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Program Regulation and the Freedom of Expression: Red Lion's Alive and Well in Canada

Erratum
article

Program Regulation and the Freedom of Expression: *Red Lion's Alive and Well in Canada?*

by Paul Slansky*

I. INTRODUCTION

The recent trends towards deregulation in the United States often have had impact in Canada because of the economic relation between the countries and similarities in the two legal systems. The impact is particularly strong when the deregulation has transborder implications or when it relates to the constitutional civil liberties which Canada has entrenched in the Canadian Charter of Rights and Freedoms of its Constitution. This paper is an evaluation of American broadcasting regulation and deregulation from a Canadian perspective in order to justify Canadian program regulation, in particular Canadian content regulation.

Many in the United States have great difficulty understanding the Canadian justification for Canadian content regulation and have seen it as a form of economic protectionism for the Canadian entertainment industry.¹ However, it is more importantly a form of program regulation. American law can be used to show that Canada *must* regulate programming and Canadian content. If Canadian content regulation can be solidly justified in American law, then the United States will have no legal basis to complain or pressure Canada over such regulation.

In determining whether program deregulation would be legally and constitutionally possible under either Canadian or American law, one should analyze the law both in preregulation and in post regulation settings, determine how the Canadian legal system fits (if at all) within the American system, and apply the American law when it fits into the Canadian system. Such a comparative exercise is also useful in understanding the possible directions of the Canadian courts with respect to both Charter and broadcasting law. As Charter cases develop in Canada, the American cases can be looked to for comparison if not guidance. The Canadian courts will likely look to the *quality* of the U.S. cases as well as their applicability in the Canadian context. Therefore, an examination of American cases to determine their quality will provide a context for their application to Canadian law.

Both of these factors, quality and applicability, point to the accept-

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¹ Indeed it does have this effect. Whether this is its purpose is outside the scope of this paper.

ance in Canada of *Red Lion Broadcasting Inc. v. Federal Communications Commission*² and to *Citizens Committee to Save WEFM v. Federal Communications Commission*.³ Acceptance is likely despite the erosion of the reasoning in these cases in the United States, especially notable and relevant in *Federal Communications Commission v. WNCN Listener's Guild*,⁴ in which the Federal Communications Commission's (FCC) Programming Statement on Deregulation⁵ was upheld by the U.S. Supreme Court.

Statutory authorities will be dealt with separately from the constitutional questions because the former are subject to change by Congress and Parliament, while the latter are not. Obviously, the latter are more important as a justification for Canadian content regulation and thus will be of primary concern, but statutory authority is also relevant for predictions and for general understanding of the two systems. However, while considering these as two distinct parts, keep in mind that both of the statutory schemes are intertwined with the freedom of expression.⁶

II. AMERICAN PROGRAM REGULATION

A. Statutory Program Regulation: *The Public Interest*

If the FCC has the authority to regulate programming,⁷ but has recently decided not to do so,⁸ surely the U.S. government and entertainment industry cannot complain that the Canadian Radio-Television Telecommunications Commission (CRTC) does not or should not have such authority (especially since the FCC exercised that authority until 1981 in entertainment programming and still does in nonentertainment programming).⁹ Indeed, there is little dispute that either the FCC or the CRTC has the authority to regulate programming. What is of issue in the United States is: 1) whether the FCC regulations serve the public interest (i.e., is deregulation possible without a legislative amendment), and 2) whether procedural safeguards must be provided under the Broadcasting Act (the Act).¹⁰ These have been issues of dispute in the United States since deregulation was initiated and executed by the issuance of a policy statement and not by legislative amendment. In Canada, this is particularly important because of the express authorization of program regulation in section 3(d) of the Act (the policy section of the Act).¹¹ An examination of regulatory authority is needed to understand

² 395 U.S. 367 (1969).

³ 506 F.2d 246 (D.C. Cir. 1974).

⁴ 450 U.S. 582 (1981).

⁵ Deregulation of Radio, 60 F.C.C.2d 858 (1976).

⁶ *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).

⁷ Communications Act of 1934, 47 U.S.C. § 151 (1982).

⁸ Deregulation of Radio, 60 F.C.C.2d 858 (1976).

⁹ *Id.*

¹⁰ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11 § 3(c).

¹¹ *Id.* § 3(d).

these two important issues.

In *Great Lakes Broadcasting Co. v. Federal Radio Commission* it was decided that although the programming format in question has only small general appeal "each member of the public is entitled to service from each station in the community."¹² A punishment for failure to comply with *Great Lakes*, loss of license renewal, was upheld in *KFKB Broadcasting Association v. Federal Radio Commission* as constitutional and not abridging the first amendment.¹³ The basis of the decision was public interest. This was eventually codified in the 1934 Communications Act, requiring the regulation for the public "convenience, interest or necessity."¹⁴

The first Supreme Court case to support program regulation was *National Broadcasting Co. (NBC) v. United States*. The Supreme Court defined public interest in terms of the needs of the "listening public."¹⁵ The Court also said that the FCC has the "burden" of determining the composition of radio communication.¹⁶ Although the Supreme Court has now abandoned this aspect of the case¹⁷ and no lower courts have ruled to the contrary,¹⁸ support still exists for the principle first enunciated in *NBC* that the FCC "cannot" discharge its licensing responsibility "merely by finding that there are no technological objections";¹⁹ that is, there must be an actual evaluation of the public interest.²⁰ This would seem to require a determination of what was in the public interest, at least in some situations.²¹

In 1946, the FCC put out their Blue Book, a codification of procedural factors to use in determining what programming is in the public interest.²² The importance of determining what was in the public interest was reemphasized in *Federal Communications Commission v. R.C.A. Communications*.²³ In *RCA* the Supreme Court said that consideration of competition and market forces alone was not sufficient in determining what was in the public interest.²⁴ A regulatory body can only allow competition if "satisfactory accommodation of the peculiarities of individual industries to the demands of public interest" are made.²⁵

¹² 37 F.2d 993, 995 (D.C. Cir. 1930).

¹³ *KFKB Broadcasting Assoc. v. Fed. Radio Comm'n*, 47 F.2d 670, 672 (D.C. Cir. 1931).

¹⁴ Communications Act of 1934, 47 U.S.C. § 303(a), (b), (f) (1982).

¹⁵ *National Broadcasting Co.*, 319 U.S. at 216.

¹⁶ *Id.*

¹⁷ *WNCN Listener's Guild*, 450 U.S. at 582.

¹⁸ *WNCN Listener's Guild v. Fed. Communications Comm'n.*, 610 F.2d 858 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

¹⁹ *National Broadcasting Co.*, 319 U.S. at 216.

²⁰ *Id.*

²¹ *Id.* at 217.

²² 7 W. FRANKLIN, MASS MEDIA LAW 744 (2d ed. 1982).

²³ 346 U.S. 86 (1953).

²⁴ *Id.* at 91.

²⁵ *Id.* at 93.

In 1960, the En Banc Programming procedure was advanced.²⁶ It adopted a fourteen-factor method of determining what is in the public interest. This was later expanded to require that surveys of the community be done (the "ascertainment" procedures).²⁷ The procedure was further amended to allow interviews with community leaders instead of surveys.²⁸

In *Red Lion Broadcasting v. Federal Communications Commission*, the Supreme Court upheld the personal attack-response aspect of the fairness doctrine. The Court held that the FCC has authority to require discussion of public issues for the public interest.²⁹ The court went so far as to say that the public interest supported the fairness doctrine as part of a collective interest in having the Act "function consistently with the ends and purposes of the First Amendment."³⁰ Therefore, in considering what is in the public interest one must consider the "ends and purposes of the First Amendment," including promotion of "the marketplace of ideas in which truth will ultimately prevail."³¹ Thus, the Supreme Court justified program regulation in order to directly promote the *rationale* of the first amendment rather than through the usual route of freedom of the press. This approach was new and short-lived, since the court later decided to stress the freedom of the press over promotion of the rationale of the first amendment directly through broadcast regulation.³²

These stringent requirements for programming in determining the public interest were continued in a series of District of Columbia Circuit Court of Appeals cases, starting with the *Citizens Committee to Preserve the Arts in Atlanta*³³ to *WNCN*.³⁴ These cases³⁵ used *Red Lion* to infuse "public interest" with the first amendment values of protecting the "marketplace of ideas,"³⁶ thereby requiring diversity in programming. The result was a doctrine that required a hearing both when more than one channel is available and a public interest exists in having diversity of radio formats.³⁷ However, if satisfactory alternatives are available,³⁸ or if

²⁶ 44 F.C.C. 2303 (1960).

²⁷ Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

²⁸ Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976).

²⁹ *Red Lion Broadcasting Co.*, 395 U.S. at 382.

³⁰ *Id.* at 390.

³¹ *Id.*

³² *WNCN Listener's Guild*, 450 U.S. at 582.

³³ *Citizen's Comm. to Preserve the Arts in Atlanta v. Fed. Communications Comm'n*, 436 F.2d 263 (D.C. Cir. 1970).

³⁴ 610 F.2d at 838.

³⁵ *Citizen's Comm. to Keep Progressive Rock v. Fed. Communications Comm'n*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service v. Fed. Communications Comm'n*, 478 F.2d 919 (D.C. Cir. 1973); *Hartford Communications Comm. v. Fed. Communications Comm'n*, 467 F.2d 408 (D.C. Cir. 1972); *Citizen's Comm. to Save WEFM v. Fed. Communications Comm'n*, 506 F.2d 246 (D.C. Cir. 1974).

³⁶ *Red Lion Broadcasting Co.*, 395 U.S. at 390.

³⁷ *WEFM*, 506 F.2d at 249.

no significant public outcry over format change erupts,³⁹ or if no "substantial or material question of fact" exists to be determined,⁴⁰ then no hearing would be required.

However, this whole line of cases requiring at least a safety valve in determining public interest by hearing⁴¹ was overturned by the Supreme Court in *Federal Communications Commission v. WNCN Listener's Guild*.⁴² The Court said that the FCC's policy statement, which decided that diversity is best served by market forces rather than regulation, must be deferred to as the FCC's determination of what is in the public interest.⁴³ It is up to the FCC to weigh public interest, whereas courts only exercise a judicial review on a limited basis.⁴⁴ In this case, the Court had to rule that the FCC's decision was not unreasonable, so the lack of a safety valve (hearing when needed) did not make the policy statement invalid.⁴⁵ But, it was noted that if the FCC's prediction that market forces best serve the public interest did not prove to be accurate, the FCC should reinstitute program regulation in order to serve the public interest.⁴⁶

Although *WNCN* fits into the scheme of the constitutional development of the fairness doctrine, it is a clear break from the important early cases in the area (*NBC*, *RCA*, and *Red Lion*) and the well accepted D.C. Circuit cases of the past decade. All of these cases emphasized the importance and mandatory nature of the FCC's "burden" to determine what is in the "public interest." It is well recognized that the public interest is a flexible standard, varying from case to case.⁴⁷ How then can the FCC lay down a rigid rule of deregulation without provision for hearings when needed and claim that the public interest has been determined, let alone served?

The D.C. Circuit seems willing to accept the demise of the *RCA* holding that a regulatory agency has very limited authority to deregulate, and only if hearings are made available. This fits the *RCA* minimum requirement that there be "satisfactory accommodation . . . to the demands of public interest."⁴⁸ Indeed, the market may serve diversity generally and thus the public interest but it was a recognition that the market does not always promote sufficient diversity that prompted regu-

³⁸ *Id.*; *Citizen's Comm. to Preserve the Arts in Atlanta*, 436 F.2d at 263; *Citizen's Comm. to Keep Progressive Rock*, 478 F.2d at 926.

³⁹ *Lakewood Broadcasting Service*, 478 F.2d at 919; *Hartford Communications Comm.*, 467 F.2d at 408.

⁴⁰ *Lakewood Broadcasting Service*, 478 F.2d at 919.

⁴¹ *WEFM*, 506 F.2d at 249; *WNCN Listener's Guild*, 610 F.2d at 838.

⁴² 450 U.S. at 582.

⁴³ *Id.* at 593.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 595.

⁴⁷ This is a result of the reference of *WNCN*.

⁴⁸ 7 W. FRANKLIN, *supra* note 22, at 744.

lation in the first place.⁴⁹ In fact, all of the D.C. cases indicate instances in which the market has broken down. All of these cases leave format decisions up to the licensee subject to scrutiny and hearing only if the facts demand it.

The Supreme Court distorted this aspect of the D.C. Circuit cases by suggesting that the D.C. Circuit rejected reliance on market forces.⁵⁰ The Supreme Court's departure from its previous precedents, *NBC* and *RCA* in particular, and the well developed D.C. line of cases is not justified here but serves as another example of the deference of the Burger court to government policy decisions. Canadian courts should not follow this decision since the earlier cases are more consistent and logical and, as we shall later discover, more consistent with the Canadian system.

B. *The Fairness Doctrine and the First Amendment*

The constitutional aspect of programming regulation is based on: 1) limitations on the freedom of the broadcaster as an aspect of free press which *allows* regulation,⁵¹ and 2) the positive first amendment right of the audience (viewers and listeners) to receive diverse programming based on the "ends and purposes of the First Amendment" (marketplace of ideas) which *requires* regulation.⁵² Thus, regulation is constitutionally authorized as well as constitutionally required.

Until recently, it was thought that a "multitude of tongues" theory was not totally applicable to broadcasting because of the scarcity of frequencies, the nature of broadcasting as an advertising medium, involuntary tendencies of the medium, and the failure of the market to always provide diverse programming.⁵³ However, the Supreme Court has returned to that approach. Indeed, the *Red Lion* case which espouses the positive duty to regulate⁵⁴ has been increasingly reduced and limited, and may not even be law anymore in the United States. It has been interpreted in later cases as a limit on the first amendment.⁵⁵ These later cases have merely upheld a limited form of *Red Lion* while discarding its substance and rationale: the direct attainment of the ends and means of the first amendment—the preservation of a marketplace of ideas—through broadcast regulation, rather than through the traditional method of a free press and a "multitude of tongues."⁵⁶

The limitation on broadcaster freedom was originally outlined in *National Broadcasting Co. v. United States*⁵⁷ in 1943, in order to allow

⁴⁹ *WEFM*, 506 F.2d at 246.

⁵⁰ *WNCN Listener's Guild*, 450 U.S. at 591-92.

⁵¹ *National Broadcasting Co.*, 319 U.S. at 217.

⁵² *Red Lion Broadcasting Co.*, 395 U.S. at 390.

⁵³ *WEFM*, 506 F.2d at 274.

⁵⁴ *Red Lion Broadcasting Co.*, 395 U.S. at 376.

⁵⁵ Starting with *WNCN Listener's Guild*, 450 U.S. 603-04.

⁵⁶ *WEFM*, 506 F.2d at 273-74.

⁵⁷ *National Broadcasting Co.*, 319 U.S. at 190.

program regulation of broadcasting. The Supreme Court distinguished broadcasting from newspapers on the basis of scarcity of frequencies.⁵⁸ This distinction has been much misunderstood. For instance, J.A. Barron has said that scarcity is not a sufficient basis for broadcast regulation because there are more broadcasters than newspapers.⁵⁹ Barron talks in terms of numbers and qualitative differences in diversity (i.e., many stations are "top 40" stations).⁶⁰

This is wrong, plain and simple. The authority to regulate programming does not relate to numbers but to the nature of broadcast frequencies and the extent of constitutionally authorized state action. Before the Radio Act⁶¹ and the Radio Treaty⁶² were enacted broadcasting was technologically impossible because of the limited number of frequencies and the unlimited number of broadcasters—there was simply too much interference. Because of the technological nature of scarce broadcast frequencies, the government had to regulate who gets a license and who does not.

However, in denying a license to broadcast, the government is potentially abridging the applicant's first amendment right to a free press. With newspapers, the only limit on numbers is an economic one, which involves no state action. In contrast, the government regulation of frequency allocation makes the first amendment "kick in." While *National Broadcasting Co.* recognized that "unlike other modes of expression, [broadcasting] is subject to governmental regulation,"⁶³ the Court also recognized that this regulation limited the applicants' first amendment rights since there is no right to broadcast without a license.⁶⁴ Therefore, the Supreme Court emphasized that if licensees were chosen "upon the basis of their political, economic, or social views or upon any other capricious basis," then denial of a license could be a breach of the first amendment.⁶⁵ However, the Court said that denial of a license for "public convenience, interest, or necessity . . . is not denial of free speech."⁶⁶ This makes the determination of issues in Section IIA of this paper crucial because, if the public interest is not properly being served by the regulatory policies and procedures of the FCC, the first amendment is being breached because the limits on free press do not go that far. This is why a discussion of the public interest invites reference to the first amendment.

⁵⁸ *Id.*

⁵⁹ D. GILMOUR & J. BARRON, *MASS COMMUNICATIONS LAW* 659 (1969).

⁶⁰ *Id.*

⁶¹ Radio Act, ch. 169, 44 Stat. 1162 (1927).

⁶² Telecommunication: Coordination and Use of Radio Frequencies Above 30 Megacycles per Second, Oct. 24, 1962, Canada-United States, 13 U.S.T. 2418, T.I.A.S. No. 5205.

⁶³ *National Broadcasting Co.*, 319 U.S. at 194.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

However, according to *Red Lion*, the first amendment may also be breached directly if diversity of programming is not being promoted. The Supreme Court here does not say that broadcasters have no rights to free speech or free press. Rather, the Court says that there is no right to snuff out the free speech of others and that the rights of viewers and listeners are paramount over broadcasters' rights.⁶⁷ Assuming these two categories of rights exist and that they sometimes conflict, why did the Supreme Court say that the rights of the audience are paramount? It is because of the nature of the audience rights. These rights are the rights "of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences, which cannot be abridged by Congress or by the FCC."⁶⁸ The right to a "marketplace of ideas" and "experiences" is a direct right to the "ends and purposes of the First Amendment."⁶⁹ Whenever a conflict exists between or within constitutional rights the conflict should be resolved by recourse to the rationales of the rights. When it is a conflict within a constitutional right presumably there is just one rationale and the decision should be easy: whichever interpretation better serves the rationale should prevail. Since the freedom of the press only imperfectly serves the rationale, and considering the right to receive is an embodiment of the rationale, the choice is obviously in favor of the right to receive.

What is the scope of this right as envisaged in *Red Lion*? From the wording of the right⁷⁰ the scope is very wide. It is not limited, as the court has later interpreted, with respect to the type of issues involved. The right is not just a right with respect to public issues or "nonentertainment."⁷¹ It relates to:

- 1) *social*—generally public but may be more focused;
- 2) *political*—public by nature;
- 3) *aesthetic*—generally not public, rather includes art, music, and other entertainment;
- 4) *morals*—can be public or private, but certainly varied;
- 5) *or other*—in context with (1) to (4) but definitely not just public or nonentertainment.

Likewise, the right is not limited merely to "ideas," i.e., discussion of music in the abstract, but "experiences," including actual music, religious programming, or other programs.

Thus, there is generally a constitutional right to diverse programming—programming for all people and all interests. It, like the limitation on free speech in *NBC*, is based on scarcity of frequencies and relates

⁶⁷ *Red Lion Broadcasting Co.*, 395 U.S. at 390.

⁶⁸ *Id.* (emphasis added).

⁶⁹ *Id.* at 390.

⁷⁰ *Id.* at 380.

⁷¹ *WNCN Listener's Guild*, 450 U.S. at 602.

to the "public interest."⁷² As Justice White says, Congress could have instituted a public system which would have satisfied the public right to access, but Congress did not do this; instead, it instituted a regulated private system.⁷³ However, private broadcasters received licenses on the condition that the public interest would be served.⁷⁴ In order to serve the public interest, broadcasters cannot repress public or private interest in types of ideas and experiences that the public would have had if the system had been public.⁷⁵ The broadcaster therefore must statutorily and constitutionally provide for the interests of all in the community. The constitutional aspects of public interest in diversity were later adopted in the D.C. Circuit cases.⁷⁶

Red Lion was the high point of constitutionally required diversity in programming. Although the doctrine has not been overruled, it has only been applied in form, not substance. The Supreme Court has subsequently interpreted the fairness doctrine narrowly in scope and the diversity aspects as limited to statutory requirements.⁷⁷ The Court has interpreted the "right of viewers and listeners" as a limit on the right of broadcasters rather than as a constitutional right on its own, which conflicts with but overrides the right of the broadcaster.⁷⁸ If the "right of viewers and listeners" is not a constitutional right but a constitutional limit, the court or Congress can easily reduce the limit on the Constitution, whereas it cannot substantially limit the right if it were itself a constitutional right.

However, before we examine the decline of *Red Lion* in the Supreme Court we must recognize that the true nature of the *Red Lion* doctrine was recognized and brilliantly analyzed in *WEFM*⁷⁹ by Chief Judge Bazelon of the D.C. Circuit. In the first instance, Judge Bazelon, speaking for the three judge court, held that no hearing was required because diversity was not "seriously threatened."⁸⁰ He recognized problems with regulation and deregulation,⁸¹ but suggested a balancing of interest by leaving programming up to the market unless diversity was seriously threatened, at which time a hearing would be required.⁸² This would minimize the possible dangers of government censorship and control and the possible chilling effects caused by regulation.⁸³ He also recognized that *Red Lion* created a constitutional right to receive "the widest possi-

⁷² *Id.* at 601.

⁷³ *Red Lion Broadcasting Co.*, 395 U.S. at 390-91.

⁷⁴ *Id.* at 391.

⁷⁵ *Id.*

⁷⁶ See *supra* notes 33-40 and accompanying text.

⁷⁷ See *infra* notes 95-101 and accompanying text.

⁷⁸ *Id.*

⁷⁹ *WEFM*, 506 F.2d at 246.

⁸⁰ *Id.*

⁸¹ *Id.* at 251.

⁸² *Id.* at 252.

⁸³ *Id.* at 251.

ble dissemination of information from diverse and antagonistic sources” in order to achieve the goal of the first amendment.⁸⁴ Furthermore, while complete reliance on the market could inhibit rather than promote this goal, some reliance was needed to prevent undue regulation.⁸⁵ He decided that a hearing was not required in this case because there were two other classical stations in the area and thus diversity was not seriously threatened.⁸⁶

The majority overruled Judge Bazelon *en banc*, relying on *Citizens Committee to Preserve the Arts in Atlanta*⁸⁷ and using a statutory analysis which required a hearing to see if the other two stations were adequate replacements. This approach was specifically overruled in *WNCN* by the Supreme Court.⁸⁸ However, Bazelon’s first judgment and his second concurring judgment remain relevant to our study, although they were also overruled in *WNCN*. Judge Bazelon agreed to change the result in order to let the FCC reconsider its first amendment values.⁸⁹ He distinguished between the diversity and competition strains of the first amendment and recognized that the latter attempts to achieve the former through the “multitude of tongues” approach.⁹⁰ This is the traditional free press approach to the first amendment. Furthermore, he felt that competition does not always promote the goal of diversity.⁹¹ He explicitly rejected Justice Douglas’ approach in *Columbia Broadcasting System*⁹² which espouses a total multitude of tongues approach. He recognized that regulations are needed to require licensees to inquire into the needs of the community,⁹³ and as a remedy when the market fails to produce diversified programming—a remedy which is achieved through the fairness doctrine and licensing procedures.⁹⁴ Otherwise, his second decision paralleled the first.

The Supreme Court decided *Columbia Broadcasting System v. Democratic National Committee* in the same year as *WEFM*.⁹⁵ It is difficult to analyze the constitutional implications of *Columbia Broadcasting System* because of the many different opinions. The case basically decided that a broadcaster cannot be forced to accept a paid advertisement according to the Act or the fairness doctrine of *Red Lion*.⁹⁶ Justices Powell and Blackmun ignored the fairness doctrine because they believed the case

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 250.

⁸⁷ *Citizen’s Comm. to Preserve the Arts in Atlanta*, 436 F.2d at 265.

⁸⁸ 450 U.S. 582 (1981).

⁸⁹ *WEFM*, 506 F.2d at 277.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Columbia Broadcasting System v. Democratic Nat’l Comm.*, 412 U.S. 94, 113 (1973).

⁹³ 27 F.C.C. 650 (1971); *WEFM*, 506 F.2d at 277.

⁹⁴ *WEFM*, 506 F.2d at 277-78.

⁹⁵ *Columbia Broadcasting System*, 412 U.S. at 113.

⁹⁶ *Red Lion Broadcasting Co.*, 395 U.S. at 382.

could be decided based on section 153(h) of the Act alone, which provided that broadcasters are not to be treated as common carriers.⁹⁷

However, the rest of the Court recognized that an evaluation of the public interest invites reference to the first amendment. Justices Burger, Rehnquist and Stewart all recognized that section 153(h) is a limit on the fairness doctrine.⁹⁸ However, they still upheld the fairness doctrine generally. Justice White also recognized the validity of the fairness doctrine but said that "broadcasters have wide discretion."⁹⁹ Justice Douglas would have overruled *Red Lion* and the fairness doctrine.¹⁰⁰ Justices Brennan and Marshall purported to follow *Red Lion* here.¹⁰¹ In tallying up the Justices, six of the Justices would uphold *Red Lion*, but five (Burger, Rehnquist, Stewart, White (somewhat) and Douglas (totally)) would limit the fairness doctrine at least for common carrier-type requirements.

It is important to note that a majority of the court misunderstood *Red Lion*. Burger and Rehnquist said that if licensees are restricted too much the first amendment will not flourish.¹⁰² They saw the first amendment in classical terms notwithstanding the changes made by *Red Lion*. They said that the first amendment protects broadcasters' freedom, but they refused to recognize the countervailing first amendment rights of the public.¹⁰³ The degree of their misunderstanding is shown by Chief Justice Burger's comment that one must treat broadcasters like newspapers and that the source of the state action is not clear to him.¹⁰⁴ This shows a misunderstanding of *NBC* and the scarcity doctrine which allows broadcasting regulation at all.

Powell and Blackmun failed to realize that the first amendment might be in conflict with section 153(h). If the fairness doctrine was only a limit on the first amendment right of free press then there would not be any conflict between section 153(h) and the first amendment, so the two Justices would not have to consider it. However, *Red Lion* says that the fairness doctrine is a positive right of the viewers and listeners which could potentially override section 153(h) in some circumstances.¹⁰⁵ Therefore, Justices Powell and Blackmun should have discussed the constitutional issues.

Likewise, Justice Douglas, who did not take part in *Red Lion*, also misunderstood that case. He said that there was now less scarcity of frequencies because of improved technology, so there is less reason for

⁹⁷ *Columbia Broadcasting System*, 412 U.S. at 113.

⁹⁸ *Id.* at 108, 118.

⁹⁹ *Id.* at 112.

¹⁰⁰ *Id.* at 128. He said that frequencies are less scarce now; he obviously misunderstood the *NBC* case.

¹⁰¹ *Id.* at 182-83.

¹⁰² *Id.* at 109.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Red Lion Broadcasting Co.*, 395 U.S. at 382.

Red Lion.¹⁰⁶ In fact, the number of frequencies is irrelevant to scarcity as a basis for the holding in *Red Lion*. Scarcity of frequencies is relevant because the government cannot let everyone broadcast, unlike newspapers where anyone can print if he or she can afford to. In considering who can broadcast (as in *NBC*) the government must also dictate how, in order that those unable to broadcast may still have access to their interests and tastes (as in *Red Lion*). If government does not regulate in this way they are denying the first amendment rights of those people who are unrepresented. Therefore, Justice Douglas mistakenly placed importance on numbers, when actually it is the inability to license everyone which is crucial, regardless of the actual availability of frequencies. This is the beginning of the trend to treat *Red Lion* as a limitation on the freedom of the press and not as a positive first amendment right.¹⁰⁷

This trend is continued in *Federal Communications Commission v. National Citizens Committee for Broadcasting*,¹⁰⁸ where *Red Lion* is only narrowly followed on its constitutional grounds by reference to the *NBC* limitations of the first amendment. Use of *Red Lion*'s positive first amendment right doctrine would have been helpful in this case. However, the Supreme Court refused to use it and instead relied on *Red Lion*'s public interest aspects, not its examination of constitutional principles.¹⁰⁹

The culmination of this trend was in *WNCN*¹¹⁰ in 1981. Here Justice White seems to have recanted or forgotten his own reasoning in *Red Lion* because he limited the doctrine to "controversial issues of importance and concern to the the public," which did not include listeners' "favorite entertainment programs."¹¹¹ This is a far cry from "the right of the public to receive suitable access to social, political, *aesthetic*, moral and other ideas and *experiences* which may not be abridged by Congress or the FCC."¹¹² Access to aesthetic experiences would seem specifically to cover one's "favorite entertainment programs." The dictionary definition of "aesthetic" is "belonging to the appreciation of the beautiful."¹¹³ Even if this does not cover music surely "other" does. Although the dissent goes off on procedural safeguard grounds, for the most part they do criticize the treatment of *Red Lion* by the majority. The dissent cites *RCA* as a limit on the power of a regulatory agency to deregulate and *Joseph Burstyn v. Wilson*¹¹⁴ for the proposition that the distinction be-

¹⁰⁶ *Columbia Broadcasting System*, 412 U.S. at 128.

¹⁰⁷ *Id.* at 109, 127, 135.

¹⁰⁸ *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

¹⁰⁹ *Id.*

¹¹⁰ 450 U.S. at 595.

¹¹¹ *Id.*

¹¹² *Red Lion Broadcasting Co.*, 395 U.S. at 380 (emphasis added).

¹¹³ THE OXFORD ENGLISH DICTIONARY 147 (1937).

¹¹⁴ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952).

tween entertainment and information is not important for first amendment purposes.¹¹⁵

Which of these interpretations is consistent with the true intent of the first amendment? Considering the nature of listener's rights in *Red Lion* as embodying the rationale of the first amendment without denying the freedom of the broadcaster (as Justices Stewart and White both recognized in *CBS*),¹¹⁶ it would seem that *Red Lion* best represents the interests of the first amendment. It strives to achieve the balance that Judge Bazelon said was required in his concurring judgment in *WEFM*.¹¹⁷ That judgment in fact is the most accurate reflection of first amendment values, but is only a concurring judgment in a D.C. Circuit case, compared to *Red Lion* which is a unanimous decision of the Supreme Court. However, Judge Bazelon makes a good point that too much regulation may not serve the first amendment¹¹⁸ because government does not always know best and government could abuse the process. An approach like Judge Bazelon's in implementing *Red Lion* seems the best route to serve the rationale of the first amendment, because it leaves the broadcaster a fair bit of leeway in programming except where regulation would better promote diversity interests in the first amendment.

CBS and *WNCN* suggest that broadcaster freedom is the essence of the first amendment and that *Red Lion* is a limit thereon. If that were true what would be the basis of this limit, practicalities? This is not a sufficient reason to restrict the first amendment and is surely not a compelling state interest. Is it in the public interest? This is indeed seen as a limit on freedom of the broadcast press in *NBC*.¹¹⁹ But is freedom of the press the only strain of the first amendment, or does free speech encompass public rights to receive as *Red Lion* and *WEFM* recognize? The fairness doctrine can be seen as a limit only if the first amendment is limited to free press. However, *Red Lion* has not been overruled. Justice White, who authored *Red Lion*, also wrote the opinion in *WNCN*. He recognized that the listener does have first amendment rights and that the fairness doctrine enhances rather than limits the first amendment. However, in the next sentence he limited the doctrine in line with the recent trend. It is true that the marketplace may serve diversity to an extent, but the FCC has a constitutional and statutory obligation to determine how it is best served in any particular instance. It is clear that *Red Lion* is a good interpretation of the first amendment in broadcasting. Later cases have misinterpreted and unduly limited it. There is no reason why Canada should apply the later interpretations over *Red Lion*.

¹¹⁵ 450 U.S. at 615-16.

¹¹⁶ *Columbia Broadcasting System*, 412 U.S. at 128.

¹¹⁷ 506 F.2d at 252.

¹¹⁸ *Id.* at 251.

¹¹⁹ 319 U.S. at 217.

III. CANADIAN PROGRAM REGULATION

A. Canadian Policy and Programming Law

In the Canadian context, program regulation has long been the rule. Ordinary program regulation has been far more developed than in the United States, but less development has occurred in the equivalent Canadian fairness doctrine. In Canada content regulation is a unique aspect of program regulation. Such regulation requires a certain percentage of broadcast time to be Canadian in origin.¹²⁰ This form of regulation applies to radio as well as television. Though it is not as crucial nor as stringent in radio.¹²¹

This regulation is important because Canadians have underdeveloped concepts of nationalism and cultural identity. There are many divisions within Canada, including: a more distinct social class structure;¹²² more developed regional disparity and regional identities;¹²³ and bicultural and bilingual elements with resentments on either side.¹²⁴ These elements contribute to the cultural identity, a problem aside from any problems of U.S. influence. As such, Canadian culture is a "mosaic" rather than a "melting pot" and so is not as unified or cohesive as the United States. Therefore, Canada has more of a need to develop cultural identity than does the United States, where a strong national identity ties the states and the people together.

Moreover, not only does Canada have an identity crisis, but it had forty-four percent of its population within reach of U.S. television in 1965 and more for radio.¹²⁵ This percentage has grown substantially since 1965. This influx of American culture makes it more difficult for Canada to form an identity of its own. Canadian children often know more about Daniel Boone and "Honest Abe" than they do about Louis Riel and J. A. MacDonald because of the influence of U.S. media. As *Capital Cities Communication v. CRTC*¹²⁶ indicates, it is illegal to tamper with American programming coming into Canada. Therefore, if Canada is to help foster a Canadian sense of identity, it must do so by regulating the Canadian content in programming.

1. Programming Policy

The Canadian broadcast network is different in one important as-

¹²⁰ Radio (A.M.) Broadcasting Regulations, CONS. CAN. REG. ch. 379, § 12 (1978); Television Broadcasting Regulations, CONS. CAN. REG. ch. 381, § 8 (1978).

¹²¹ Compare Television Broadcasting Regulations, *supra* note 120, at § 8 with Radio (A.M.) Broadcasting Regulations, *supra* note 120, at § 12.

¹²² W. CLEMENT, *THE CANADIAN CORPORATE ELITE* 172 (1975).

¹²³ D. GLENDAY, H. GUINDON & A. TUROWETZ, *MODERNIZATION AND THE CANADIAN STATE* 85-86 (1978).

¹²⁴ *Id.* at 209-10.

¹²⁵ REPORT OF THE COMMITTEE ON BROADCASTING 17 (1965).

¹²⁶ [1978] 2 S.C.R. 141.

pect; it is a combination of both public and private systems. The Canadian Broadcasting Co. (CBC), the national broadcast service, is a public system run as a branch of the government (a crown corporation) and thus should be more fully devoted to the goals of the Act than private broadcasters would be. But this duality does not affect the regulation of private broadcasters. The Broadcasting Act treats them separately, as if there were no CBC.¹²⁷ Thus, the fact that the CBC exists is not an impediment to the application of U.S. law based on a privately owned system.

The four objectives of the dual broadcast system are: (1) wide and varied programming choice, (2) high quality programs, (3) broadcaster responsibility, and (4) awakening Canadians to Canadian realities through broadcasting.¹²⁸ These objectives are codified in section 3 of the Broadcasting Act.¹²⁹ The 1965 Parliamentary Committee report rejected programming for the majority or for the average listener or viewer.¹³⁰ It saw the public not as a homogenous mass but as interlocking, overlapping groups.¹³¹ The Committee thought that each of these minority groups should be appealed to. The Committee also recognized that when there are few alternatives for an audience, broadcasters must be more varied.¹³² However, this did not mean that urban centers should have specialization. Admittedly, some specialization would be appropriate, but this should be specialization for particular groups of the listening public rather than specialized types of programming.¹³³ This is to achieve the goal of providing stations to which the people could be faithful.¹³⁴ Overall, this system is quite similar to the U.S. one except that specialized types of programming alone were encouraged more in the United States than in Canada in 1965.

Has that changed since 1965? In 1965 private broadcasters were very responsive to local concerns,¹³⁵ but not very responsive to the needs of Canadian content.¹³⁶ In 1978, local private broadcasters had become even more responsive to local needs.¹³⁷ Likewise, the basic structure of program regulation has not changed much recently. CRTC's 1983 Review of Radio proposes numerous changes, but most are consolidation

¹²⁷ Broadcasting Act, 1967-68 CAN. REV. STAT. B-11 (compare Parts II and III of the Act).

¹²⁸ REPORT OF THE COMMITTEE ON BROADCASTING, *supra* note 125, at 17; Broadcasting Act, 1967-68, CAN. REV. STAT. B-11, § 3(b), (c), (d).

¹²⁹ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11, § 3.

¹³⁰ REPORT OF THE COMMITTEE ON BROADCASTING, *supra* note 125, at 18.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 18-19.

¹³⁴ *Id.* at 19.

¹³⁵ *Id.* at 52.

¹³⁶ *Id.*

¹³⁷ See generally, TELECOMMUNICATION GROUP, SIMON FRASER UNIVERSITY, A STUDY OF THE EMERGENCE OF NEW FORMS OF LOCAL PROGRAMING WITHIN THE CANADIAN BROADCAST SYSTEM 8 (1978).

and updating for efficiency.¹³⁸ The CRTC will become less stringent in the amount of detail that it requires for license application.¹³⁹ However, the general degree of regulation compared to the United States is still high. This is especially true of the F.M. frequency, where Canadian policy has differentiated F.M. from A.M. since regulation of the latter has been, up to now, less than successful.¹⁴⁰ Canadian content has stayed the same in radio,¹⁴¹ while in television there has been a decision to revise it into a weighted point scheme. However, even the television changes are no less stringent.

Is old U.S. policy compatible with the Canadian policy? The U.S. system relied heavily on the discretion of the broadcaster and did not worry too much about license transfer unless there was a format change. Canadian policy is much more stringent and keeps a closer check on its licensees.¹⁴² It has stringent promises of performance, even though the 1983 policy statement pared them down somewhat.¹⁴³ Also, before the deregulation in the United States, the trend in the late 1970's was towards less regulation in the United States. The same cannot be said for Canada.

But is this a difference of degree, or a difference in kind? This depends mostly on the attitude of the regulatory agency. In the United States, the FCC felt uncomfortable with too much regulation because of the traditions of a free press. In Canada, those traditions have not been as strong. Generally, the CRTC is fairly comfortable in a regulatory laden atmosphere. However, if Canada were to choose between the old U.S. scheme and the present deregulated scheme, the former would be far more compatible.

2. Statutory Program Regulation

a. Section 3

The 1968 Broadcasting Act¹⁴⁴ is different in structure and philosophical underpinnings than the United States Act. Unlike the American Communications Act,¹⁴⁵ which gives the FCC the power to regulate programming, the Canadian Act is centered around section 3, which codifies Canadian broadcasting policy. In section 15 of the Act the Commission shall "regulate . . . and supervise . . . the broadcasting policy

¹³⁸ CANADIAN RADIO-TELEVISION & TELECOMMUNICATIONS COMM'N, POLICY STATEMENT ON THE REVIEW OF RADIO: NOTICE 83-43 (1983) [hereinafter cited as RADIO POLICY STATEMENT].

¹³⁹ *Id.* at 4-5, 8-9.

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.* at 24.

¹⁴² For example, the CRTC regulates the amount of theatrical performance, informational programming, general music programming and, of course, Canadian content.

¹⁴³ RADIO POLICY STATEMENT, *supra* note 138, at 4-5.

¹⁴⁴ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11, § 3.

¹⁴⁵ 47 U.S.C. § 303 (1982).

enumerated in section 3." Note that section 15 says *shall* regulate—it gives the CRTC no choice. Likewise, section 3 states that the listed objectives "can best be achieved by providing for . . . regulation." The two major themes that run through most of section 3 are the protection and development of Canadian culture *and* the diversification of programming.

The former strain is recognized in section 3(b), (f) and (g)(iv). Section 3(b) is the basic Canadian content section: "The Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada." The wording is very similar to that in *Red Lion*: "political, social, aesthetic, moral and other ideas and experiences."¹⁴⁶ It reflects how well the gist of *Red Lion*'s right to diverse programming is applicable to Canadian content as well as other program regulation. Section 3(f) and 3(g)(iv) outline the statutory commitment of the CBC to "service that is predominantly Canadian in content and character"¹⁴⁷ and to the "development of national unity and provision for a continuing expression of Canadian identity."¹⁴⁸ Considering the fact that the purpose of the CRTC's existence is to implement section 3 through regulation¹⁴⁹ it is inconceivable that the CRTC could deregulate Canadian content as the FCC did, by the issuance of a policy statement. In Canada, the Act would have to be amended.

Another strain of section 3 is to provide for diversity in programming. As outlined at the beginning of part III of this paper, Canada is seen as a mosaic with many independent parts, often separated by vast geographic areas. It is for this reason that the Act is so committed to the goal of diversity. Already one can predict that *Red Lion* fits in well with the Canadian concept of broadcasting.

Sections 3(a), (c), (d), (e), (g)(i) and (iii), (h) and (i) all relate to diversity. Section 3(a) declares that the airwaves are publicly owned. This is a necessary presumption in *Red Lion*. Section 3(c) recognizes both constitutional strains of the first amendment.¹⁵⁰ Section 3(c) states: "The right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned." This fits perfectly with *Red Lion*. Furthermore, it is likely that limits on these rights will be overturned on a Charter of Rights attack, since section 1 of the Charter says that the rights therein are "*subject only* to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." To allow any statute or regulation to abrogate the freedom of expression in section 2(b)

¹⁴⁶ *Red Lion Broadcasting Co.*, 395 U.S. at 390.

¹⁴⁷ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11, § 3(f).

¹⁴⁸ *Id.* § 3(g)(iv).

¹⁴⁹ *Id.* § 15.

¹⁵⁰ At the time of drafting this Act the Canadian Bill of Rights was in force for federal legislation.

is certainly unconstitutional. Section 2(b) can only be limited by section 1 of the Charter.

Section 3(d) expressly requires diversity in programming: "The programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern and the programming provided should be of a high standard" This section not only recognizes diversity as a goal but in the same section recognizes a statutory fairness doctrine. This again fits *Red Lion* perfectly. However, the Canadian statute goes even further, requiring programs to be of a "high standard."¹⁵¹ The regulation of quality is an indication of the highly regulated nature of the Canadian system. Quality control regulation may, however, be subject to a constitutional challenge under the Charter. The success of such a challenge is not as clear as it is under section 3(c) since Canada has a more limited view of free press, as compared to freedom of expression, than does the United States.¹⁵²

Section 3(e) states that "all Canadians are entitled to broadcast service in English and French." This recognizes the unique bilingual nature of Canada and does not, of course, relate to the United States situation.

Section 3(g)(i) requires the CBC to provide "[a] balanced service of information, enlightenment and entertainment of people of different ages, interests and tastes covering the whole range of programming in fair proportion." Like *Red Lion*, but unlike *WNCN*, this section does not limit the goal of diversity to public issues or nonentertainment, but expressly authorizes wide diversity in entertainment and again goes even further by requiring that this service be in "fair proportion."

Section 3(g)(iii) recognizes French and English cultural tensions and the regional divisions in Canada. It specifically requires the CBC to try to lessen these divisions through the broadcasting of "cultural and regional information and entertainment." Note the last two sections¹⁵³ relate only to the CBC and not to private broadcasters. Thus the *Red Lion* rationale does not directly apply. However, *Red Lion* talks of public broadcasting as a direct route to achieve the "ends and purposes" of the first amendment, and would require such a public system to strive for diversity and implicitly do so with more stringent standards.¹⁵⁴ *Red Lion* recognizes, however, the fact that the U.S. government chose not to go this route and so private broadcasters should have some constitutional requirement to provide diversified programming which is imposed by the FCC.¹⁵⁵ Thus, *Red Lion* is indeed consistent with public regulation in

¹⁵¹ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11, § 3(d).

¹⁵² See *infra* Part III(B).

¹⁵³ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11, § 3(g) (i),(ii).

¹⁵⁴ 395 U.S. at 390.

¹⁵⁵ *Id.* at 390-91.

Canada. So close is the reasoning that Justice White, the author of *Red Lion*, may well have had the Canadian legislation in mind at the time.

Section 3(h) is also closely connected with the *Red Lion* decision. This section provides: "Where any conflict arises between the objectives of the national broadcasting service and the interests of the private element . . . it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service." Here the "public interest" is to be favored when resolving the conflicts between private and public interests. This is more flexible than the command in *Red Lion* that the rights of viewers and listeners must be paramount to the rights of broadcasters.¹⁵⁶ It is likely that the main aspect of the public interest to be served here is diversity since the CBC's objectives, which heavily stress diversity and Canadian content, are to be given paramount consideration. This flexible approach is what Chief Judge Bazelon suggested in *WEFM*.¹⁵⁷ He recognized the danger of automatically ruling in favor of program regulation and stressed a route that would ensure maximum first amendment values without treading too heavily on the rights of private broadcasters. This is what the Act seems to attempt here.

Overall, the Act is almost an embodiment of *Red Lion* because it attempts to encourage diversity for the particular needs of Canada, one of those needs being to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."¹⁵⁸ While in some cases the Act even goes beyond *Red Lion*, at no time could the CRTC sanction or promote a case like *WNCN* as did the FCC and the U.S. Supreme Court. It would go against the very essence of the Act to deregulate entertainment programming.

b. Cases

Section 28 of the Broadcasting Act provides a statutory fairness doctrine for purposes of elections. In *Re CFRB and A.G. for Canada*,¹⁵⁹ this section of the Act was challenged as being ultra vires the Parliament of Canada on division of powers grounds since the section governed provincial as well as federal elections. The court found that the pith and substance of the section was to prevent the use of radio for partisan comment when there was insufficient time before an election for a person or party attacked in a radio broadcast to answer.¹⁶⁰ The view that the section was intended as radio regulation and only had incidental, if any, effects on provincial elections was sustained by the court.

¹⁵⁶ *Id.* at 390.

¹⁵⁷ 506 F.2d at 249.

¹⁵⁸ Broadcasting Act, 1967-68, CAN. REV. STAT. B-11 § 3(b).

¹⁵⁹ 1 Ont. 79 (H. Ct. J. 1973).

¹⁶⁰ *Id.* at 82.

In *CKOY Ltd. v. The Queen*,¹⁶¹ a CRTC regulation requiring broadcasters to get consent before broadcasting any telephone interview was upheld as an attempt to further section 3(d) of the Act, i.e., "high standards."¹⁶² The court said programming is: "more than the mere words that go out over the air, but the total process of gathering, assembling and putting out the programmes generally"¹⁶³ Here the Canadian Supreme Court could have used section 16(1)(b)(ix) which allows regulation in furtherance of section 3 where necessary, but instead chose to use section 16(1)(b)(i), which relates to section 3(d), in order to insure that the CRTC has wide powers to regulate content.¹⁶⁴ The court also declared that the CRTC has "wide latitude with respect to the making of regulations to implement policies and objects for which the Commission was created."¹⁶⁵ All in all, the Supreme Court has given the CRTC sweeping power to regulate program content.

In *CTV Television Network, Ltd. v. CRTC*,¹⁶⁶ the Supreme Court upheld a Canadian content requirement which required that a minimum amount of original drama be produced by a licensee each year. This case is relevant as a reaffirmation of *CKOY* and the wide powers of the CRTC, as well as an explicit extension of this generous attitude toward licencing as well as regulation.

Unfortunately, no cases exist in Canada which are equivalent to the D.C. Circuit cases in which the regulatory agency declined to act.¹⁶⁷ This is primarily due to the construction of the Act—which states the purpose of the Commission is to "regulate" through section 3—and the attitudes of the CRTC towards regulation. However, for these same reasons it is likely that *NBC v. United States*, *RCA* and the D.C. Circuit cases, which require some inquiry into whether the public interest is being served by the licensee, would find ready acceptance in the Canadian courts. Section 3(h) is particularly on point since it *requires* the Commission to decide in favor of the "public interest" whenever the interests of private broadcasters conflict with the *objectives* of diversity of the national broadcast service which are found in section 3(g).

B. Canadian Freedom of Expression and Broadcasting

In attempting to apply U.S. constitutional doctrines in Canada one must compare the constitutional structures and traditions of the two countries. The United States system is a system of checks and balances with one branch of government limiting the other, with the Constitution as the binding thread and the Bill of Rights as the general limitation on

¹⁶¹ 90 D.L.R.3d 1 (1978).

¹⁶² *Id.* at 10.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 6.

¹⁶⁶ 41 N.R. 277, 285 (1982).

¹⁶⁷ See *supra* notes 33-40 and accompanying text.

governmental interference. In Canada, the principle of parliamentary supremacy provides, or at least provided, for provincial legislatures and the federal parliament each to be supreme within their respective spheres, without any checks and balances except as to the boundaries of those spheres. There were some limits to this principle based on the preamble of the British National Act, now the Constitution Act, 1867, which states that Canada shall have "a Constitution similar in principle to that of the United Kingdom."

However, in 1981 the Constitution Act, 1982 was made part of the Constitution of Canada. Contained within that Act was The Charter of Rights and Freedoms that entrenched a number of rights which, according to section 52 thereof, "is the supreme law of Canada, and any law that is inconsistent . . . is of no force or effect." Except for the limits of the notwithstanding clause,¹⁶⁸ and the reasonable limits clause,¹⁶⁹ the Charter has been made supreme over the will of Parliament and the provincial legislatures. It may be said, therefore, that a system of checks and balances has at least been partially imposed on Canada. However, one must realize that the constitutional traditions of old still remain and the conservative traditions of the Canadian courts may yet limit the effect of the Charter.

As yet, Canada still awaits the decisions of the Supreme Court to settle such issues, so any discussion of the Charter now is merely educated speculation. However, because of the textual similarities in some instances and the highly developed case law, U.S. constitutional principles will have at least some bearing on this development. The law of the United States has often been referred to in appellate Charter cases. The degree of applicability will probably vary from section to section of the Charter depending on:

1. textual similarity or dissimilarity;
2. prior Canadian constitutional law (if any);
3. post-Charter Canadian case law (if any);
4. nature, compatibility, and value of American case law; and,
5. nature of Canadian interests in the area (law and policy).¹⁷⁰

If it were not for a change in the drafting of section 1 of the Charter, American cases would have no relevance whatsoever. Originally section 1 read: "subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government." Since then, the reference to parliamentary government has been dropped, thus allowing American law to have some relevance.

1. Constitutional Text

In both Constitutions there is a freedom of speech or expression and

¹⁶⁸ CHARTER OF RIGHTS AND FREEDOMS § 33.

¹⁶⁹ *Id.* § 1.

¹⁷⁰ See *supra* Part III(A).

a freedom of the press.¹⁷¹ In the United States it has been recognized¹⁷² that these two freedoms can be in conflict with one another; that is, if the press is to operate freely are they then free to restrict the freedom of others to speak? If not, where is the line drawn? With respect to broadcasting, *Red Lion* recognized that the rights of the broadcaster, the free press, may conflict with the rights of viewers and listeners to receive ideas and experiences, their freedom of speech.¹⁷³ As such, since the latter more directly served the purposes of the first amendment, that being the protection of the "marketplace of ideas," the rights of the public should be paramount. Is the same conflict possible in section 2(b) of the Charter? If so, will the line be drawn in the same way?

The Charter says in section 2 that "[e]veryone has the following fundamental freedoms: b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication" At first glance this seems wider than the first amendment of the U.S. Constitution, but considering the way the U.S. Constitution has been interpreted it is not. However, it certainly is not more narrow. In the United States "free speech" has been widely interpreted to encompass many forms of "expression" including the right to receive ideas and experiences.¹⁷⁴ "Free press" has also been widely interpreted as being applicable to many different media, although limited by *NBC v. United States* with respect to broadcasting so as to allow regulation.¹⁷⁵

In Canada does the text of section 2(b), "freedom of expression," recognize a right to receive "ideas and experiences"? Will it be so interpreted? The beginning of section 2 says that "everyone has" these rights. That would seem, *prima facie*, to include the public as well as individuals. As well, the right here is more than a right to expression, but also a right to free "thought, belief, opinion and expression."¹⁷⁶ These elements would together constitute a wide conception of "ideas" and could thus be seen as a constitutional codification of the rationale of the first amendment of fostering a "marketplace of ideas." This would fit well with the reasoning of *Red Lion* which provided alternate means to achieve the ends and purpose of the first amendment through government regulation.¹⁷⁷

Moreover, since a right to form and express ideas may be read as a right in itself, the means to achieve it are open. Alternatively, if these rights are not a constitutional codification of the market place of ideas, then the rights of free "thought, belief and opinions" would be denied if there was no opportunity to receive diverse ideas and experiences, since

171 Compare U.S. CONST. amend. I with CANADIAN CONST. § 2(b).

172 See *Red Lion Broadcasting*, 395 U.S. at 382; *WEFM*, 506 F.2d at 249.

173 395 U.S. at 380.

174 *Id.* at 381.

175 *National Broadcasting Co.*, 319 U.S. at 217.

176 CHARTER OF RIGHTS AND FREEDOMS § 2.

177 See *supra* notes 29-32 and accompanying text.

these are the basis on which thoughts, beliefs and opinions are formed. One can therefore infer a right to receive diverse ideas and experiences.

This speculation will be of no effect if the courts are not predisposed to such arguments. However, as will be further discussed later, *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* upheld the right of the listener and viewer to receive communication as part of section 2(b).¹⁷⁸ This right will probably be extended to broadcasting as well since it was recognized even before *Red Lion* in section 3(c) of the Broadcasting Act.

The text of section 2(b) raises two issues: 1) the effects of conflict between press and expression; and 2) the degree of protection afforded broadcasting as a "media of communication." Unlike the first amendment where there is a freedom of speech *and* a freedom of the press, in Canada there is a freedom of expression *including* the freedom of the press.¹⁷⁹ Does this mean that in Canada "freedom of the press and other media of communication" are part of the other four basic rights and not, as in the United States, two related but separate freedoms? It seems that these latter freedoms were included as an afterthought to ensure that they would not be excluded if only the four basic rights were included. This says something of Canada's attitude to a free press (and maybe something about Pierre Trudeau's attitudes toward the press). The logical effect of this wording would be that in a conflict between one of the four basic rights and the freedom of the press, the latter would not be overly emphasized so as to exclude the former. Thus, one could infer a preeminence of *Red Lion's* right to receive over the freedom of the press in the text of the Charter.

This may be going a bit too far simply on one word, but one cannot presume an accidental or haphazard wording. One must also consider the great weight given to wording in statutory and constitutional interpretation in Canada. Since legislative or constitutional history is not considered in Canadian courts, courts rely largely on what is within the four corners of the statute. Alternatively, the freedom of the press would not be on an equal level with the other four freedoms but would be only one factor. As will be later discussed, this limited view of freedom of the press tends to appear in cases.¹⁸⁰

Did the drafters of the Charter intend to put "other media of communication" on the same constitutional level, with the same constitutional protection, as the freedom of the press? It can be argued that by expressly including this freedom in the Charter, while it is not express in the U.S. Constitution, this is what the Charter drafters intended. How-

¹⁷⁸ 147 D.L.R.3d 58 (Ont. H. Ct. J. 1983). "[Freedom of expression] also extends to the listener and to the viewer, whose freedom to receive communication is included in the guaranteed right." *Id.*, *aff'd*, 45 Ont. 2d 20 (Fed. Ct. App. 1984), *leave to appeal to the Supreme Court of Canada granted* April 4, 1984.

¹⁷⁹ CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 2(b).

¹⁸⁰ *Southam Inc. v. The Queen* (No. 1), 146 D.L.R.3d 408 (Ont. H. Ct. J. 1983).

ever, this would not be likely considering: 1) the probable interpretation of the word “including” to mean that free press and free broadcasters are to be treated as lesser aspects of the larger four rights and thus should be balanced with competing rights in specific circumstances; 2) the Broadcasting Act which by implication requires such comprehensive regulation of broadcasters and in section 3(c) expressly limits the freedom of broadcasters; 3) the *CFRB* case¹⁸¹ held that each media is to be treated differently for the purpose of free speech;¹⁸² and, 4) one cannot presume the equality in scope of any rights to any exact degree because section 1 of the Charter imposes limits as to the facts of each case.¹⁸³ It is likely then that the scope of the freedom of broadcasters will be determined on a case by case basis, not on the basis of the text alone.

2. Pre-Charter Cases

a. Freedom of Expression

Before the Bill of Rights, there was some basis for the freedom of expression in the preamble of the Constitution Act, 1867, which provided for “a Constitution similar in principle to that of the United Kingdom.” In a concurring judgment in *Switzman v. Elbing and the Attorney General of Quebec*, Abbott J. said that “free expression” and “discussion . . . are essential to the workings of a parliamentary democracy.”¹⁸⁴ Although he recognized that there were limits to this right, he said in obiter that neither Parliament nor the Legislatures of the provinces can abrogate that right.

This right fared worse under the Bill of Rights. Although it was upheld in the Appellate Division of the Supreme Court of Nova Scotia, the Supreme Court of Canada used a division of powers argument to uphold the impugned legislation in *Re Nova Scotia Board of Censors and McNeil*.¹⁸⁵

In *CTV Television Network, Ltd. v. Canadian Radio-Television & Telecommunications Comm'n*¹⁸⁶ the Supreme Court merely asserted that the freedom of expression was not abridged by minimum Canadian content drama requirements imposed on a licensee. Chief Justice Laskin said that even section 3(c) of the Broadcasting Act, if taken at its widest, would not support striking down such content requirements.¹⁸⁷ However, he ignored the Bill of Rights and *Switzman*. Although both of these are limited, they are certainly less limited than section 3(c) of the Act

¹⁸¹ *CFRB and the Attorney General of Canada* (No. 2), 30 D.L.R.3d 279 (Ont. H. Ct. J. 1973).

¹⁸² Note that many Canadian cases are loose with the use of the words “speech” or “press” and should be analyzed according to the context.

¹⁸³ See *Ontario Bd. of Censors*, 147 D.L.R.3d at 56.

¹⁸⁴ 7 D.L.R.2d 337 (1957).

¹⁸⁵ 84 D.L.R.3d 1 (1978).

¹⁸⁶ 134 D.L.R.3d 193 (1982).

¹⁸⁷ *Id.* at 200.

and Justice Laskin should have considered them. The Canadian courts have not been wonderfully generous with respect to the freedom of expression before the Charter, despite what the Ontario Court of Appeals said in *Ontario Board of Censors*. If not for a change of heart by the courts after the Charter, comparison to U.S. cases would have been a waste of time.

b. Freedom of the Press and Broadcaster

The pre-Charter trend in freedom of expression has been parallel to the freedom of the press. However, its post-Charter success has not been as bright as the freedom of expression. This tendency is hinted at in the pre-Charter cases. In *Saumur v. City of Quebec*,¹⁸⁸ Justice Rand, citing the 1938 Supreme Court decision of *Re Alberta Legislation*,¹⁸⁹ in which Justice Cannon recognized a "right of public debate," said that "freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of government."¹⁹⁰ The basis for this right was the preamble to the British National Act. Keep in mind that the rationale for this right was the "right of the public to be informed." This is important as a precursor to the *Red Lion* type of thinking now predominant in the Broadcasting Act and in the *Ontario Board of Censors* case. It also shows that, unlike the United States, the emphasis on free press is not on the rights of the press but on the right of the public.

The freedom of the press was treated similarly to the freedom of expression under the Bill of Rights.¹⁹¹ In *Hlookoof v. City of Vancouver*,¹⁹² a license for certain premises was revoked because of defamatory remarks made in a newspaper. The revocation was upheld on division of powers grounds.¹⁹³

In *Gay Alliance Toward Equality v. Vancouver Sun*,¹⁹⁴ the freedom of the press was not directly applied but was relevant and was referred to in dicta. In that case the majority interpreted the British Columbia Human Rights Code which required that services be offered in a nondiscriminatory way.¹⁹⁵ Justice Martland here said that the newspaper defendant must print a homosexual classified ad because classified advertising by newspapers was a service "customarily available to the public."¹⁹⁶ In dicta, however, he said that had the refusal to print been

¹⁸⁸ [1953] 4 D.L.R. 641, 672.

¹⁸⁹ [1938] 2 D.L.R. 81.

¹⁹⁰ [1953] 4 D.L.R. at 641.

¹⁹¹ See *Re Nova Scotia Bd. of Censors and McNeil*, 84 D.L.R.3d 1 (1978).

¹⁹² 67 D.L.R.2d 119 (B.C. S. Ct. 1968).

¹⁹³ *Id.*

¹⁹⁴ 97 D.L.R.3d 577 (1974).

¹⁹⁵ B.C. REV. STAT. ch. 186.

¹⁹⁶ 97 D.L.R.3d at 591.

related to editorial content, i.e., a letter to the editor, the newspaper would not have had to print it because of the freedom of the press in the Bill of Rights.¹⁹⁷

Does this mean that the freedom of the press is limited to content or is this merely the traditional reluctance to render a statute inoperative because of the Bill of Rights? If it is the former, it continues the tradition of a limited free press in Canada. If it is the latter, then we can expect this to change because the Charter of Rights is now entrenched. The post-Charter cases will determine which is the case.

In *CFRB* the Ontario High Court spoke of "freedom of expression,"¹⁹⁸ but in fact what they addressed was freedom of the broadcaster, like the press, to be unregulated. It was claimed here that the regulation of newspapers over election comment is not acceptable and therefore should not be allowed with respect to broadcasters either. The court responded to this, stating that broadcasters are to be treated differently from newspapers.¹⁹⁹ Some reference was made to the limits in section 3(c) of the Act.²⁰⁰ Since this regulation would have been theoretically inoperative if imposed on the press, but was still held to be valid with respect to broadcasting, an implication arises that different standards exist for different "media of communication."

In *CKOY* the Supreme Court of Canada questioned whether broadcasting comes under the word "press" in the Bill of Rights,²⁰¹ but did not answer the question.²⁰² It is probable Justice Spence said that "the freedom of the press is not absolute and . . . is subject to the ordinary law," and so upheld the statutory limits in section 3(c) of the Act,²⁰³ because of the limits of the Bill of Rights as a statutory instrument for interpretation. However, he had no such excuse for his comment that there is no infringement of rights because nobody is hindered from making comments.²⁰⁴ Here he was recognizing that the freedom of expression of the speaker is not infringed, but he either ignored or rejected the freedoms of the broadcaster. In fact, he expressly recognized that he was protecting the freedom of the person interviewed to withhold his speech.²⁰⁵

The freedom of the press may or may not be more limited than the freedom of expression, depending on how it fares after the Charter. However, the freedom of the broadcaster is severely limited in Canada

¹⁹⁷ 97 D.L.R.3d at 589, citing *Miami Herald Publishing Co. v. Turnillo*, 418 U.S. 241 (1974).

¹⁹⁸ 30 D.L.R.3d at 283.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 281.

²⁰¹ 90 D.L.R.3d at 12.

²⁰² This was probably the reason for the wording "and other media of communication" in the Charter.

²⁰³ 90 D.L.R.3d at 12.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

according to *CFRB*²⁰⁶ and *CKOY*,²⁰⁷ especially when other free speech rights are at stake.²⁰⁸

3. Post-Charter Cases

In evaluating the effect of U.S. law on the interpretation of the Canadian Constitution how should one compare pre- and post-Charter cases? Post-Charter cases are of course more attuned to the present constitutional realities—the Charter. They are also generally more up to date.²⁰⁹ However, there are no section 2(b) post-Charter Supreme Court cases or any section 2(b) broadcasting cases yet.²¹⁰ As well, the old cases are still relevant because the Bill of Rights and the Constitution Act, 1867 are still relevant. They should, therefore, be treated merely as cases of relatively equal value, that is, equal to pre-Charter cases and possibly continuing in the development of the case law for the freedom of expression and the freedom of the press.

a. Freedom of Expression: The Rights of Viewers and Listeners

The only case to have dealt with the freedom of expression, as opposed to freedom of the press, is *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*.²¹¹ In that case two movies, “Not a Love Story” and “America” were censored by the Ontario Board. The authority of the board to do so was challenged on the basis of section 2(b) of the Charter, as a “prior restraint” of free expression.²¹² This claim was based on the American doctrine which proclaims that if there is prior restraint there must also be procedural safeguards, including a definition of obscenity, notice administrative procedures and prompt judicial review.²¹³ In this case, it was alleged that the lack of legal criteria or regulations allowed unfettered discretionary application. The court stated that section 2(b) is “mainly declaratory of the freedoms which have long existed in Canada . . . for we Canadians have always enjoyed a full measure of freedom of expression, as well as the other

²⁰⁶ 30 D.L.R.3d at 279.

²⁰⁷ 90 D.L.R.3d at 2.

²⁰⁸ *Id.*

²⁰⁹ *But see C.T.V.*, 134 D.L.R.3d at 193.

²¹⁰ Since the writing of this paper the Federal Court of Appeal has decided *New Brunswick Broadcasting v. CRTC*, 55 N.R. 143 (1984). In this case denial of a licence was upheld despite a section 2(b) challenge by the broadcaster. The court refrained from deciding the case on the basis of the Charter. The court instead treated licensing of the airwaves as a right to access to public property. Accordingly section 2(b) did not provide a remedy with respect to access to this property for broadcasters or the public. This property is to be regulated by the CRTC. However, only right to a licence was denied. Program regulation was not in issue. Program regulation clearly raises freedom of expression, opinion, etc., whereas denial of a licence may not.

²¹¹ 147 D.L.R.3d at 59.

²¹² *Id.* at 60-61.

²¹³ *Id.* at 63.

freedoms.”²¹⁴

This of course, is overstating the extent of protection that has been available in Canada, but as the court pointed out the Charter now “guarantees these rights . . . and . . . permit[s] expansion over the years ahead.”²¹⁵ Does this statement apply to freedom of the press in the same degree? Although freedom of the press is included in the quote from section 2(b), it is not entirely clear that “other freedoms” refers to freedom of the press and other media. Even assuming that “other freedoms” refers to press and other media, why didn’t the court say “as well as the press”?²¹⁶ One would generally expect an appellate court interpreting a new constitution to be less ambiguous. One cannot take this statement to apply fully, if at all, to freedom of the press, and must instead rely directly on freedom of the press cases for that purpose.²¹⁷

The rest of the case interpreted the limit of the right by section 1 of the Charter, stating: “The [Charter] . . . guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*”²¹⁸

Since the rights have been *prima facie* abridged here the Act cannot be constitutional as applied unless section 1 applies, since the rights are guaranteed subject only to section 1. As well, the court recognized that the onus of proving section 1 is on the government. The court agreed that on the basis of comparative analysis the limits of censorship are “demonstrably justified in a free and democratic society.”²¹⁹ The court denied the government’s argument that this was merely regulation of commercial activity. Instead, the Court recognized the rights of the theater owner “to express someone else’s ideas or show someone else’s film.”²²⁰

This right to express ideas of others does not necessarily extend into broadcasting because of the scarcity argument.²²¹ The court also recognized the rights of the “*listener and viewer, whose freedom to receive communication is included in the guaranteed right.*”²²² This is almost verbatim from *Red Lion*²²³ and is the best illustration so far that *Red Lion* has found fertile ground in Canada.

The court also noted that it is constitutionally acceptable to have different limits for different modes of expression as long as section 1 is

²¹⁴ *Id.* at 64.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See, e.g., *Southam*, 146 D.L.R.3d 408.

²¹⁸ *Id.* at 413 (emphasis added).

²¹⁹ 147 D.L.R.3d at 65.

²²⁰ *Id.* at 66.

²²¹ See *Red Lion Broadcasting Co.*, 395 U.S. at 382; *National Broadcasting Co.*, 319 U.S. at 218.

²²² 147 D.L.R.3d at 66 (emphasis added).

²²³ 395 U.S. at 385.

met.²²⁴ This alters *CFRB* slightly. It seems to say that all forms of expression are equally protected²²⁵ but that different levels of limitation by section 1 are possible. This is a reasonable construction of the Charter's structure since section 1 is meant to be flexible. Thus, as mentioned earlier, although section 3(c) limits are "prescribed by law," they are probably not "reasonable limits" nor "demonstrably justified." However, the logical and reasonable limits of *Red Lion* and *NBC* would still remain and would likely be acceptable under section 1.

Yet, the court withheld judgment as to whether the limits were reasonable since they were not "prescribed by law" and thus failed on that ground. The court said that "law" meant statutes, regulations, or common law.²²⁶ Here the only limits were discretionary not legal.

b. Freedom of Press and other Media of Communication

In *Southam Inc. v. the Queen* the issue is "not . . . freedom of the press *per se*" but access of a journalist to a juvenile delinquent hearing as a member of the general public.²²⁷ The Act called for a complete ban of the public from such hearings. The court overturned this, saying that a complete ban is not justified as a "reasonable limit" per section 1;²²⁸ but what right was infringed? The court said that openness of the courts is "one of the hallmarks of a democratic society."²²⁹ In order to provide accountability of the courts and to promote openness of ideas and information generally, the court ruled that reasonable physical access to the courts was a constitutional right based on a "large and liberal construction" of section 2(b).²³⁰

It is indeed significant that the court in *Southam* discusses the textual argument per freedom of the press. Although, the court said that "limited" was not the appropriate word to use for the effect of the word "including" in section 2(b), the court also said that "freedom of expression would seem to have a wider and larger connotation than the words 'freedom of the press.'"²³¹ It decided this on the basis of the different wording of section 2(b) and the first amendment ("and" compared to "including").²³²

Despite the result in *Southam* and the fact that a journalist was involved, this case should not be taken to mean that freedom of the press is strong. As the court said, "it is not a freedom of the press case."²³³ It

²²⁴ 147 D.L.R.3d at 66.

²²⁵ *Id.*

²²⁶ *Id.* at 67-68.

²²⁷ 146 D.L.R.3d at 408.

²²⁸ *Id.* at 430.

²²⁹ *Id.* at 414.

²³⁰ *Id.* at 418.

²³¹ *Id.* at 416.

²³² *Id.* at 416-17.

²³³ *Id.* at 417.

said that freedom of the press is weaker than freedom of expression. There were also no other rights at stake here since only physical access was required.

This last point is particularly significant when comparing *Southam* to true free press cases involving gag orders, *Regina v. Begley*²³⁴ and *Regina v. Banville*.²³⁵ In *Banville*, the least restrictive way was held to be a ban. *Banville*, when compared to *Southam*, shows the true limits of the freedom of the press compared to the freedom of expression. It also shows that weakness of freedom of the press compared to other constitutional rights.²³⁶

4. Application of American Constitutional Law in Canada

As the last section has established, the freedom of expression in Canada seems to be thriving,²³⁷ whereas the freedom of the press, including the freedom of broadcasters,²³⁸ is weak.²³⁹ According to the *Ontario Board of Censors* case,²⁴⁰ all forms of expression are equally protected in theory, but section 1 can vary that actual protection for each form. *Southam* however, recognizes that freedom of the press is not a form of expression but a lesser right to freedom of the "medium" along which the important forms of expression are "disseminated."²⁴¹

The presence of listener's and viewer's rights and their predominance over the freedom of broadcasters as expressed in *Red Lion* seem to be almost a foregone conclusion. I say almost because we have yet to hear from the Supreme Court of Canada. However, it is quite unlikely that the Supreme Court of Canada will submerge the freedom of viewers and listeners to receive below the preference for the freedom of broadcasters, as seems to have been the trend in the United States. The hesitant balancing approach of Bazelon in *WEFM* would likely be the minimal level to which the rights of viewers and listeners will be protected in Canada.

In considering what directions the Supreme Court might go on the issue, one should consider the character of the Court and its recent trends and ideological stances compared to those in the United States. In the United States, the Warren Court (the Court at the time of *Red Lion*) did not limit itself to traditional, conservative views of rights as mini-

²³⁴ 2 Can. Rts. Rep. 50 (Ont. H. Ct. J. 1982).

²³⁵ 141 D.L.R.3d 36 (N.B. Prov. Ct. 1983), *aff'd*, 145 D.L.R.3d 595 (N.B.Q.B. 1983).

²³⁶ Contrast with U.S. cases dealing with freedom of the press: *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richard Newspapers Inc. v. Virginia*, 448 U.S. 535 (1980); *Chandler v. Florida*, 449 U.S. 560 (1981); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

²³⁷ *Ontario Bd. of Censors*, 170 D.L.R.3d at 65; *Southam*, 146 D.L.R.3d at 408.

²³⁸ *CKOY*, 90 D.L.R.3d at 10; *CFRB*, 30 D.L.R.3d at 279.

²³⁹ *Hlookoof*, 67 D.L.R.2d at 121; *Southam*, 146 D.L.R.3d at 410; *Bagley*, 2 Can. Rts. Rep. at 53; *Banville*, 141 D.L.R.3d at 40.

²⁴⁰ 170 D.L.R.3d at 65.

²⁴¹ 146 D.L.R.3d at 416.

num guarantees for individuals versus the government, while the Burger Court has been so limited.²⁴² In Canada, the Supreme Court tends to be closer to the Burger Court on some issues but not uniformly so. Chief Justice Laskin is a good example. In some cases he was very conservative with respect to rights and freedoms,²⁴³ while other times he was very liberal.²⁴⁴ If there is any tendency of the court other than on an area by area basis, it is to be deferential to the federal government.²⁴⁵ Since the CRTC is not about to deregulate programming, it is unlikely that any challenge to deregulate would succeed. However, if the CRTC initiated deregulation with Parliamentary support, that may be another story.

As to particular United States Supreme Court cases, the alternatives to *Red Lion* are certainly not attractive to the Canadian courts or to the Canadian system. *CBS* would not likely be followed because of the *Gay Alliance* case which refused to apply the Bill of Rights but relied on common law. The courts in Canada might not be as hesitant to restrict broadcasters as in *CBS*, whether seen as a service or content because of the limits on broadcaster rights inherent in the Act which has been upheld by the Supreme Court in the past despite freedom of the press challenges.

Canada would also not likely follow *WNCN* because of the aversion Canada feels toward deregulation, the nature of the Act and the still strong recognition of wide constitutional *Red Lion* principles. As well, a procedural fairness doctrine accepted in *Re Nicholson & Holdmand - Norfolk Board of Commissioners of the Police*²⁴⁶ would likely require hearings in at least some circumstances. However, just because Canada decidedly leans in the direction of *Red Lion* and decidedly leans against its American alternatives does not mean that the Supreme Court of Canada will necessarily follow *Red Lion*. In fact, the Supreme Court has a tendency not to follow but to take suggestions from the United States. However, the Canadian tendencies and doctrines outlined in this paper show at least the probable bounds of the Supreme Court's eventual decision on the topic.

IV. CONCLUSIONS

The discussion of the doctrinal value of the statutory decisions and the tendencies of Canadian policy, as well as the Canadian statutory context, make it evident that the CRTC could not and should not deregulate as did the FCC. At the very least, legislative amendment would be needed. The way the system is formulated, any major deregulation effort

²⁴² Compare *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) with *Hudgers v. N.L.R.B.*, 424 U.S. 507 (1976).

²⁴³ E.g., *C.T.V.*, 41 N.R. at 285.

²⁴⁴ E.g., *R. v. Burnshire*, 44 D.L.R.3d 584, 584-85 (1976).

²⁴⁵ E.g., *C.T.V.*, 41 N.R. at 285; *CKOY*, 90 D.L.R.3d at 10.

²⁴⁶ 88 D.L.R.3d 671 (1979).

would totally disrupt the entire Canadian broadcast system. However, in the United States, where broadcasters have always had great discretion in programming, deregulation was not much of a radical change. Even if Canada did revise the entire broadcasting scheme, it is likely that at least some provision for hearings would be required when the market breaks down and the interests of diversity are not served. It is here that the constitution combines with policy in both the United States and Canada, thereby requiring diversity for the minority interests. The social structure of Canada and its cultural identity crisis particularly demand it in Canada. Indeed, the nature of Canada and its relation to the United States may require hearings, not only to determine if there is sufficient diversity but also whether there is sufficient Canadian content.

Constitutionally, the *Red Lion* doctrine requires the government to ensure that "listeners and viewers" have adequate exposure to "political, social, aesthetic, moral and other ideas and experiences."²⁴⁷ Neither Congress nor the FCC can deny this right. Yet, the FCC seems to have done so with the support of the Supreme Court, claiming that the market will suffice for this purpose. The Burger Court has misconstrued the nature of the government's duty. Canada understands this duty and is willing to enforce it. It is entrenched in the Act and the case law. As a result of the social problems in Canada, the duty is even greater. This is why Canada has Canadian content—to provide adequate exposure to *social* ideas and experiences.²⁴⁸ The sooner the United States recognizes the nature of Canada's stance and realizes that their own legal doctrines support it, the sooner conflict between the two nations in communications issues like piracy, satellites and radio advertising taxation will be resolved.

²⁴⁷ *Red Lion Broadcasting*, 395 U.S. at 390.

²⁴⁸ *Id.* at 390.