

Canadian Content on Television: New Developments in Law and Policy

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The subject I have been asked to address is one of those subjects that everyone knows something about. We are all television watchers. We are all aware of what passes for "Canadian content" on television, and we probably all have views on whether we like it or not and whether we want more or less.

Some of us are also aware of the fact that Canadian television stations have to show a certain amount of Canadian content whether they want to or not. Many of us may wonder if there is an incipient Charter question when the government orders the media to carry Canadian programs.

I think all of us will also be aware that new technologies are overtaking both the regulator and the broadcasting industry, and there are more signals and choices than ever before. We have just revised our *Broadcasting Act* to take account of some of these developments.¹ So the question will be raised, is there any room for Canadian content regulations in a world that seems to be increasingly dominated by viewer demand?

I am not entirely a bemused observer in this area. I have been involved on and off in Canadian content matters for over 25 years. Sometimes, I have acted for the regulator; sometimes, I have acted for the broadcaster; sometimes, I have acted for the program producer. Of course, they all see this issue from different perspectives.

Today I thought I would discuss for the benefit of a group of jurists some of the more interesting developments in the area of Canadian content.

First, I'm going to provide you with an outline of what we do to protect and assist Canadian content on television. I will then discuss some of these measures in more detail. Then I will provide some questions and answers about how and whether this strategy works and whether it can survive the many challenges it faces.

But I want to warn you. This is a surprisingly complex area, one which lends itself to simplistic slogans that turn out upon inspection to be highly misleading.

I. A TEN-PART STRATEGY

Let me start by bringing you up to date about the measures Canada has in place to ensure that there is a reasonable amount of Canadian content on television.

The "strategy" - if we can call it that - is a complex one made up of at least ten components. I am going to list them in the order in which they were introduced.

1. Support a public sector network - the CBC - with the financing to develop and broadcast Canadian programming. In the *Broadcasting Act*, the CBC is called "the national public broadcaster", and its role is highlighted and emphasized. The key role played by the CBC has been a central part of the Canadian content strategy since the CBC came into existence in the 1930's and then entered the television age in 1954.
2. Require private sector television stations and networks to show certain amounts of Canadian programming. In other words, a "Canadian content" quota. This has existed in one form or another since 1961, when private television stations not affiliated to the CBC were first licensed across Canada.
3. Limit the carriage of distant U.S. signals into cable homes across Canada to the 3 commercial U.S. networks and PBS, subject to limited exceptions. That's what we call the "3 + 1 rule", and it has been in place since 1971.

4. Prohibit advertising expenses on U.S. border stations as an allowable expense for Canadian advertisers. That's what the industry refers to as *Bill C-58*, enacted in 1976, and now a central support structure for the industry.
5. At the same time, protect the Canadian off-air services by preventing programs from those distant U.S. signals from being delivered to Canadian cable homes when a local Canadian station has already bought the rights to that program and is running it at the same time. That's called the "simultaneous substitution" rule, and it has been in place since 1976.
6. Require private sector television stations to expend certain amounts on Canadian programming. That's the Canadian expenditures quota. It was first introduced in 1982 for pay television and then extended to regular television networks and stations in 1986, 1987 and 1989, as part of their licence renewal decisions.
7. Support Canadian production with subsidies from Telefilm Canada, a public agency created in the 1960's but renamed and rejuvenated in 1984. Those subsidies are provided in the form of loans to be recouped only out of profits, and are conditional on pre-commitments from Canadian broadcasters.
8. Licence Canadian-owned versions of successful U.S. pay television and specialty program services on cable television, all with their own Canadian content rules. So now we have First Choice and Superchannel licensed in 1982, TSN and MuchMusic licensed in 1984, and Newsworld, Vision, YTV, WeatherNow and the Family Channel licensed in 1987. At the same time, a number of comparable French-language services were licensed.
9. In licensing those new services, make sure that they have distinct and non-competitive programming formats and protect the advertising revenues of the off-

air television services. This strategy began abortively in 1982 with the licensing of competing Canadian pay television services - First Choice and Superchannel - who practically killed themselves in the process of trying to compete head-to-head with the same programming. By 1984 and 1987, the CRTC recognized its error, approved the reorganization of pay, and began licensing new so-called specialty satellite services on the basis of what might be called "program niche" monopolies. One music video service, one youth service, one sports service, and so on, in each language. Combined with the setting of terms for the carriage of these services on basic cable, these decisions have created a host of new viable Canadian services, all with distinct Canadian content requirements. And more such services are expected to be licensed by the CRTC next year.

10. Protect Canadian programming services by limiting the number and type of competing U.S. satellite services that may be carried by cable television into the home and the basis upon which they may be sold to consumers. These are called the "tiering and linkage rules" and they were first introduced in 1984, significantly revised in 1987, and are being reviewed again next year.

This summary will give you some idea of the complexity of the problem and the types of regulatory solutions that have been adopted.

Most countries in the world, other than the United States, find it necessary to protect and assist the production and broadcasting of domestic television programs. Almost all of them apply domestic quotas to their private broadcasters. Most of them combine these measures with subsidies. But it is safe to say that no country in the world has quite the complexity of measures that Canada has found it necessary to implement. At the same time, it is also fair to say, no country, including the United States, has the diversity of programming signals available to its viewers that Canada does.

Later in my talk, I want to discuss some of the criticisms being levelled at Canada's regulatory strategies, particularly from our U.S. friends to the south, and some responses to those criticisms. But before I do, I would like to provide you with a little more detail about what is the central regulatory protection for Canadian content: namely, the Canadian content quota and the requirement for Canadian content expenditures.

II. THE CANADIAN CONTENT QUOTA

I will start with a discussion of the quota. We have had an overall Canadian quota in place for television since 1961. The original rules in the 1960's required only 40% Canadian content and were very loosely worded.² In 1970, the newly created CRTC carried out a wholesale reform of those rules and the amended rules still apply today.

The basic quotas for private television in Canada now require 60% Canadian content during the 18-hour broadcast day, and 50% Canadian content in the evening hours from 6 p.m. to midnight. The quota is higher for the CBC³ and is subject to some case-by-case exemptions. There is one special proviso that was added in 1984, namely, that a new fully Canadian drama production exhibited in prime time is given a 150% credit. (When I use the word "drama", by the way, I use it in the very wide sense used in the television industry; the word "drama" embraces virtually all fiction programming, whether it consists of action adventures, situation comedies, or full length feature films).

The overall quota of 60% and the evening hour quota of 50% for Canadian content have been remarkably stable and have now been in place for over 20 years. However, the requirements only apply to the overall schedule and, apart from the 150% credit for new drama, do not distinguish between particular program categories. In the absence of specific quota requirements for the higher cost categories such as drama, the private television industry in the 1970's, particularly in English Canada, focused on the least expensive categories in Canadian content to produce - news, sports, game shows and some variety. The result was that there was virtually no

Canadian drama on private English television. The only Canadian drama to be seen was on the CBC. The situation was somewhat better on French-language private television.

A new order of the day came for private English television in 1979. In that year, the CRTC decided to impose a category quota explicitly for Canadian drama as a condition of licence for the CTV Television Network. The quota was 26 hours of new drama per year rising to 39 hours over the 5-year licence term. That licence condition was appealed to the Supreme Court of Canada on a variety of grounds, which upheld the CRTC in 1982.⁴

In 1987, in its decision for renewing the CTV Network licence for another 5 years, the CRTC upped the ante for Canadian drama considerably, requiring CTV to broadcast 2-1/2 hours a week of a regularly scheduled Canadian drama series, rising to 4-1/2 hours per week by the end of the licence.⁵ All but one hour of the requirement had to be scheduled after 8 p.m. The decision also required an additional 24 hours per year of Canadian feature films, mini-series and limited dramatic series to be broadcast by CTV. The terms of the 1987 CTV decision, which would normally have run out last month, were recently extended by the CRTC for one year, pending resolution of the long-standing arguments over control of the CTV network.

The Global television network, which is not actually a "network" as defined in the Act, but shares many of the same attributes, is also subject to a special quota for Canadian drama. Under the terms of its 1986 renewal, Global was broadcasting about 3 hours per week of first-run Canadian drama.⁶ In April 1992, however, the CRTC renewed Global's licence subject to a condition that this amount be increased to 3-1/2 hours by the 1994-95 season, all of which was to be broadcast between 8 and 11 p.m., therefore matching the current CTV series drama commitment for this time period.⁷

The Canadian content quotas for the new specialty services carried on basic cable generally match the 50%/60% rules established for conventional television. In the case of pay television, however, recognizing that it is offered only to homes subscribing to pay, and that it depends on

recent release feature films, the annual volume of which in Canada is not high enough to support a higher quota, the Canadian content quota has been held to 30%. Since the content of the pay services is made up almost entirely of feature films, this is in effect a content quota for drama.

This approach of differentiating specialized services from general television services is reflected in the new wording of the 1991 *Broadcasting Act*, which states that:

*each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian content and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, makes that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources.*⁸

III. CANADIAN CONTENT EXPENDITURES

I turn now to a brief outline of the Canadian expenditures rules. As I mentioned earlier, a Canadian expenditures quota was first introduced in 1982 for pay television. It was a quota specified as a fixed percentage of subscription revenue. When penetration levels of pay television turned out to be far less than projected, the pay television licensees went back to the Commission and persuaded the CRTC, in 1987, to establish lower expenditure levels as a proportion of subscriber revenue.

The current rules provide for a specified percentage of network subscription revenues - typically 20 to 25% - to be expended on Canadian programming. However, the percentage increases as the number of subscribers to the service increases.

The concept of requiring a level of expenditures on Canadian programs was later extended to Global in 1986⁹ and CTV in 1987.¹⁰ Then in 1989, the CRTC applied the concept to all major television stations, as part of their licence renewal decisions. The level of expenditures was also

tied to the advertising revenues of the station concerned. As a result, the expenditures on Canadian programs required by the CRTC now fluctuate up and down with changes in the advertising revenue for the stations.¹¹

Earlier this year, the Commission modified the programming expenditures formula by allowing some averaging to occur between fiscal years.¹² It has also addressed a number of concerns expressed in the course of the 1992 Global renewal by tightening some of the accounting rules applicable to the calculations involved.¹³

IV. SOME QUESTIONS

Now that you've heard about how we protect and assist Canadian content programs, I would like to deal with seven obvious questions and not so obvious answers.

A. Question 1. Can we ever define anything called Canadian culture?

As lawyers, of course, it is necessary to come up with a legal definition of Canadian content, in order to make these regulations effective. The CRTC definition is contained in a public notice issued in 1984.¹⁴ In essence, it defines Canadian content entirely by origin not by content. In other words, Canadian content is defined as programming made by Canadians - written, directed, produced and performed by Canadians. If the program is partly by Canadians and partly by non-Canadians there is an elaborate set of rules to determine whether it qualifies as Canadian or not. The rules involving the use of non-Canadians are much more flexible when the production is done with Europeans where we have co-production treaties than in the case of U.S. co-productions where the problem of U.S. control is seen as more likely.

But content as such is not involved. It is not necessary to include maple syrup or snow in the script. The story does not have to have Canadian themes or Canadian locales.

The Commission does not prescribe ideas. What it prescribes by regulation is where the ideas come from. And the intent of the regulation is that a certain proportion of our broadcasting system should be devoted to ideas, stories, and experiences from Canadians.

B. Question 2. Why the fixation on drama?

This is a logical question. The answer is threefold. First, drama is the most expensive form of television to produce. Second, if you did not require its presence, private television would fill its Canadian content quota with cheaper forms of Canadian programming - news, sports, game show and variety, as was the case in the private section in the 1970's. Third, drama is seen as being a very important form of expression. It is the single most popular genre on television, dominating primetime on most television networks around the world.

In that connection, it is interesting to note that the European Community also has a domestic content quota for broadcasting. But it only applies to drama programs. In other words, the EC feels it has nothing to fear from U.S. competition in news, information or sports programming. Where it does feel that it needs protection is in the drama field, where U.S. drama, already amortized in the American market, comes in at only incremental cost and threatens European dramatic programming, which like Canadian drama, is much more costly to produce.

C. Question 3. So Canadians now produce more drama. But does anybody want to watch it?

This is an interesting question. Back in the 1970's, when private television avoided Canadian drama like the plague, the standard justification apart from the cost was that we could not produce drama that ordinary Canadians would want to watch. It was viewed as a grand conceit that Canadian drama would ever compete with U.S. drama like Mary Tyler Moore or M.A.S.H.

We had a situation coming into the 1980's where about 75% of Canadian English television viewing and 50% of French television viewing was to foreign (mostly U.S.) programs. Almost all of the viewing to Canadian content was to news, sports and variety programming. Very little viewing was to Canadian drama because there was very little to watch. By contrast, the great bulk of the foreign viewing was to U.S. drama.

Since then, we have had a proliferation of new signals, but also a decision to increase the emphasis on Canadian drama on television. The amount of Canadian drama has doubled on English television and tripled on French television.¹⁵

The result is interesting. On the English side, with all the new U.S. signals, and the introduction of home VCRs and pay TV, you would expect Canadian content viewing to decline. But it has held its own. It is still about 25% of overall viewing. One of the key components to that result has been Canadian drama, which has increased from about 1% of overall viewing to almost 3%. A very small amount, you might say, but it is one of the reasons why overall foreign viewing has not increased on the English side.

On the Francophone side, the difference has been even more dramatic. Canadian content viewing has actually increased from 50% to 64% in French Canada in the last 10 years despite the proliferation of signals. The reason has been almost entirely due to the increase in viewing of French-language Canadian drama, which has gone from about 6% of total French viewing to almost 16%.

D. Question 4. If Canadians are in fact interested in watching Canadian drama, why do we need regulations to insist on it? Won't viewer demand ensure a continuing supply of Canadian drama?

This is the great argument from our friends to the south. The Motion Picture Association of Canada, made up of the Hollywood studios, basically argues that any quotas ignore viewer demand and represent a government attempt - inevitably doomed to fail - to dictate local tastes and

preferences. In the popular entertainment category of programs, says the Hollywood studios, let the viewer determine what he or she wants to watch. If the indigenous programs are good, viewers will watch them. If they are not, they will not be watched, and they are not worth putting on. If a program is truly cultural - which is to say, high-brow - then, says the studios, let it be put on the public channels with public subsidies. But don't interfere with the marketplace for popular entertainment product by dictating what viewers are permitted to watch.

These arguments sound attractive. If we had a free market system, according to them, viewers would get what they want to watch. Therefore if they want to watch Canadian drama, they will get it.

The problem is the amortization of cost. If you ask a Canadian broadcaster to choose between a Canadian program that delivers twice the audience of a U.S. program, but at three times the cost, the broadcaster if not constrained by regulation would inevitably find it more profitable to choose the U.S. program. Thus, unless Canada has a domestic quota, cheaper U.S. product that can be sold in Canada at a fraction of its production cost will always tend to displace Canadian programs - even if those Canadian programs are more popular with viewers - because the Canadian programs come at a much higher cost per viewer.

The same problem occurs in Europe which is why quotas for EC drama continue to apply.

E. Question 5. Don't these regulations amount to having the government tell you what program you can or cannot see?

The answer is no. But this is a trick question. If I had asked the question in a slightly different way, namely, "Don't these regulations amount to having the government tell you what **programming services** you can or cannot see? the answer would be yes.

If you want to watch a Hollywood movie, such as *Batman Returns* for example, you can see it on a Canadian service, First Choice, Superchannel and Super Ecran. But you can't see it in Canada on Home Box Office or Showtime. Later, after being shown on pay television, *Batman Returns* will probably show up on CTV or Global as a movie of the week. It may also be shown on ABC network stations. But if it is running at the same time as it is broadcasted on CTV, you will see the Canadian signal not the U.S. signal.

What the Canadian strategy is based on, in other words, is the concept that any programming service going to the public should be owned and operated by a Canadian company subject to regulations that require a certain amount of Canadian programming and Canadian expenditures. Yet, viewers should have access to programming from around the world, but that programming should be presented by a Canadian programming service.

This policy is under increasing technological attack. The threat of the U.S. border stations has been countered with Bill C-58, the 3 + 1 policy, and the simultaneous substitution regulations, all of which attempt to protect the local television stations and the stream of advertising revenue upon which they rely. But it is much more difficult to apply such a policy in regard to high power direct-to-home satellite broadcasting which will be launched in 1994. This issue will be addressed further on.

F. Question 6. Isn't most of the government support for Canadian content a waste?

This is a variant of another argument frequently heard from the U.S., namely, that government can never create great art.

Of course, it's true. Individuals create great art, not governments.

But it is certainly true that governments can **support** great art. The history of great art is the history of subsidy from patrons - either the state or the nobility; just ask Mozart and Michelangelo.

That being said, governments can also end up supporting mediocre art. The same can be said for corporations or Hollywood studios. We aren't going to concern ourselves if the studios waste their money on trash, but in terms of allocating public subsidies, how do we assure ourselves that we get value for the money?

When it comes to popular culture, most people neither expect or receive great art. What they receive is popular art. And popular art can be good, terrible, uplifting, irritating, boring, fascinating. As Canadians, we can be all those things. So we should be tolerant if some of the programs we create infuriate us as much as they challenge us.

The lesson Canada has learned since it began focusing on the support of popular culture in the 1970's is that governments are terrible arbiters of taste. For that reason, the support mechanisms we have put in place in the 1980's have a number of elements that address the question of viewer demand.

The key point is that the Canadian content regulations do not dictate program choice. Within the quota, a broadcaster can choose any program it wishes as long as it is of Canadian origin. One hopes and expects that those programs will take into account anticipated viewer interest and demand.

Supporting this approach is the fact that the subsidies for Canadian content that come from Telefilm Canada are only given when there is a commitment letter from a Canadian broadcaster to the effect that the broadcaster will pay a licence fee and actually broadcast the program once it is completed.

These mechanisms do not mean that poor programs will not be made. But broadcasters choose the programs on behalf of their viewers and they will not commit to a program that has no chance of attracting interest. The proof is obviously in the pudding, and we have many programs to show the results: *Avonlea*, *E.N.G.*, *DeGrassi*, *Neon Rider*, *Il Lance Il Compte*, *Les Filles de Caleb*, and many others.

The result has been what many observers would agree is an extraordinary success story in the last few years for Canadian drama. But it is a fragile success story, highly dependent on regulatory structures and government support.

G. Question 7. Doesn't technology always win out in the end?

Technology makes possible a proliferation of signals and a fragmentation of audience. The experience of the past few years is proof that it is possible to maintain and even increase the strength of Canadian programs in the face of that competition by insisting on a distinct Canadian market, on distinct Canadian services, and by focusing attention on Canadian drama, the single most difficult type of programming to produce but the most potent in terms of viewer interest and cultural sovereignty.

We would be kidding ourselves if we thought this can go on forever. The single most crucial problem for Canada is to avoid the technological pressures for the North Americanization of program services.

That pressure can be resisted, but only by creating Canadian services that occupy the field, and satisfy viewer demand for increased choice and diversity, while at the same time maintaining a meaningful presence for Canadian content programs that viewers will want to watch.

H. Question 8. Aren't our cultural protection measures inevitably doomed with the multilateral trade agreements?

Canada is under pressure to freeze or even roll back its cultural protection measures. Nevertheless, it has succeeded in maintaining a cultural exemption for cultural industries in the recently concluded *North American Free Trade Agreement (NAFTA)* negotiations. In the Uruguay Round negotiations for the *General Agreement on Tariffs and Trade (GATT)*, it has found common cause with the members of the EC and successfully resisted any rollback of protection measures for domestic content in the audiovisual field.

There is an increasing recognition among most of our major trading partners other than the U.S. that in the audiovisual field - particularly in drama - there must be special measures or indigenous drama coming from smaller countries will be displaced by drama created for and amortized over the U.S. market.

As more of the world's broadcasting systems become privately owned rather than publicly financed, and as satellite broadcasting increasingly spills over international boundaries, the economic pressures to focus on television drama from the U.S. will increase. It will be the task and the challenge for national broadcasting systems like our own to continue to ensure - in the name of cultural diversity and autonomy - that the ideas and stories of the people to whom broadcasting is transmitted be given pride of place on their own broadcasting systems.

FOOTNOTES

1. *Broadcasting Act*, S.C. 1991, c. 11, proclaimed in force June 4, 1991.
2. For a review of these rules, see P.S. Grant "The regulation of program content in Canadian television: an introduction", (1968) 11 Can. Pub. Adm. 322.
3. The CBC is required to maintain a 60% quota in both the 18-hour broadcast day and the evening period from 6 p.m. to midnight.
4. See *CRTC v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530.
5. Decision CRTC 87-200, March 24, 1987. The proportion of original hours to repeats of regularly scheduled Canadian drama was required to exceed the 70% level. In other words, for each 10 hours of repeats, CTV was required to broadcast at least 7 hours of new drama programming.
6. This consisted of 1-1/2 hours of first-run drama and 1-1/2 hours of reruns: see Decision CRTC 92-220, at 3.
7. *Ibid.* April 8, 1992.
8. *Broadcasting Act*, *supra* note 1 at s. 3(1)(f).
9. Decision CRTC 86-1086, November 14, 1986.
10. Decision CRTC 87-200, March 24, 1987.
11. "Overview: Local Television for the 1990s", Public Notice CRTC 1989-27, April 6, 1989.
12. Public Notice CRTC 1992-28, April 8, 1992.
13. Decision CRTC 92-220, April 8, 1992.
14. Recognition for Canadian Programs, Public Notice CRTC 1984-94, April 15, 1984.
15. Statistics Canada reports that the supply of Canadian drama for anglophone viewers increased from about 4% of the available viewing schedule in 1982 to about 7% in 1990. However, much of the drama in 1982 was made up of less costly children's programming and animation. The increase has been largely made up of prime-time series like *Avonlea*, *E.N.G.*, *Street Legal*, *DeGrassi*, *Neon Rider* and the like.