, I will argue, would be a much more narrowly cast piece of legislation that constrains the CRTC to one

of its four orientations, much to the detriment of the social, cultural and economic fabric of Canada.

Split Personality

Of the many ways to characterize the CRTC over the years, one seems to me to hold promise. It casts the CRTC as an actor with a split personality, actually three or four distinct personalities or, in more mundane terms, four distinct orientations. For the purposes of this speech, let's call these personalities, *adventurer*, *sober sister*, *politico* and *reluctant debutante*. Throughout its history, including today, one can see evidence of each of these personalities in decisions made by the CRTC.

First the *adventurer*: This is the CRTC that licensed an Aboriginal station operating out of a van so long ago. If such an agency could talk, it would say: "I can bend media (all media) to our collective purpose (as spelled out in the Act). I can turn mass media into 'people's media' maintaining audience satisfaction even while accommodating minority tastes and interests and allowing people to "talk back to the media". I can turn hardware merchants into broadcasters (think of the early days of cable). I can look directly into the eyes of those whom I license – not their lawyers and paid consultants – and ask them to commit themselves personally to the goals they proffer when asking for a licence or renewal. I can make those seeking profit from the broadcasting system also care about the goals enunciated in the Act. I can engage the public, by which I mean those who normally pay no attention to public affairs let alone the actions of the CRTC, in a conversation about the direction and content of the broadcasting they receive. "

The result has been a number of crucial decisions over the years. These range from the licensing of not only Aboriginal stations, but also student and also ambitious community stations (including even television). These decisions include requiring cable-casters to be broadcasters and to include and pay for an access channel that has more than public service announcements and sponsored programming. They include providing protection for those investing in Canadian television programming so that they can reap the financial benefit for the program rights they have purchased. These decisions include the attempt to make FM radio something other than "audible wallpaper". They include several incentive systems to promote the production of Canadian shows (drama) and to nudge licensees into making programs from which they have little hope of making a profit no matter how good they are. Even today, they include the decision

to ensure that one need not be a subscriber to a licensed service to purchase one or more of the streams of programming using an internet connection.

Most importantly, in my view, the adventurer CRTC has had an expansive and imaginative notion of how to protect free speech on broadcast media. The constellation of decisions starting with “Air of Death” reflects a notion of free speech that is much more than a “weight and balances” view, much more than one that balances every opinion with an opposite one. These decisions include provisions so that the right to reply is meaningful. They focus on the perspectives not brought to bear in the media and on making heard the voices silenced by their omission from public affairs. The adventurer CRTC makes a careful distinction between offensive and abusive programming. Its decisions include the notion that one should have access to programming that reflects only a single point of view, say religious programming, but that such programming should be “of high standard”, non-discriminatory and balanced in its programming. The adventurer CRTC’s decisions make it clear that it is possible to translate vague phrases such as “high standard” into meaningful decisions about particular programs without ever intervening beforehand in the broadcast of specific program content, without censorship in other words.

Some of the adventurer CRTC decisions were successful in their own terms, some worked moderately well for a while but later fell by the wayside, and some should, in retrospect, be considered naive and failures. The fact that there is an uneven record would not disturb an adventurer because all adventurers fail sometimes, coming up short on their goals. In other words, my claim is not that all of these decisions were good ones, or even the best ones that could have been made at the time. It is simply that the CRTC has been, from time to time, an adventurer, bold in its attempts to match the broadcasting system to the goals of the Act.

The second personality is *sober sister*. The sober sister CRTC is acutely aware of the realities of being a regulator and facing an ever-changing broadcasting environment. Sober sister knows that the Act empowers the CRTC to do some things, but not others, and even today limits its capacity to implement and enforce its regulations let alone its policies. A sober sister mentality is needed: The CRTC is constantly dealing with an ever smaller number of industry players who must reap profits even to remain in business, let alone fulfill their obligations under the Act. The CRTC is also constantly dealing with anti-competitive forces, that is, markets that would be anything but free (and Canadian) if left to the invisible hand. The CRTC is constantly witness to disputes among industry players (and occasionally others) that threaten the good

governance of the system as a whole. It has to contend with a public-private system, with all of the contradictions that entails, and with a CBC that is a public but mostly not a popular licensee.

Could *sober sister* CRTC talk, it might say: “I can keep media from all sounding the same. I can keep the traffic flowing, that is, ensure that there is room for many different kinds of service without any service occluding the others. I can control, to at least some extent, the ever-present attempts to ‘game the system’. I can ensure that those already in the system are not displaced by every new promise of a service that comes along. I can introduce notions of fairness, a level playing field so to speak, in a system that otherwise privileges those too big to fail and exploits the consumer. I can do all this even while ensuring that Canadians can watch or listen to whatever they want to watch even as they have access to programs by and about their fellow Canadians.”

Sober sister CRTC introduced rules of the road, that is, regulations for now virtually all services. It has tried to regulate each new service in light of its impact on the services that were available at the time. It sought, and eventually was granted, better powers of enforcement. Recognizing that ever-larger groups of broadcasting services were owned by a few corporations, many of which also have non-regulated business ventures, it sought ways to regulate these conglomerates. It paid attention to the problems created by vertical integration, that is, where a broadcaster buys its “independent” programming from a company it also owns, trying to ensure that other producers are not disadvantaged. It has supervised industry-generated codes and standards. Sober sister has ensured that there is a process for dispute resolution that involves the CRTC only as a last resort. It made provision for local, regional and multi-ethnic services. It finds a way to coordinate responses between broadcasting and its telecommunications mandates with their differently oriented legislation, keeping in mind that many industry players operate in both realms. It distinguishes between regulations and policies, the latter of which can be even set aside to accommodate the specific needs of a licensee deemed to need special attention. And perhaps most importantly, through its priority and preponderance rules, sober sister CRTC tried to ensure that both the spirit and the letter of the Act is fulfilled by sustaining a *Canadian* broadcasting system with programming to meet its needs.

And again, some of this has worked brilliantly, some has worked for a time, and some should probably be counted as failures. As the cliché notes: one plays the cards one is dealt, including the card that goes with forty-seven years of being a *regulatory* agency.

Personality three is *politico*: Politico CRTC maintains an ever-watchful eye on the priorities and preoccupations of the government of the day, on media coverage (notwithstanding good journalists, media are hardly an biased source) and public sentiment. Politico CRTC is almost too eager to please, or at least not cause a backlash. It acts in advance of directives and legal challenges, and in terms of what it senses to be the winds of public opinion. It provides forums for public discussion. It does so even as it coins grand rhetoric such as “bridges to the future” in the hope of demonstrating its responsiveness to all the many voices, including industry of course. Politico CRTC stresses that it takes seriously all the talk of the new communications revolution. It is ever cognizant of the reality faced by industry, though occasionally swayed by rhetoric.

Politico CRTC introduced exemptions for the so-called new media because it harkened to the cry that the Internet must be free. Politico first bundled services to ensure that the preponderance rules in the Act were fulfilled, and then unbundled them to respond to the sentiment that no one should be forced to have access to a service not personally chosen. It has consistently worried about the cost of services to the consumer. Politico CRTC has tried to ensure that local and regional broadcasting survives despite enormous pressures to upend it. For many years, it made sure that there was a diversity of multi-ethnic services that could survive. Politico CRTC pays mind to the constant refrain from some quarters that Canadians must be free to watch what they want to watch, whenever they want to watch it, to the point now where any attempt to regulate in terms of a “single system” becomes exceptionally difficult. And perhaps most interestingly, politico CRTC constantly stresses its predilection towards deregulation as a public good, despite being a regulator, as if regulation was in itself contrary to the public good. Again, some decisions were, in retrospect, brilliant and others decidedly not.

Finally, today, there is evidence of a fourth personality, one related to politico but somewhat differently oriented. I would call this last personality, the *reluctant debutante* with emphasis on “reluctant”. This reluctant debutante might say: “My days of glory are numbered. I shrink from my heritage as a unique and important regulator. This heritage offers me a role I no longer want to play. I bow to the social and technological pressures that are placed upon me, not only because I operate in today’s political atmosphere but also because I believe that the future looks nothing like the past. If I am to move forward, I must navigate in a world in where the old

rules do not hold strong and where I control few of the variables. I play my part, because I must, graciously and thoughtfully, but in such a way as not to disturb or offend.”

In describing the four personalities of the CRTC, hopefully I have not conveyed the impression that I think that there has been some kind of fall from grace on its part. I do not believe that the sky has fallen on the goals of the Broadcasting Act. Other commentators may make such claims, but such are not the arguments being advanced here. In my view, sometimes, in exerting one or other of its multiple personalities, the CRTC is just being realistic about the potential and limitations of its actions, while other times it the agency seems to have self-censored itself in the aid of goals only hinted at in the Act. My point thus far is simply that there are differently oriented perspectives reflected in CRTC decisions.

The Legislation:

I will make the claim here, and provide evidence later in a text version of this speech, that the Broadcasting Act is unique among legislation governing broadcasting around the world. To be sure, regulation of broadcasting is commonplace and often there is an independent agency in other countries. In the Canadian Act, however, the terms, goals, mandate and powers of the CRTC are unusually broad in their scope and ambitions. Of course, the Canadian Broadcasting Act responds, as does broadcasting legislation everywhere, to the history and particular contours of broadcasting in the country where it applies, but this is not my point. Very many of the decisions of the CRTC referred to here simply could and would not have been possible or (if possible) likely under other countries’ legislation.

The ambitious scope of the Canadian Broadcasting Act has led to some of the problems that attend to broadcasting in this county. This is not because of the content of thevAct. Rather, to speak of strengthening the “social, cultural and economic fabric” of the country, or of recognizing cultural and political (say regional and multi-ethnic diversity) or of engaging citizens in informed debates about public issues is to speak of the whole of the polity, its goals and its governance.

No piece of legislation, not even a Constitution, let alone an Act that establishes a regulatory agency, can consistently and successfully steer through all the many the political and social minefields that attend to the fabric. Indeed, no legislation is a vision statement for the

country as a whole, even if it includes one. The intent of any legislation is to enable, control or prohibit particular actions, and to provide indications of how this might be accomplished, whether by the courts or through regulation or by actions of government departments, or even by aspiration and inspiration.

Legislation is expected to take time, consultation and thought to fashion, precisely because it always needs to meet the needs and goals of differently-oriented groups and differently-interested parties. It is supposed to be tempered against every new fashion or wind of change. Legislation rarely if ever represents the wishes of everybody or group, or even all of those who participate in the debate surrounding it. No piece of legislation can predict or contain an uncertain future, no matter how carefully the legislation is framed to go forward into that future. Legislation is always the result of a negotiation among interested parties, among parliamentarians and among the various constituencies they reflect and represent. As such, it should not be surprising when legislation contains vague language, evidence of compromises and often contradictions.

To put the point a little too bluntly, legislation is intended to be enabling. It is about the options for action in respect to the goals stated therein. It is about creating the space for government, agencies, corporations and/or individuals to move forward knowing, at least in vague outline, the rules of the game and the consequences of not following them. And in the case of legislation that creates a regulatory agency, it is about allowing specialist bodies to make decisions that require specialist knowledge and continuity. To expect more of legislation is to betray an unwillingness to appreciate the contingencies of the political system.

It is its enabling function that makes the Broadcasting Act so special. The Act creates space for all the four CRTC personalities and for all the decisions that follow from each. It allows the CRTC to be, at any point of time, *adventurer*, *sober sister*, *politico* and *reluctant debutante*. It allows the agency tremendous scope for action, and (as innovators must have) room to fail as well as succeed. It allows the CRTC to respond differently to different situations. It enables the CRTC to be firm on occasion and simply a facilitator on others. Most importantly, it makes it clear what goals the whole enterprise is in aid of, leaving it open for the agency and its many publics to determine how best to accomplish the goals and when to push for what. Furthermore, the Act aims to be technologically neutral, recognizing that the infrastructure of modern communications is always evolving. To ask more is to ask legislation to do what legislation can

never do. For example, to ask legislation to predict and control the future is nonsense. To think that legislation will not contain contradictions or conflicting goals is to misunderstand how legislation comes to be.

What about the Broadcasting Act? Should it be tossed aside now as having served its purpose for its time?

To ask a new Broadcasting Act to do less than it does now, with the intent of lightening the footsteps of government, is entirely possible and in today's environment, all too likely. Doing so will come at the cost of crippling at least some of the personalities of the CRTC, certainly the adventurer and maybe also the sober sister in favour of the politico and the reluctant debutante. It would come at the cost of enabling much less. And perhaps most importantly, it might well come at the cost of dismantling a Canadian broadcasting system in favour of a modest attempt to control for the deleterious effects of bad and/or anti-competitive behavior in the marketplace. It will treat the people who make up its many publics as if they were consumers only, not citizens, not members of communities, not even particularly Canadian.

Climate change:

Throughout the history of the CRTC, there have been cries that the climate is changing and that the CRTC is out of sync with the future as it is unfolding. Always there is some truth to these claims. The introduction of cable was a major force for change; the introduction of satellite broadcasting also. Pay television was initially considered to be so potentially threatening to the single system, with so little benefit, that its introduction was delayed. Figuring out what to do about the huge influx of narrowly-cast "broadcasting", that is, broadcasting aimed at specific audiences only, was a major challenge. Dealing with a changing public consciousness about the meaning and implications of freedom of expression was likewise. The new media are no longer so new, but they caused a major crisis for regulators everywhere at the time their impact was first considered. The shape of the broadcasting sector has changed dramatically many times. The CRTC has always had to scramble to keep up with the shifting contours of the environment and the industry.

Public mood does change, as do governments' priorities from time to time. Someone is always predicting doom for the industry or Canadian producers or the system as whole. Remember the best forgotten "information highway" and the "death star", or the contention that

every room would have a communication device that responded to our every whim, or that all Canadians would rise up angry if anyone ever tampered with their having complete access to every possible programming option, without restriction. Of course there is change afoot; there always has been. It is always more and always less than expected. The “next great thing” is always on the horizon. Only some portion of “the next” will actually come to fruition. A much smaller portion will be “great”.

We tend to think of the future as bringing ever more choice, but so often it has brought precisely the opposite, at least in the longer term. Options are constricted when the field becomes so crowded with competitors for audiences/consumers that no one can afford the high values that are noisily touted as associated with “the next great thing”. If I may be permitted a comparison: Not to denigrate big box stores and malls, but they have hardly heralded more choice for the consumer with their standard repertoire of franchised outlets, the availability of which seemed exciting at first.

So, yes, the climate for broadcasting is changing, as such climates do. No one should minimize yet the threat posed to independent producers, the Canadian broadcasting system or public engagement with then system, the public understood as citizens as well as consumers, by the new technologies. People will disconnect from cable, and the industry will adapt or fade away. Social media based on audience-generated content, including You Tube, will attract significant audiences away from existing programming services. Newly available Danish television, subsidized to a level that is inconceivable in Canada, will always seem better than even the best of Canadian offerings. Only in our wildest dreams could *House of Cards* or *Orange is the New Black* be produced in Canada, but not because Canadian producers lack the necessary ambition or skill. Such shows do not go into production unless those who finance them are assured of a much larger audience than any Canadian show, no matter how good, could presume to generate even from an export market. And right now, when everything feels like it is new and in flux and when the streaming and on-demand services are becoming a force to contend with, we seem to think it is our right to expect to have everything, the best and also whatever and whenever we choose to watch, all at a very low cost.

The point is not that these threats, promises and expectations are wrong. Many of them are legitimate. The point is simply that the CRTC needs all possible the tools in its arsenal to respond to the next round of changes such that there remains a Canadian broadcasting system to

talk about. The CRTC needs all of its four distinct personalities to respond to the challenges of today, just as it did in the past. It needs a broadly enabling Act, and all of the mandated goals and powers it now has, just to keep up with, let alone to be pro-active in the face of change. It always has, and it certainly does now.

Concluding remarks:

Our language for talking about the goals of the Broadcasting system is tired. No one, least of all the present government, is likely to be convinced by the phrase “tell our own stories”, regardless of how important it is to do so. Canadian program producers are rightly frightened of a Canadian broadcasting system that has fewer incentives for their support, but their constant refrain of “support us” fails to resonate. In today’s environment, it sounds like they are asking for handouts. When people today say that “we need to promote cultural industries”, it sounds like they are promoting a “nanny state” and thus undermining confidence in what can be accomplished by innovative individuals and companies. It hardly stirs any response to say that, without access to high levels of resources, no one should expect globally attractive production values from programming produced in Canada. It sounds a stale complaint when someone points out the obvious, that support from government for any form of culture is declining sharply. And yes, some will always attempt to game the system, no matter what it is.

Stale does not mean false; it simply means that a new way of speaking about these very issues is needed if the goals of the Broadcasting Act are to resonate publicly and politically.

Even with new language, we need to ensure that there are broad goals worth pursuing. There must be room for an agency to not only respond but to act. There must be space for the whole pantheon of Canadian citizens to see their needs, wants, aspirations and communities reflected in a viable Canadian broadcasting system. With all of its shortcomings, contradictions and limitations, the current Broadcasting Act can provide most of this. It is not perfect, but then no governing instrument, public or private, ever is.

Let me sum up in conclusion: In this day and age, and with any government we are likely to have in the near future, it is hard to imagine how a revised or new Broadcasting Act might come even close to measuring up to the challenges just identified. It is hard to imagine how any agency created today could have large ambitions or accomplish much.

All too often, ours is a fragile nation held together by the few things we truly share. One of these is a broadcasting system as facilitated by the Broadcasting Act. It can bend but must not be allowed to break.

