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Monica Auer

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# The CRTC's Enforcement of Canada's Broadcasting Legislation: "Concern", "Serious Concern", and "Grave Concern"

M.L. Auer, M.A., LL.M.†

## I. Introduction

This paper describes results from a quantitative study of the enforcement by the Canadian Radio-television and Telecommunications Commission<sup>1</sup> (CRTC or Commission) over the last several decades of Canada's broadcasting legislation and its own regulations. Established by Parliament in 1968, the CRTC is a quasi-judicial regulatory agency that administers Canada's *Broadcasting Act, 1991*<sup>2</sup> as well as the nation's telecommunications legislation.<sup>3</sup> Parliament has accorded the CRTC a broad range of discretionary powers over broadcast licensees, from granting, denying or revoking licences, to issuing mandatory orders.<sup>4</sup> It is one of many federal regulatory agencies that administer and enforce Parliament's legislation.

A review of the CRTC's enforcement of the *Broadcasting Act, 1991* and its own regulations is timely. The agency announced in June 2006 that it would itself be reviewing aspects of its 1999 policy for conventional, over-the-air television broadcasters<sup>5</sup> through a public hearing process to begin in late September 2006.<sup>6</sup> At about the same time, the Governor in Council ordered the CRTC to provide a factual report on the future environment of Canada's broadcasting system; the Order notes in part that "the Government favours a smart regulatory approach that ensures effective and efficient regulation focused on results for Canadians".<sup>7</sup> Understanding the efficacy of the CRTC's approach to enforcing licensees' legislative and regulatory compliance in the past may provide insight into the likelihood of success of any new regulations or policies introduced for conventional, over-the-air television broadcasters, or for the broadcasting system as a whole.

The Commission's regulation of its licensees has been studied several times since 1968: in 1970, by the Special Senate Committee in Mass Media,<sup>8</sup> in 1983 by the Law Reform Commission of Canada,<sup>9</sup> in 1986 by a federal task force studying Canadian broadcasting,<sup>10</sup> and

again in 2004, by the Parliamentary Standing Committee on Heritage. Generally speaking, however, these studies used case-based analyses wherein the conclusions necessarily depended on the cases reviewed. This paper adopts a broadly based empirical approach to describe and analyze the CRTC's regulation of its conventional, over-the-air radio licensees from 1968 to 2005.

This paper concludes that the CRTC uses informal sanctions, rather than the penalties set out by Parliament in Canada's broadcasting legislation, and that the CRTC's enforcement of the Act and its regulations has not deterred the repeated regulatory and legislative non-compliance by many radio licensees.<sup>11</sup> Part II begins by briefly reviewing the rationale for regulating use of the broadcast airwaves, as well as previous research about CRTC enforcement and broadcasters' compliance from the early 1980s. Part III explains the method of collection and analysis of data about Canadian broadcasters' compliance with the Act and regulations, while Part IV presents the results of the data analysis. Conclusions and recommendations regarding the regulation of licensee conduct in Canadian broadcasting appear in Part V.

## II. Canadian Broadcast Regulation

Parliament asserted jurisdiction over the Canadian airwaves in the early years of the twentieth century. It enacted the *Wireless Telegraphy Act*<sup>12</sup> in mid-1905, following the patenting of wireless telegraphy in England in 1896.<sup>13</sup> By 1919, Canada's Federal Department of Naval Service had granted an experimental broadcast licence to the Marconi Wireless Telegraph Company for XWA.<sup>14</sup> In 1922, the Federal Minister of Marine and Fisheries (now responsible for radio)<sup>15</sup> created a new licencing system and three classes of radio licences: an amateur broadcasting station licence, a private receiving station licence, and a private commercial broadcasting station licence.<sup>16</sup> The Minister's department issued fifty-

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†Monica Auer has worked at Treasury Board, the CRTC and the CBC. She offered consulting services in broadcast regulation after leaving the CBC, and while attending law school. She was called to the Ontario Bar in mid-2006, after completing her articles in Ottawa. This paper is based on research submitted in 2005 in partial fulfillment of the requirements for the LL.M. at the University of Ottawa. It benefited from the comments of Professor Ellen Zweibel, and the anonymous reviewers of this journal.

two licences for private commercial broadcasting and amateur broadcasting that year.<sup>17</sup>

Although many stations began operations, usable frequencies were scarce:<sup>18</sup> technological limitations of early radio transmitters and receivers meant that a single high-powered station in an area simply drowned out any other stations nearby.<sup>19</sup> Licences were therefore strictly controlled<sup>20</sup> both in terms of the single frequency they used and the hours during which they used it.<sup>21</sup> In fact, spectrum scarcity was by then an international problem: despite agreements reached at several international conferences,<sup>22</sup> frequencies assigned to Canada by international treaty had on occasion been appropriated by other countries.<sup>23</sup>

However, it was program content and politics, not technological limitations related to spectrum scarcity, that finally led to the legislation on which many of our existing rules and policies are based. In early 1928, the Ministry of Marine and Fisheries notified one of its licensees, Universal Radio of Canada Limited, that its one-year broadcasting licence would not be renewed.<sup>24</sup> No reasons for the cancellation were given.<sup>25</sup> At a time when Canada's population was small, petitions from "many hundreds of thousands of Canadians" protested the cancellation.<sup>26</sup> Accusations flew that the licence had been cancelled because some of the programming carried by the licensee came from the International Bible Students' Association (now known as the Jehovah's Witnesses).<sup>27</sup> The integrity of the licensing process<sup>28</sup> was further impugned when the frequency assigned to the cancelled licence was granted to a station owned by the Toronto Star, said to favour the governing Liberal party.<sup>29</sup> The government, therefore,<sup>30</sup> announced an inquiry into broadcasting, to be headed by Sir John Aird, President of the Canadian Bank of Commerce.<sup>31</sup>

The Aird Commission's 1929 report concluded that although the country's privately owned radio stations benefited Canadians by providing them with free entertainment, the stations tended to carry too much advertising<sup>32</sup> and too many foreign programs:

[a]t present the majority of programs heard are from sources outside of Canada. It has been emphasized to us that the continued reception of these has a tendency to mould the minds of the young people in the home to ideals and opinions that are not Canadian.<sup>33</sup>

The Aird Commission's report led to Parliament's<sup>34</sup> enactment of the *Canadian Radio Broadcasting Act*<sup>35</sup> in 1932. This legislation created the Canadian Radio Broadcasting Commission (CRBC), the nation's first broadcast regulator, responsible for allocating frequencies, call signs and levels of Canadian programming.<sup>36</sup> The legislation required broadcasters to apply for and hold licences.<sup>37</sup> Within several years, however, complaints arose with respect to the lack of high-quality Canadian programming made available under the CRBC's supervision.<sup>38</sup> Therefore, in 1936, Parliament amended the broadcasting legislation to create the Canadian Broadcasting Corporation (CBC) in an attempt to fill this perceived

void.<sup>39</sup> Until 1958, the CBC was responsible not only for producing and broadcasting a national radio service, but also for regulating privately owned radio and television broadcasters.

Concerns about this combination of regulation and programming roles led to new broadcasting legislation in 1958. The *Broadcasting Act*<sup>40</sup> created the Board of Broadcast Governors (BBG) to regulate both privately owned broadcasters and the CBC. The legislation also emphasized the importance of Canadian programming content.<sup>41</sup> Yet, while Parliament enabled the BBG to make regulations to promote and ensure increased levels of Canadian talent,<sup>42</sup> the BBG lacked licensing authority. Instead, the BBG was to make recommendations to the Minister of Transport, whose department then granted broadcast licences. By the early 1960s, members of Parliament expressed concerns "that the Board had not properly exercised the immense powers which Parliament had delegated to it".<sup>43</sup>

## A. The CRTC: 1968 Purpose and Powers

Parliament replaced the BBG with the CRTC in the 1968 *Broadcasting Act*.<sup>44</sup> This was in response not only to concerns about the BBG's effectiveness in regulating Canada's public and private broadcasters,<sup>45</sup> but also to demands for rules that would promote Canadian culture. Section 3 of the 1968 *Broadcasting Act* set out Parliament's broadcasting policy for the nation, stipulating in section 3(b) that Canada's 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". Parliament required the new Commission to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy".<sup>46</sup>

To enable the CRTC to fulfil its regulatory and supervisory roles, Parliament granted the CRTC new powers and more independence than its predecessors.<sup>47</sup> The CRTC now possessed the authority to prescribe classes of broadcasting licences, to make regulations applicable to all broadcast licensees or to licensees of one or more classes, and to revoke all but CBC broadcast licences.<sup>48</sup> The 1968 *Broadcasting Act* also authorized the CRTC to issue and renew broadcasting licences for terms of up to five years and under such conditions as the CRTC considered necessary for the individual circumstances of its licensees.<sup>49</sup>

Parliament was informed by the Secretary of State responsible for the new *Broadcasting Act* during debates in the House of Commons that the Commission would "now have a great deal more flexibility in determining the nature and proportion of Canadian content required from each broadcaster".<sup>50</sup> The Secretary of State also stated, however, that these new powers could "... be effective only if the regulatory agency has the power to

impose significant penalties on those who fail to meet its requirements".<sup>51</sup>

Parliament granted the CRTC three types of penalties to use when broadcasters breached the *Broadcasting Act* or the CRTC's regulations. First, the CRTC was not required to renew licences, nor to grant licences for the maximum possible term. Licensees, therefore, risked the non-renewal or short-term renewal of their licences for failure to abide by the conditions of their licences, namely, the CRTC's regulations or the *Broadcasting Act*. Breaching a condition of licence also constituted a ground for the CRTC to revoke or suspend a broadcasting licence.<sup>52</sup> Second, Parliament authorized the CRTC to "suspend any broadcasting licence" (except for those held by the CBC).<sup>53</sup> The CRTC was also directed not to revoke or suspend licences unless a broadcaster so requested, or unless the CRTC believed the licensee had violated or failed to meet a condition of licence.<sup>54</sup> Third, broadcast licensees that violated a regulation under the *Broadcasting Act* were "guilty of an offence and . . . liable on summary conviction to a fine not exceeding twenty-five thousand dollars for a first offence and not exceeding fifty thousand dollars for each subsequent offence".<sup>55</sup> Those found to be broadcasting without a licence were committing an offence and were "liable on summary conviction to a fine not exceeding one thousand dollars for each day that the offence continues".<sup>56</sup> These new powers were considered so broad that by the mid-1970s the Commission was "derisively referred to as the 'Parliament of broadcasting'".<sup>57</sup>

Like its predecessors, the CRTC has been the subject of review and criticism. In 1980, a Law Reform Commission of Canada study concluded that the CRTC had failed to address important issues since 1976, and that it was unable "to commit the time and resources necessary" to do so.<sup>58</sup> In 1983, another study undertaken for the Law Reform Commission concluded that an examination of the CRTC's regulatory activity "has not discovered clearly articulated, coherent compliance programs"<sup>59</sup> and that "[t]he Commission has not demonstrated a willingness to employ the harsh sanctions against licensees for even the most flagrant violations of the FM radio policy [underlining in original]".<sup>60</sup> In 1986, a third discussion of the CRTC by the Law Reform Commission of Canada noted specifically that the Commission

... has not revoked or suspended FM radio licences for detected non-compliance with content requirements. Indeed, the CRTC has not denied licence renewals in notorious situations such as the large Montréal FM radio market, where licensees' non-compliance with content requirements has been perhaps the most serious. The CRTC tends to be satisfied with reasonable assurances from licensees that they will improve their performance. In rare situations where assurances have not been forthcoming, the CRTC has refused to renew a few FM radio licences. . . . When the CRTC has refused to renew licences, the same licensees, newly constituted, have always been given new licences for the same markets. Even the CRTC has explicitly recognized that such non-compliance threatens its integrity.<sup>61</sup>

In 1986, a federally appointed task force on broadcast policy concluded more broadly that the CRTC had

... [n]ot developed any clear strategy to ensure compliance with regulations and licensing conditions.<sup>62</sup>

After reviewing the task force's recommendations, Parliament decided to revise its 1968 broadcasting legislation.

## B. The CRTC: 1991 Purpose and Powers

The *Broadcasting Act, 1991* (the Act) reiterates many of the elements of Parliament's 1968 broadcasting policy for Canada.<sup>63</sup> Familiar components of the new legislation refer to Canadian content, Canadian control, and programming of high standard. The new Act also introduces constraints on the CRTC's activities. The CRTC must continue to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy" in section 3(1), but must now undertake this role

... in a flexible manner that

- (a) is readily adaptable to the different characteristics of English and French language broadcasting . . . ;
- (b) takes into account regional needs and concerns;
- (c) is readily adaptable to scientific and technological change;
- (d) facilitates the provision of broadcasting to Canadians;
- (e) facilitates the provision of Canadian programs to Canadians;
- (f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and
- (g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.<sup>64</sup>

The powers granted to the CRTC under the 1991 legislation resembled those it already possessed. The CRTC may still establish classes of licences and regulations,<sup>65</sup> issue licences for terms of, now, up to seven years, subject to any conditions the CRTC deems necessary,<sup>66</sup> and suspend or revoke any licence.<sup>67</sup> The contravention of a CRTC regulation still constitutes a summary conviction offence, although the fine has increased to up to \$25,000 for individuals, and up to \$250,000 for corporations.<sup>68</sup> (It is tempting to infer the importance Parliament attributed to broadcasters' failure to abide by the CRTC's regulations from the fact that these financial penalties are substantially higher than those set for summary conviction offences by the *Criminal Code*. Under the *Criminal Code*, the maximum fines range from \$2,000 for individuals, to \$25,000 for corporations.)<sup>69</sup>

Parliament also created two new sanctions for non-compliance. Under the new Act, broadcasters who breach a condition of their licence commit a summary conviction offence, although no fine is stipulated.<sup>70</sup> In addition, the CRTC now has the authority to

... by order, require any person to do, forthwith or within or at any time and in any manner specified by the Commis-

sion, any act or thing that the person is or may be required to do pursuant to ... any regulation, licence, decision or order made or issued by the Commission ... and may, by order, forbid the doing or continuing of any act or thing that is contrary to ... any such regulation, licence, decision or order.<sup>71</sup>

An order under section 12(2) “may be made an order of the Federal Court or of any superior court of a province and is enforceable in the same manner as an order of the court”.<sup>72</sup> Appeals from a CRTC order or decision lie with the Federal Court of Appeal on questions of law or jurisdiction, provided the court’s leave is obtained.<sup>73</sup>

## C. Application of the CRTC’s Powers

The CRTC has exercised its authority to implement the broadcasting policy set out in section 3(1) of the Act by developing policies, setting out regulations, licensing undertakings, sanctioning non-compliance and issuing mandatory orders. With responsibility for over 1,000 broadcasting licensees<sup>74</sup> whose licences expire every seven years or less, the Commission has also developed procedures to assess licensees’ compliance with the terms of their licences and the CRTC’s regulations. It explains some of these procedures in “circulars”, such as Circular No. 444, which sets out the CRTC’s *Practices Regarding Radio Non-Compliance*. The CRTC’s procedures for assessing licensee compliance typically rely on data that licensees must submit under the regulations. Failure to submit information requested by the CRTC in itself constitutes a regulatory infraction.

Licensees cannot be surprised about the existence of Canada’s broadcasting legislation or the CRTC’s regulations. Applicants for a new commercial radio station, for example, must “solemnly declare” in section 1.3(d) of the application form that they “have examined the provisions of the *Broadcasting Act* and the broadcasting regulations relevant to this application”.<sup>75</sup> The same procedure applies to applicants renewing an existing commercial radio broadcasting undertaking.<sup>76</sup>

### 1. Regulation

Licensees’ day-to-day operations are guided in part by the CRTC’s regulations. Separate regulations govern Canada’s radio, television, satellite-based programming services, and broadcast distribution services.<sup>77</sup> Regulations are legally binding rules of conduct imposed on regulatees, and are of general application.<sup>78</sup> Some regulations are common to all broadcasters: these include the requirement to submit annual financial information to the CRTC, and the requirement to not transfer control or ownership of a broadcasting undertaking without the CRTC’s prior approval. Other regulations apply only to stations that originate programming content: radio and television broadcasters are required to maintain “logs” describing the programming material they air, and

submit this information to the CRTC upon request.<sup>79</sup> The CRTC also requires radio and television broadcasters to submit financial information yearly, and to retain a recording of their broadcasts for at least four weeks.<sup>80</sup>

The CRTC’s radio, television and satellite-based programming service regulations share certain common elements regarding programming content. The regulations for these services prohibit certain activities such as the promotion of illegal acts, the dissemination of false or misleading news, or the broadcast of abusive comment or pictorial representations that may expose others to hatred or contempt on the basis of specified prohibited grounds. As noted earlier, the regulations also require these licensees to maintain recordings and written descriptions of their broadcast content.

Perhaps the best-known of the CRTC’s regulations relates to Canadian content. The CRTC has described stations’ broadcast of music with Canadian content as “one of radio’s vital contributions towards fulfilling the cultural goals set out in the Act”.<sup>81</sup> Minimum levels of Canadian content are specified by regulation: at least 35 percent of the musical selections aired during the week by commercial radio services must be Canadian,<sup>82</sup> while at least 60 per cent of the broadcast content aired during the year by television services must be Canadian.<sup>83</sup>

To assess compliance with the Canadian content regulations, CRTC staff write licensees periodically to request their recordings of on-air content (known as logger-tapes, although licensees now also submit this material on CD) for a specified week.<sup>84</sup> Licensees are required by regulation to submit these logger-tapes at the CRTC’s request. The CRTC staff analyze levels of Canadian content in broadcasters’ on-air programming, notify licensees of the results, and place copies of the correspondence in the Commission’s public examination files.

Since 1999, the CRTC has published annual reports describing aspects of the broadcasting system, which include a limited description of licensee compliance with certain regulations. Specifically, a table entitled “Promoting the airplay of Canadian and French vocal music” summarizes the percentage of a sample of stations that meet the CRTC’s regulations for Canadian content and French-language vocal music. The CRTC’s reports identify neither the stations chosen, nor the method by which they were chosen. Assuming, however, that the CRTC used the same method of choosing stations and that it selected from the same classes of stations, the results from the 2000 to 2005 reports shown below suggest that compliance with the regulations for Canadian content and French-language vocal music ranges from 67% (2002 report) to 100% (2004 report).<sup>85</sup>

Year (Year of data)	Sample size		Canadian content		65% FVM weekly		55% FVM weekly	
	Eng	Fre	6am-mdnt	6pm-6pm	6am-mdnt	6pm-6pm	6am-mdnt	6pm-6pm
2000 (1999)	33	20	100%	97%	85%	na	na	90%
2001 (2000)	35	8	100%	100%	75%	na	na	75%
2002 (2001)	37	6	95%	92%	67%	na	na	67%
2003 (2002)	51	21	92%	88%	90%	na	na	90%
2004 (2003)	30	16	90%	93%	88%	na	na	100%
2005 (2004)	25	6	92%	96%	100%	na	na	83%

"FVM": French-language vocal music; "na": data not shown in CRTC's reports

The CRTC's reports do not show its actions in response to the limited number of non-compliant stations.

## 2. Applications for, to renew, or to amend licences

The CRTC has indicated that its periodic assessments of licensees' adherence to regulations play a role in its decisions to renew licences or grant amendments to the terms and conditions under which licensees operate.

### a. Short-term renewals

The majority of conventional radio and television stations, and cable services in large urban centres existed before the CRTC was created. By comparison, pay and specialty television services, and non-cable distribution services, are relatively new. The majority of these services have only been licensed since the late 1980s. Under the 1968 broadcasting legislation, the maximum licence term possible was five years; Parliament extended the maximum term to seven years in 1991.

The CRTC has explicitly used its licence renewal power to penalize non-compliance. Licences need not be renewed for the full terms available under the legislation. Short-term licence renewal, according to Charles Dalfen, the CRTC's current Chairman, "is a stronger weapon than you might think because it puts licensees under the gun and puts them to the expense of coming back and justifying themselves, and the publicity attended on that is invariably unwelcome".<sup>86</sup>

The CRTC has explicitly linked licensee non-compliance to the denial of licensees' applications for full-term licence renewals. In 1984, for instance, the CRTC warned that it would not review requests for relief from the CRTC's Canadian content policies made by broadcasters in Windsor, Ontario, "unless, and until, broadcasting undertakings are operated in full compliance with their Promises of Performance, Commission policies and regulations".<sup>87</sup> A month later the CRTC denied an application to renew CJMF-FM Quebec City's licence because it had not complied with its Promise of Performance, noting that it considered

... that the increasing degree of non-compliance by the licensee during the last few years, particularly in the area of

music, undermines the integrity of the licensing process, the objectives of the FM policy and, generally, the very authority of the Commission. ...<sup>88</sup>

In the mid-1980s, when a small flurry of radio licensees breached the logger-tape regulation, the CRTC reminded licensees that repeated regulatory non-compliance might result in prosecution, short-term licence renewals, or revocation.<sup>89</sup> In 1993, after 15 licensees had breached the logger-tape regulation, the CRTC warned licensees that it would use its authority to suspend, revoke or fail to renew licences if licensees breached the CRTC's policies and/or regulations.<sup>90</sup>

By 2001, the CRTC formally linked non-compliance to a specific short-term penalty: radio stations found to be operating in breach of the CRTC's regulations for the first time would normally be granted four-year licence renewals, while re-offending licensees would generally be "called to appear at a public hearing to discuss the problem".<sup>91</sup>

### b. Licence amendments

Along with short-term licence renewals, since the mid-1990s the CRTC has adopted a policy of denying licensees' applications to amend their licences to penalize regulatory non-compliance. In the case of CIMG-FM Swift Current, for instance, the CRTC, in 1995, denied the licensee's application to amend the station's music format due to documented, repeated, and continued instances of breaches of the logger-tape regulation. The Commission announced that

... a station's compliance with established policy requirements and regulations is fundamental when assessing the merits of any amendment request. Accordingly, in view of the licensee's repeated instances of non-compliance, the licence amendments proposed for CIMG-FM are denied.<sup>92</sup>

Similarly, in 1996 the CRTC denied licence amendments requested by CKRL-FM Quebec City because the station had breached the logger-tape and French vocal music regulations, as well as a condition of licence. The Commission said that the licensee's

... circumstances do not warrant a departure from the Commission's long-standing practice of denying all licence amendment applications filed by licensees who are in a state of non-compliance.<sup>93</sup>

### c. Revocation and non-renewal

The CRTC has so rarely used its authority to revoke licences to punish non-compliant licensee behaviour that even the CRTC's current Chairman believes the power has never been used.<sup>94</sup> In fact, the CRTC has twice revoked a licence for the licensee's failure to meet the terms of that licence. Each case involved a cable company that, having been granted a licence with terms specifying when the licence would be implemented, failed to implement that service.<sup>95</sup>

The CRTC's authority to revoke or to not renew a broadcast licence was recognized by the Federal Court in 1971. In *National Indian Brotherhood v. Juneau et al.* (No. 3), [1971] F.C. 498 (FC TD) the Federal Court dismissed an application for writs of *certiorari* and *mandamus* regarding the CRTC's decision not to hold a public hearing about a complaint about a broadcaster's programming decision.

Rather than revoke licences, the CRTC has preferred not to grant certain licensees' applications for licence renewal. This has occurred on 15 occasions.<sup>96</sup> To date, the courts have held that the CRTC's decision not to renew a broadcast licence does not breach the licensee's freedom of expression;<sup>97</sup> however, if the CRTC required applicants to replace the offending licensee, it lacked authority to prevent the licensee from reapplying for the licence.<sup>98</sup>

### d. Conditions

The CRTC often tailors its legal requirements of a broadcaster through conditions imposed on a licence. The CRTC's authority to impose conditions of licence was recognized by the Supreme Court of Canada in 1982.<sup>99</sup> At one time, such conditions were literally attached to a broadcaster's actual licence certificate. In the early 1980s, for instance, glue attached the following typewritten statement related to transfers of ownership, to broadcast licences:

CONDITION The prior approval of the Commission is required with respect to any act, agreement or transaction which will directly or indirectly

- (a) result in a change of or materially affect the ownership or effective control of the broadcasting undertaking licensed hereby; or
- (b) transfer or enlarge a bloc of securities designated herein as subject to this requirement.<sup>100</sup>

The CRTC now explains and lists conditions of licence in its licensing decisions.

Although the CRTC has attached conditions of licence to virtually every type of broadcaster's licence,<sup>101</sup> it has done so in particular with respect to Canadian radio stations. Beginning in the 1970s, the CRTC began using conditions of licence to tailor the nature of the content aired by individual radio stations, and in particular that of FM radio stations. Until this time, many FM radio stations simply rebroadcast most of the content of commonly owned AM stations.<sup>102</sup> By ensuring that each

FM station offered distinctive programming, the CRTC addressed Parliament's policy goal of ensuring Canadians' access to diverse programming content.

Under its *FM Policy* the CRTC set conditions of licence for FM stations that reflected the specific programming commitments these broadcasters made in their applications for new stations or for licence renewals.<sup>103</sup> In the late 1970s and early 1980s, the condition required

... that the licensee make all reasonable efforts in good faith to substantially fulfil ... each section of the Promise of Performance attached hereto and made a part of this licence.<sup>104</sup>

Towards the mid-1980s, the CRTC also warned licensees about the consequences of non-compliance with a condition of licence:

[i]t is a condition of licence that an FM licensee make all reasonable efforts to fulfill substantially each section of its Promise of Performance. All instances of non-compliance with the Promise of Performance are viewed with concern by the Commission.<sup>105</sup>

The CRTC subsequently linked current non-compliance with conditions of licence with prospective denials of broadcasters' applications,<sup>106</sup> and sometimes denied broadcasters' applications to amend their licence conditions due to non-compliance. In 1987, for instance, the CRTC denied radio station VOXM's application to amend its licence because it had not fully met its condition of licence.<sup>107</sup>

## 3. Prosecution and Orders

The CRTC initiates prosecutions through the Department of Justice. During the twentieth century, over 30 prosecutions were launched under Canadian broadcasting legislation; these cases are summarized in Appendix 1. Of the 25 cases involving radio, television, or cable since the creation of the CRTC, 20 were successful, in that licensees were convicted by the courts for regulatory non-compliance. These prosecutions all occurred before 1989. The last prosecution appears to have occurred in 1988 when Fundy Broadcasting Co. Limited pled guilty to charges that it had breached the CRTC regulation prohibiting abusive comment.<sup>108</sup>

Since 1991, however, the CRTC has relied on its new "mandatory order" power to address licensees' non-compliance. In 1994, the CRTC warned non-compliant stations that

[u]nder the *Broadcasting Act*, an order may be issued and legal proceedings instituted in respect of any licensee that fails to comply with the regulations. Non-compliance can have more severe consequences, including suspension, non-renewal or revocation of a licence. The Commission intends to take such measures where licensees fail to comply with its regulations.<sup>109</sup>

...

If, at any time, the licensee should fail to comply with the requirements of the regulations or the conditions of its licence mentioned in the Mandatory Order appended to this decision, ... [The licensee] would then be required to appear before the Federal Court on a charge of contempt of

court. If the licensee were found guilty, it would be found in contempt of court and liable to a fine as provided for by the Federal Court Rules.<sup>110</sup>

Circular No. 444 stipulates that non-compliant stations operating under a short-term renewal or that are apparently non-compliant twice in the same licence term are generally expected to show cause as to why a mandatory order should not be issued. Although the CRTC appears to suggest that it prefers sanctions based on licensing decisions or mandatory orders, the Commission has not explained why it prefers these over the other, prosecution-based sanctions set out in the *Broadcasting Act, 1991*.

### III. Method of Analysis

Previous research about the CRTC's enforcement of Canada's broadcasting legislation and the Commission's regulations adopted a case-based approach to analyze the CRTC's treatment of a limited number of licensees. A disadvantage of this approach is that the cases selected for analysis may be unrepresentative, calling into question any conclusions based on the sample of cases. One solution is to increase the number of cases studied: the larger the sample, the more reliable the conclusions based on analysis of the sample.

Although, ideally, the CRTC itself would monitor and track information such as regulatory compliance, it has not published statistical summaries describing either licensees' breaches of the Act or its regulations, or the penalties it has imposed for such infractions. Since 2000, however, the Commission has published limited information about radio licensees' compliance with Canadian content and French vocal music regulations. In 2000, for instance, the CRTC indicated that 33 English-language radio stations had met Canadian content requirements over the 18-hour broadcast day, while all but one of these had met the requirement for the period from 6 a.m. to 6 p.m.<sup>111</sup> Seventeen of 20 French-language radio stations had met the full-day requirement for French-language vocal music, while 18 of the 20 had met the requirement in the 6 a.m. to 6 p.m. period.<sup>112</sup> It is unclear what conclusions these data support, as it is unclear whether this sample is representative of all radio stations. Moreover, neither the method for choosing the sample of stations, the call signs of the stations chosen, nor the sanctions imposed on their licensees for breaching the regulations, are shown.

In contrast, the data on which this paper is based describe 499 commercial, educational, and community radio stations' non-compliance with Canada's broadcasting legislation or the CRTC's regulations, between 1968 and 2005. These stations represent almost three-quarters (72%) of all of the CRTC's radio stations.<sup>113</sup>

Though broadly based, the data obtained for this paper have limitations. The sources and limitations of these data are discussed below.

### A. Sources of Data

Data were collected by reviewing four types of documents related to commercial, educational or community radio stations: CRTC decisions, CRTC public announcements, CRTC letters to licensees and/or complainants, and case law reports. Incidents of licensees' non-compliance were noted in decisions (452 or 39% of all materials), letters (647 or 56%), public notices (31 or 3%) and court cases (18 or 2%).

Each document identifying regulatory non-compliance was scanned, printed, and then coded to identify:

1. the station's on-air identifier, or call sign (e.g., "CHEZ-FM");
2. the station's geographic location (municipality and province);
3. date of the document correspondence, decision or public notice;
4. identification of document (letter or decision/public notice);
5. type of station (commercial, community, educational);
6. station band (AM or FM);
7. date of the station programming analyzed by the CRTC;
8. up to six non-compliance issues (identification of non-compliance);
9. up to eight regulatory sanctions (CRTC response to non-compliance);
10. in the case of CRTC decisions, term of licence granted (in months); and
11. financial penalties, in the case of prosecutions.

Codes to describe regulatory breaches and sanctions were divided into large categories (regulatory breach, breach of the Act or breach of condition of licence, licence revocation, renewal, short-term renewal, prosecution) that were developed in detail as the research continued. A complete list of the codes used to describe regulatory sanctions and breaches appears in Appendix 2.

#### 1. Choice of regulatee

The data describe the CRTC analysis of the programming of 499 commercial, community and educational radio stations that originate programming. These stations represented more than two-thirds (68%) of the 735 CRTC commercial, community and educational radio stations in 2005.<sup>114</sup>

#### 2. Publications and files

The CRTC has always published its decisions, announcements, and public notices,<sup>115</sup> but online versions of its decisions are only available for the period beginning in 1984. Decisions and announcements from 1968 to 1984 were searched manually at the CRTC's library, to locate documents referring to regulatees' non-compliance with CRTC regulatory requirements. The CRTC online search engine was used to locate decisions



and public notices from 1984 to 2005, which referred to terms such as “failure”, “non-compliance”, “compliance”, “shortfall”, and “breach”.<sup>116</sup> These decisions were coded to identify the nature of a licensee’s regulatory breach, and the type of sanction imposed by the CRTC. Short-term licence renewals were identified as a sanction unless the CRTC stipulated that the shorter-than-normal term was being issued for administrative reasons.

The files maintained by the CRTC for each licensee constitute a second, and sometimes more detailed, source of information about the CRTC’s regulatory interactions with its licensees. “Public examination” versions of these files may be reviewed at the CRTC’s offices,<sup>117</sup> and typically include licensees’ applications to the CRTC and correspondence between licensees and the Commission.<sup>118</sup>

On occasion, the CRTC’s correspondence with a station addressed a regulatory breach that the CRTC also subsequently identified in a licensing decision. To minimize double counting, documents that referred to the same regulatory problem were excluded: if the CRTC wrote to a station twice about a failure to meet Canadian content regulations on a specific date, for example, but subsequently addressed that specific failure in a decision, only the decision was retained in the data set. If, however, a CRTC letter referred to a failure to meet Canadian content regulations on a date, and the CRTC’s decision referred to a failure to meet that regulation on a different date, both the letter and the decision were retained.

An interesting difference that emerged between the CRTC’s decisions or announcements, and its public examination files related to level of detail. CRTC decisions that referred to a licensee’s non-compliance with a regulatory requirement did not consistently identify the specific type of non-compliance. The correspondence between the CRTC and a licensee was often more explicit, however, in identifying the size of breaches (with respect to levels of Canadian content, for instance).

## B. Limitations

The choice of data for this research paper imposes several limitations on its conclusions.

### 1. Radio only

Due to time constraints, data collection focussed on the CRTC’s regulatory enforcement of commercial, community and educational radio stations that originate programming. Radio stations comprise the majority of broadcasters after distribution undertakings (such as cable). Excluding the CBC, television, pay services and specialty services means, however, that no conclusions may be drawn about the CRTC’s approach to regulatory enforcement for these types of services. Drawing such conclusions would require an assumption that the regulatory behaviour of the CBC, or religious radio broadcasters, or of television-based services, for example, was

neither more nor less compliant than that of the stations in the data set. In the absence of empirical evidence one way or the other, conclusions drawn must be limited to commercial, community and campus radio stations.

### 2. Some historical records unavailable

While the CRTC’s decisions and announcements are available from 1968 to the present, the examination file materials were generally available from 1984 forward. This is because the Commission does not retain its broadcast licensee files indefinitely. It keeps files related to the current and immediately preceding licence term at its offices (i.e., for up to 14 years), and sends older files to the federal government’s central storage facilities in Ottawa-Hull or to National Archives. After 21 years, only that material from these files which the CRTC deems of “historical value” is retained; the rest is destroyed.<sup>119</sup> Currently, very few of the original files about Canada’s radio broadcasters are available through the CRTC, and any file materials related to broadcast licensees that existed before 1984 may only be available from the licensees themselves, if they kept their own copies.<sup>120</sup> Due to lack of time, individual broadcast licensees were not consulted to ask whether they retained these files. As a result, the research data likely *underestimate* non-compliance from 1968 to 1984.

### 3. Incomplete records

A third limitation arises from the way in which materials related to radio licensee non-compliance were obtained. At the outset of the research it appeared that several hundred radio licensee files would have to be reviewed, some of which were voluminous.<sup>121</sup> The CRTC stores many of its older files in the basement of its facilities. As a result, its staff would have had to physically move these files to the second-storey public examination office, which has limited space. The CRTC was therefore asked for copies of all CRTC and licensee correspondence related to radio programming analyses, from its analysts’ files.

The material provided by the CRTC related to 614 stations, representing four out of five (83%) of the commercial, campus, and community stations operating in 2005. Just over one-fifth of these stations (141 or 23%) complied with the broadcasting legislation and regulations: these broadcasters responded to the CRTC’s notification of their non-compliance to explain that the apparent non-compliance was based on inaccurate CRTC information,<sup>122</sup> and the CRTC accepted the broadcaster’s explanation. In the remaining cases, the broadcaster failed to respond or the CRTC reiterated that a breach had occurred. Absent a letter from the broadcaster or a letter from the CRTC acknowledging an error in its analysis, it was assumed that non-compliance had occurred. The data in this paper may, therefore, *overestimate* non-compliance, to the extent that the CRTC in fact agreed that the broadcaster had complied

with the regulations, but the materials reviewed for this study excluded such correspondence.

#### 4. Data problems

Finally, a problem arose due to decision-writing style and substance. Using key-words searches online to locate decisions issued by the CRTC since 1984 means that decisions that criticized licensees' non-compliance without using terms such as "failed", "failure", "non-compliance", "compliance", "complied", or "logger-tapes", for instance, were excluded from the analysis. Non-compliance is, therefore, underestimated in the period from 1984 to the present to the degree to which the CRTC has used other terms to refer to stations' failure to comply with the Act or its regulations.

Some decisions lacked clarity. Consider the case of CIHO-FM Saint-Hilarion: in Decision CRTC 92-627, the CRTC reminded the licensee that

... while CIHO-FM is licensed as an independent FM broadcasting undertaking, it is essentially a community-owned and community-oriented station.<sup>123</sup>

The CRTC's comments suggest that even if it grants licensees a specific type of licence, it regulates them depending on its own perception of the station's operations. Given this paper's focus on whether differences exist in the regulation of different classes of broadcasters by the CRTC, the CRTC's description of the station's essential character was accepted, and in this case, CIHO-FM was coded as a community radio station.

It was also sometimes unclear what regulation a station had breached. A CRTC letter dated 8 May, 1988 addressed to CHAI-FM Châteauguay included a five-page analysis demonstrating that the station's vocal-instrumental ratio did not conform with its Promise of Performance; that it had mis-identified six Canadian musical selections; and that it had aired an excessive number of advertisements. However, the CRTC letter did not mention a specific regulatory breach. Similarly, when the CRTC approved the CBC's acquisition of CKLW-TV Windsor from St. Clair River Broadcasting Limited, the CRTC expressed considerable concern with respect to St. Clair River Broadcasting Limited's solicitation of advertising accounts from Detroit, Michigan. It reminded "the licensee that its obligation is to serve the people of Canada in the Windsor area and that it should eliminate any practices that might interfere in any way with this obligation".<sup>124</sup> Yet it is unclear from this decision whether the CRTC had actually identified a specific instance of regulatory non-compliance.

Lacking certainty, cases such as those described above were excluded from the data; to the degree that these decisions in fact related to non-compliant behaviour, non-compliance is again underestimated.

The CRTC may not have consistently disclosed when a station changed its on-air identification, or call-

sign, in its decisions, announcements and correspondence. Consider hypothetical station CABC. If the CABC callsign changed to CZYX and each station breached the CRTC's regulations twice, failure by the CRTC to note that CABC was CZYX would result in data indicating two stations that each breached the regulations twice, rather than one station that breached the regulations four times. As the CRTC does not publish lists of stations' call signs, resources such as the Canadian Communications Foundation's online search engine, "Broadcasting History", were consulted frequently.<sup>125</sup> To the extent that stations with both the current and former callsigns appear simultaneously in the data, however, instances of repeated non-compliance are *underestimated*, while the number of non-compliant stations might be *overestimated*.

## IV. Results

This section begins by describing levels of non-compliance by radio stations, and types of sanctions used by the CRTC. It then briefly discusses the manner in which the CRTC enforces the broadcast legislation and its regulations.

### A. Non-compliance

The CRTC's annual monitoring reports of recent years reported that an average of 95 per cent of a small sample of radio stations had complied with the CRTC's Canadian content regulations. Although not explicitly stated by the Commission, one might infer that most radio stations comply with the regulations, and that non-compliance hovers around five per cent.

#### 1. Non-compliance in general

Analysis of the data collected for this research found that between 1968 and 2005, the CRTC identified 499 commercial, community, or campus stations as having failed to comply with the broadcasting legislation or its regulations on at least one occasion (see Table 1). This means that over the three and a half decades studied, two-thirds (68%) of Canada's licensed commercial, community, or student stations breached Parliament's broadcasting legislation or the CRTC regulations at least once.

The majority (451 or 91%) of non-compliant radio stations were commercial undertakings; the remainder were community (40 or 8%) and campus (8 or 1%) stations. Three-quarters (75%) of Canada's commercial radio stations breached the regulations or the broadcasting legislation one or more times; fewer than half (44%) of community radio stations breached the regulations or legislation, while almost one-fifth (19%) of student radio stations were non-compliant.

**Table 1: Non-compliant stations, 1968–2004**

Type of station	Where non-compliance identified			Non-compliant stations		Total stations licensed, by class of licence		Non-compliant stations as % of similar stations licensed
	PN	Decisions	Letter	Total stations	% of stations	Total stations	% of stations	
Commercial	31	249	382	451	91%	602	81%	75%
Community		34	77	40	8%	90	12%	44%
Student		7	3	8	1%	43	7%	19%
Total	31	288	462	499	100%	735	100%	68%

\* Note: totals do not add horizontally, as some stations were the subject of more than one of document (*i.e.*, both received a letter and was subject of a decision). “Total” represents the number of stations in the dataset, regardless of how many PNs, decisions or letters are associated with any given station.

## 2. Repeated non-compliance

More than half (285 or 57%) of the radio stations committed non-compliant behaviours on two or more separate occasions. Over one-quarter (156 or 31%) of the

radio stations committed non-compliant behaviours on three or more separate occasions. One station — CHOI-FM — breached the CRTC regulations or Canada’s broadcasting legislation on 15 separate occasions.

**Figure 2: Occasions of non-compliance**

Occurrences of regulatory or legislative breaches	All stations	% of breaching stations
One	214	43%
Two	129	26%
Three	72	14%
Four	36	7%
Five	18	4%
Six	15	3%
Seven	4	1%
Eight	6	1%
Nine	3	1%
Ten	1	0.2%
Eleven	0	0%
Twelve	0	0%
Thirteen	0	0%
Fourteen	0	0%
Fifteen	1	0.2%
<b>Total stations with 1 or more breaches</b>	<b>499</b>	<b>100%</b>
With 2 or more breaches, as % of 499	285	57%
With 3 or more breaches, as % of 499	156	31%

### 3. Type of non-compliance

The CRTC's documents identified more breaches of its regulations than of Canada's broadcasting legislation. A failure to meet requirements of the broadcasting legislation with respect to high-standard programming, imbalance or a licensee's lack of control occurred on 15 occasions, while the CRTC regulations were breached on 305 occasions. The documents also identified 64 breaches of a licensee's conditions of licence, and 126 breaches of licensees' Promises of Performance attached as conditions of licence.

Approximately 100 separate regulatory issues were identified in the CRTC documents, but several occurred repeatedly. The most frequent issue involved radio broadcasters' failure to submit logger-tapes when required to do so: of the 1,148 CRTC documents studied, more than one-third (447 or 37%) noted a missing, incomplete, incorrect, or inaudible logger-tape.<sup>126</sup> More than one-third (202 or 41%) of the CRTC decisions referred to a logger-tape problem.

The next major regulatory issue identified by the CRTC involved Canadian content: just over one-fifth (275 or 22.7%) of the CRTC documents referred to licensees' failure to meet levels required by regulation or condition of licence. Radio licensees' failure to schedule Canadian content in a reasonable manner was noted on 121 occasions. A failure to meet French-language vocal music regulations was raised as an issue in 47 decisions.

An interesting aspect of the Canadian content decisions was that the size of the breach was often relatively small. In March 1996, for instance, CHUM Toronto breached the required minimum percentage of Canadian musical selections when four of the 458 songs it played over the course of a week were determined to be non-Canadian — leaving the station with 29.7% Canadian content, rather than the required 30%.<sup>127</sup> Such slim margins support the idea that some licensees treat regulatory limits such as Canadian content as ceilings past which they need not aim.

Comparatively few decisions notified licensees of a breach of the high standard requirement of the broadcasting legislation, or the CRTC's own regulations prohibiting abusive or profane conduct. Between 1986 and 2004 (see Table 2) 17 decisions referenced this type of non-compliance.

**Table 2: Breaches of high standard**

Year	Abusive content	Breach of high standard
1976	1	
1986	1	
1988	1	
1989	2	
1990		1
1991	1	
1994	3	1
1995	1	
1996	1	
1998		1
1999	1	
2002	1	
2004	1	
<b>Total</b>	<b>14</b>	<b>3</b>

### 4. Unreported non-compliance

An unusual aspect of the CRTC's decisions is that the agency does not consistently refer to non-compliant acts already identified in CRTC correspondence with those stations. The CRTC identified non-compliant behaviour in letters to 416 radio stations, but identified non-compliant behaviour in 288 decisions related to the stations.

Several explanations come to mind to account for this inconsistency. First, the CRTC decisions may not refer to non-compliant acts raised in its correspondence with stations if the materials provided by the CRTC for this research were actually incomplete: that is, subsequent correspondence noting that a station was compliant, instead of non-compliant, was not provided. Second, non-compliant behaviours noted in letters from

the late 1990s and early 2000s may not be identified in CRTC licensing decisions as the licences for these stations have not yet expired. A third explanation is that the CRTC may tailor its enforcement of its regulations and the legislation to the circumstances of each station or to the nature of the infraction involved.

Consider CHYC Sudbury: in letters dated January 28, 1994 and 12 February, 1998, respectively, the CRTC wrote the station that the logger-tapes it had submitted were incomplete or inaudible to some degree, contrary to CRTC regulations. Neither of the decisions that followed these letters raised the logger-tape regulation breach. Coincidentally, each decision involved a change in the station's ownership: in 1995 the CRTC granted an application by Pelmorex Radio Inc. to acquire the assets of the station from its parent company, Pelmorex Inc. In 1999, the CRTC granted the application by Haliburton Broadcasting Group Inc. to acquire the assets of CHYC from Pelmorex Radio Inc.<sup>128</sup> Neither ownership decision mentioned the regulatory breach.

In other cases, however, the CRTC did focus on stations' non-compliance, although neither the broadcasting legislation nor the CRTC's regulations were breached. In the case of CKST Vancouver, for instance, the station's failure to report whether it had spent \$27,000 in each of 1997 and 1998 on Canadian talent development as suggested by the CAB's *Distribution Guidelines for Canadian Talent Development* led the CRTC to state, in the station's licence renewal decision, that it "expected" "the licensee to make up the \$34,500 shortfall in its required expenditures on Canadian talent development during the first two years of the new licence term".<sup>129</sup> The licensee did not meet the CRTC's expectation, and in 2000, the CRTC approved an application to transfer control of the station to Grand Slam Radio Inc. Its decision noted that the station's monetary "obligation remains unfulfilled. Accordingly the Commission notes the purchaser's commitment to make a contribution of \$34,500 to FACTOR on the closing date of this transaction".<sup>130</sup> In this case, the CRTC continued to enforce its expectation, despite a change in ownership.

The CRTC may view enforcement of monetary allocations to Canada's performing arts sector as being more important than the enforcement of its regulations.

**Table 3: Prosecutions in relation to broadcasting**

Year	Station	Charge	Outcome	Fine
1973	CFRB Toronto	Breaching s. 28(1) Act by airing partisan political comment one day before 1971 Ontario provincial election	Conviction	\$5000 (maximum)
1972	CHML Hamilton	Breaching s. 28(1) of broadcasting legislation by airing partisan announcement re referendum next day in Hamilton	Convicted on appeal	Unknown
1974	CJTR Trois-Rivières	Excessive advertising contrary to s. 7(1) of <i>Radio (A.M.) Broadcasting Regulations</i>	Pled guilty	\$745
1974	CJMT Chicoutimi	Excessive advertising contrary to s. 7(1) of <i>Radio (A.M.) Broadcasting Regulations</i>	Pled guilty	\$1,200

## B. Sanctions

Parliament has established a series of formal sanctions in Canada's broadcasting legislation in the event that broadcast licensees fail to adhere to the CRTC's regulations or conditions of licence. The CRTC has also come to rely on sanctions of its own devise.

### 1. CRTC's use of formal sanctions

Formal sanctions set out in Canada's broadcasting legislation include licensing penalties (revocation, non-renewal, imposition of conditions of licence), mandatory orders, and prosecution. Since 1968, the CRTC has relied on a sanction listed in Canada's broadcasting legislation to address twelve per cent (60) of 499 cases of regulatory non-compliance. These results suggest that the CRTC has rarely relied on the powers specifically designed by Parliament to sanction regulatory non-compliance.

A review of the CRTC's licensing decisions from 1968 to 2005 indicates that the agency has never revoked a radio station's licence without the licensee's consent. The CRTC has, however, denied applications to renew 15 radio stations' licences, most often in the 1980s.<sup>131</sup> In some cases, the same licensees successfully re-applied to use the now-available frequencies. For example, the CRTC denied the renewal application by CJMF-FM Ltée for CJMF-FM in 1984,<sup>132</sup> but granted a new licence to that same licensee the same year.<sup>133</sup>

[d]escribing CJMF-FM's (the applicant) new proposed ownership structure at the hearing, the applicant said that it had taken [translation] "very serious steps to eliminate any possibility of repeating past errors with respect to fulfilling our commitments to the Commission".

Nevertheless, non-compliance issues subsequently arose for the same licensee in 1986 and 1987.<sup>134</sup>

Radio stations have also been charged and convicted of offences under Canada's broadcasting legislation. Between 1968 and 1990, 19 successful prosecutions of radio licensees occurred (see Table 3; additional details in Appendix 1). The last prosecution of a radio licensee apparently occurred in 1988 — although, as many of these decisions are unreported, appearing only in CRTC annual reports or other documents, this number may be higher.

1974	CHAM	Improper logging of names of advertising sponsors (other charges withdrawn)	Pled guilty	\$500
1975	CHLT Sherbrooke	Broadcast of abusive comments and profanity, improper logging of commercials contrary to ss. 5(1)(b), (c) and 4(1)(e) of <i>Radio (A.M.) Broadcasting Regulations</i>	Convicted	\$300
1976	CFCF Montreal	Failure to provide logger-tapes; 3 other counts on same charge withdrawn <sup>135</sup>	Pled guilty	\$500
1976	CJSA Ste-Agathe	Failure to provide logger-tapes (2 counts) <sup>136</sup>	Pled guilty to first count, 2 <sup>nd</sup> dropped at request of both parties	\$300
1976	CKY Winnipeg	Failure to provide logger-tapes on 2 occasions <sup>137</sup>	Pled guilty to both charges	\$1,500
1976	CKEY	Failure to provide logger-tapes <sup>138</sup>	Pled guilty	\$25
1976	CFRB Toronto	Broadcast of partisan political content day before provincial election contrary to s. 28(1) of broadcasting legislation	Conviction (appeal dismissed)	\$5,000
1976	CKVL	Failure to provide logger-tapes <sup>139</sup>	Pled guilty	\$1000
1976	CJRN Niagara Falls	Failure to provide logger-tapes	Pled guilty	\$1500 (\$500 1 <sup>st</sup> offence, \$1000 2 <sup>nd</sup> offence)
1977	CKNW New Westminster	Broadcast of partisan political content day before provincial by-election contrary to s. 28(1) of broadcasting legislation <sup>140</sup>	Conviction	\$750
1977	CHTK Prince Rupert	Failure to provide logger-tapes <sup>141</sup>	Pled guilty	\$100
1977	CKRM	Broadcast of offensive comment contrary to s. 5(1)(b) of <i>Radio (A.M.) Broadcasting Regulations</i>	Convicted on appeal	Unknown
1979	CKOY Ottawa	Broadcast of telephone interview without interviewee's consent, contrary to s. 5(1)(k) of the <i>Radio (A.M.) Broadcasting Regulations</i>	Convicted on appeal	Unknown
1979	CKIQ Kelowna	In 1974 rebroadcast programming without CRTC's written consent contrary to s. 14 of <i>Radio (A.M.) Broadcasting Regulations</i>	Convicted on appeal	Convicted of breaching Regulations (rebroadcasts)
1988	CFBC Saint John	Abusive comment contrary to s. 3(b) of <i>Radio Regulations, 1986</i>	Pled guilty	Unknown
<b>Total</b>	19 stations	Logger-tapes (7) Partisan political comment before election (4) Abusive comment (3) Excessive ads (2) Improper logging (1) Telephone interview aired without consent (1) Rebroadcast programs without CRTC's consent (1)		Total fines: \$13,420 Average fine: \$1,032

The overall average fine imposed as a result of the prosecution was \$1,032, well below the maximum fine possible under the broadcasting legislation of the period (\$25,000). The fines ranged in amount from \$25 in 1976, to \$5,000 in 1973 and 1976.

Since 1991 the CRTC has imposed 10 mandatory orders on commercial, educational or community radio stations.

## 2. CRTC's use of "informal" sanctions

Rather than relying on the sanctions established by legislation, the CRTC tends to impose sanctions that stem from its licensing authority. Licensees have been called to public hearings (50 instances or 11% of all cases), denied applications to amend their licences (32 cases or 7%), and/or received short-term renewals (311 cases, or 69%).<sup>142</sup>

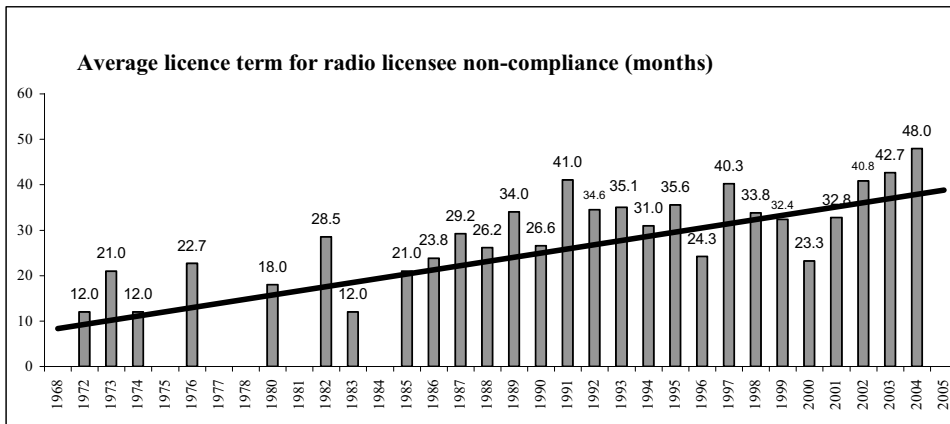
### a. Short-term licence renewals

In the early 1980s it was suggested that the CRTC relies on short-term licence renewals as regulatory sanctions, because frequent applications for renewal "multiply the regulatory burdens on the licensee... the short term renewal of licence is a significant event in a licensee's regulatory history".<sup>143</sup> It is unclear, however, whether the CRTC's practice of issuing short-term licence renewals actually deters subsequent non-compliance. Stations that received a short-term renewal often committed one or more subsequent breaches.<sup>144</sup> Although CHOI-FM exemplifies this problem (with short-term renewals in 1986, 1988, 1995, and 2002 before its licence was not renewed in 2004), other examples include CING-FM (with short-term renewals in 1985, 1995, and 1996), CHRC (short-term renewals in 1988, 1990, and 1991), CIGB-FM (with short-term

renewals in 1985, 1987, and 1988). It is, therefore, somewhat unclear whether short-term renewals have the desired deterrent effect.

Over time, moreover, the regulatory burden that short-term renewals supposedly impose on licensees has decreased. In 1968, the average length of a short-term renewal was one year, or one-fifth of a full licence term.

**Figure 2: Average licence term for radio licensee non-compliance (months)**



### b. Reminders

Perhaps in response to the diminishing *avoir du poids* of its sanctions, the CRTC has developed a compulsive tendency to remind its licensees that they are regulated. In 321 cases in which the legislation, the regulations, or a condition of licence was breached, the CRTC reminded the licensee of the relevant legislative section, regulation, or condition.<sup>145</sup> One example is that of CHER Sydney, a broadcaster that was first licensed and went on air in 1965.<sup>146</sup> Following a 27-year period during which it presumably applied for, and received, licence renewals under Canada's broadcasting legislation and regulations, the CRTC in 1992 said it viewed

... with serious concern the licensee's repeated failure to meet a fundamental provision of the regulations. ... The Commission hereby puts the licensee on notice that it is required to *comply at all times* with the regulatory provisions concerning logger-tapes.<sup>147</sup>

A question such statements raise is whether the CRTC seriously thinks that some of its licensees in fact believe that — from time to time — they do not need to adhere to the CRTC's regulatory provisions.

### c. "Alleged" non-compliance

Another question raised by the results of this research is whether the majority of Canada's commercial, educational and community radio licensees have committed legislative and regulatory breaches due to the CRTC's willingness to label such breaches as "apparent", rather than real. The Commission sometimes denies that breaches have occurred, insisting that such breaches are merely "alleged". CKTB St. Catharines offers an example.

In 2004, however, the average short-term renewal was four years — more than half the current seven-year, full-term renewal and close to the maximum five-year renewal term granted from 1968 to 1991. If short-term renewals impose a regulatory burden on licensees, the burden has grown lighter over the last several decades.

When the CRTC considered its licence renewal in 1996, the licensee admitted that it had not met the regulation for Canadian content. In its decision the CRTC nevertheless stated it would "revisit the licensee's *apparent* non-compliance with respect to Canadian content at the time of the next licence renewal".<sup>148</sup> Similarly, when licensees of CHER Sydney,<sup>149</sup> CKCL Truro,<sup>150</sup> CKCI Parksville,<sup>151</sup> CHYM Kitchener<sup>152</sup> and CKOY Timmins<sup>153</sup> admitted their non-compliance to the CRTC, the regulator re-categorized the infractions as "alleged". An interesting point this raises in passing is whether a station would be able to defend against a charge of breaching a CRTC regulation by noting the CRTC's decision to describe the breach as "alleged".

### d. Strong language

The CRTC has also relied on strong-sounding, but legally meaningless, terminology to sanction non-compliance. As early as 1973, one CRTC Vice-Chairman noted that the CRTC

... without imposing a licence condition or issuing a regulation will point to a concern it has relating to a licensee's particular circumstances. This form of gentle persuasion is contained in the Commission's decision and almost invariably produces the desired result since every licence must some day be renewed. ...<sup>154</sup>

These "concerns" are typically expressed as "expectations", which the CRTC has introduced instead of conditions of licence. In 2001, for example, the CRTC removed one station's condition of licence concerning ethnic programming, but "expected" it "to continue to offer approximately 18 hours of third-language program-

ming in each broadcast week over the new licence term".<sup>155</sup>

Although one virtue of the CRTC's expression of its expectations of licensees is that the agency makes public its objectives through the "expectations", this virtue is weakened in that the "expectations" have little or no legal force. Being neither regulations nor conditions, the breach of an expectation is not subject to the sanctions established by Parliament. It is, therefore, uncertain whether the CRTC would be able to enforce requirements stemming from expectations. In 1999, for instance, CKST Vancouver failed to report whether it had spent \$27,000 in each of 1997 and 1998 on Canadian talent development. The CRTC's renewal decision noted the Commission's expectation — not a condition of licence — that CKST would make up the shortfall. In fact, however, the station did not meet this expectation, and enforcement proved time consuming.<sup>156</sup>

**Table 4: Harsh words and the CRTC**

CRTC terminology	Total cases	Regulations					Act (high standard, elections)
		Breach of regulation	Logger-tape	Abusive comment	Canadian content	FVM	
"Concern"	45	41	24		19	1	
"Serious concern"	7	7	6	0	1	2	
"Very serious concern"	3	3	3	0	0	1	
"Grave concern"	31	19	14	1	7	8	4
"Great concern"	32	30	18	17	8	7	24

Note: Figures do not add horizontally because a single case may refer to more than regulatory breach.

## C. Flexibility

### 1. Inconsistency

From 1968 to 2005, the CRTC applied both its formal and informal sanctions "flexibly", imposing penalties inconsistently for same breaches. For instance, it imposed short-term licences in three-quarters (145) of the 203 cases where stations failed to submit complete and intelligible logger-tapes, but in the remaining cases (58 instances) granted full licence renewals for the same infraction. Licensees were also treated unequally with respect to the scheduling of Canadian content. In 1991, for example, the CRTC informed some radio licensees that it was monitoring the time of day at which Canadian musical selections were being played, "for information purposes only", and that the results would not be used to assess licensee regulatory compliance.<sup>157</sup> Yet, the previous year, the CRTC had denied a full licence term to CKRM Regina in part because it viewed

... with concern the licensee's apparent reluctance to respect the spirit of the Canadian content regulation during the peak listening morning drive period. It rejects the licensee's rationale for its persistently low levels of Canadian musical content during the hours of 6:00 a.m. and 9:00 a.m. and considers as inadequate the station's responses at the hearing as to why it continued to ignore the Commission's expressed concern in this area. Clearly, the corrective mea-

### e. Harsh words

The CRTC frequently scolds licensees about their failure to adhere to its regulations, their conditions of licence, or the broadcasting legislation, using language that runs the gamut from mere "concern" (49 cases), to "great" or "grave concern" (63 cases). The intensity of the language has increased over time. Between 1987 and 1993, the CRTC expressed "concern" about licensees' regulatory breaches in 40 documents. Between 1993 and 2004, however, it noted its "serious concern" or "great concern" in another 38 cases. It expressed "great concern" with non-compliant behaviour fairly consistently from 1986 to 1997, in 31 cases. The CRTC tended to demonstrate a wide range of concern (from mere "concern", to "great concern") in the case of regulatory breaches, but only expressed grave or great concern when the broadcasting legislation itself was breached (see Table 4).

asures should have been in place earlier, long before the hearing in May.<sup>158</sup>

The CRTC's policy of granting applications to amend licences only if stations complied with the CRTC's regulations and the broadcasting legislation was also applied inconsistently. The CRTC first noted this "long-standing practice" in 1996, although the data gathered for this research show that it had only linked compliance directly and explicitly with application approval the previous year, in 1995. Of 91 applications for amendments discussed in CRTC decisions that also identified non-compliance, only one-third (34%) of radio station applications were denied — one-fifth (23%) were approved in part,<sup>159</sup> and almost half (43%) were approved in their entirety.

### 2. Blind eye

In addition to applying sanctions inconsistently, at other times the Commission simply ignored infractions. In 1990, for example, CKSB Saint-Hyacinthe was unable to provide its logger-tapes for 21 June, 1989, but did so for 23 August, 1989. Although the station had breached CRTC regulations in June, the CRTC renewed the station's licence for a full term, merely reminding the station that it "must take the necessary measures to ensure that it is in compliance at all times with the regula-



tions".<sup>160</sup> Similarly, in 1986, when radio station CKAP confessed to having aired abusive content and to its failure to submit audible logger-tapes on three separate occasions, the CRTC found the station's programming satisfactory in all other ways, renewed its licence and did not issue a short-term renewal.<sup>161</sup>

## V. Conclusions and Recommendations

### A. Conclusions

#### 1. High levels of non-compliance

The level of non-compliance exhibited by licensed commercial, community, and student stations is substantially higher than the level that might be inferred based on the statistics published in the CRTC's annual monitoring reports. The monitoring reports suggest that roughly five per cent of a sample of stations failed to adhere to the CRTC's regulations concerning Canadian content. Data collected for this paper demonstrated that from 1968 to 2005, however, 499 of the CRTC's licensed commercial, community, and student stations breached Canada's broadcasting legislation, the CRTC's regulations, or their conditions of licence on at least one occasion. Just over half of these non-compliant stations breached the regulations twice or more. The non-compliant stations represented 68 per cent of the 735 commercial, community and student stations licensed in 2005, and stations repeating the non-compliant behaviour more than once represented 39 per cent of the licensed stations.

#### 2. Limited general and specific deterrent effects

The level of non-compliance among Canada's commercial, community, and student stations suggests that the CRTC enforcement approach has had limited general deterrent effects. Sanctions imposed by the CRTC do not appear to deter stations from breaching regulatory requirements. The fact that over half of non-compliant licensees breached these requirements on more than one occasion also suggests that the CRTC's regulatory approach has limited specific deterrent effects: the sanctions imposed on these stations by the CRTC do not tend to deter them from subsequent non-compliance.

That over half of non-compliant stations committed non-compliant acts after being sanctioned by the CRTC suggests that even if the CRTC's informal sanctions impose administrative costs on licensees, the "price may be small . . . in light of the profits which can be made by licensees while not complying".<sup>162</sup> Licensees may retain these profits, while passing the actual costs of non-compliance — cultural or other — to third parties. This limits the CRTC's success in deterring non-compliance.

### 3. Preference for informal over formal sanctions

Despite a high success rate in the limited number of cases that were pursued in the 1970s and 1980s, the CRTC rarely uses the sanctions specifically established by Parliament in its broadcasting legislation, and in particular prosecutions. One explanation for the CRTC's apparent preference for informal sanctions such as short-term licence renewals and harsh language, is that the fines imposed by the courts in these cases were very low.

The CRTC instead relies primarily on informal sanctions, such as short-term renewals or strong-sounding "expectations". Repeated instances of short-term renewals suggest that stations feel free to breach the legislation or regulations, rather than compelled to meet their terms. Relying on expectations rather than conditions or regulations limits the CRTC's ability to enforce whatever goals it has set for a licensee, a fact that is unlikely to escape most licensees' attention.

Inconsistency in enforcement is also a problem. The CRTC's inconsistent approach to the same or similar regulatory concerns in broadcasting may demonstrate administrative flexibility, but also limits licensees' ability to understand the CRTC's approach to regulation and suggests that the CRTC does not apply equal standards to broadcasters. Even if the CRTC possesses draconian powers, its inconsistent use of its authority has left some licensees relatively free to ignore regulatory requirements, often more than once.<sup>163</sup>

This study reconfirms earlier research that the CRTC does not regulate and supervise Canada's commercial, community, and student stations consistently.<sup>164</sup> Law Reform Commission studies, the 1986 Task Force, and the Auditor General studied, considered and publicly criticized the CRTC's inconsistent approach to regulation, but little appears to have changed.<sup>165</sup> What might explain this?

The CRTC's inconsistent application of Canada's broadcasting legislation may have continued because — its open public process notwithstanding — the CRTC's regulation of its licensees is not transparent. The CRTC does not publish statistics about its enforcement of the broadcasting legislation and regulations. And although a lone graduate law student may have the leisure to review several thousand pages of CRTC correspondence, decisions and notices<sup>166</sup> in order to track the CRTC's regulatory enforcement patterns, it is unlikely that many members of the general public would also be able to do so. In fact, the single body with the resources and expertise to monitor enforcement of Canada's broadcasting legislation is the CRTC itself. The fact that the CRTC either chooses not to monitor enforcement, or not to publish the results of its own research, surely cannot be explained by lack of resources alone.<sup>167</sup>

By the end of 2006 the CRTC will have reviewed its policy for commercial radio, reviewed aspects of its 1999 policy for conventional, over-the-air television, and will have provided the federal government with a report about the future environment of the broadcasting system. What the CRTC has not announced — and has never provided to the public — is a review of the efficacy and efficiency of its approach to regulatory non-compliance. As laudable as the Commission's policies are, how meaningful are they if licensees fail, and fail repeatedly, to adhere to their requirements?

What is to be done?

## B. Recommendations

### 1. The CRTC

In the past, complaints about Canada's broadcast regulator eventually led to its replacement. Elimination or replacement of the CRTC at this time will not ensure the enforcement of the *Broadcasting Act, 1991*, and would likely continue to delay the achievement of its objectives. This is because of the time that would be needed for the public and Parliament to analyze, debate, and make decisions about a new regulator, and for a new regulator to be established and to begin its work.<sup>168</sup> Meanwhile, licensees may continue to breach the legislature's broadcasting policy, and the regulator's regulations.

The level of non-compliance overall and the incidence of repeated non-compliance suggest that the objectives of Canada's broadcasting policy are at best being met sporadically, every few years or so, just before a station's licence comes up for renewal and the CRTC's monitoring is likely to occur. The CRTC's publication of annual statistics about regulatory non-compliance of a group of unidentified radio stations without additional information about the non-compliance (One-time? Repeated? Inconsequential? Substantial?) provides only superficial comfort that Parliament's objectives are being met. It is simply silly to think that members of the public have the time, the resources, the expertise, and the interest to review thousands of CRTC policies, regulations, public notices, and decisions to determine whether the Commission really is enforcing Parliament's legislation.

I suggest that the most efficient and effective way to improve the CRTC's performance as a regulator is to make its operations transparent to Canadians and to Parliament. The CRTC's lack of detail in its decisions and inadequate annual reports mean that it now lacks transparency. The CRTC's decisions, for instance, now refer less frequently to actual previous non-compliance by licensees than its decisions of the 1970s and 1980s.<sup>169</sup> Moreover, beginning in November 2002, stations such as CFGP-FM Grande Prairie that were non-compliant with respect to Canadian content, were no longer warned that

CRTC would be monitoring their performance.<sup>170</sup> In addition, the CRTC has not called some non-compliant licensees to public hearings for more than a decade.<sup>171</sup>

If the CRTC were to resume the practice of holding public hearings when licensees breach the legislation and regulations, posting its subsequent actions in tabular form on its otherwise-excellent Web site, and prosecuting non-compliance where permitted by law, parliamentarians and broadcasters alike would gain a greater appreciation of the CRTC's regulatory activities, and the standards to be met.

### 2. Monitoring

The CRTC often monitors broadcasters' Canadian content and French-language vocal music levels. Results for individual stations are not easily accessible. Although included in licensee's public examination files, the CRTC's reports are not, for instance, published in the CRTC's annual monitoring reports or published online. Particularly in the case of strict-liability regulations such as the CRTC's regulations for minimum Canadian content levels and French-language vocal music, the CRTC should review the on-air programming of a large, random sample of broadcasters annually, and publish the results for each station online. Knowing that the CRTC may review their performance before their licence renewal may promote licensees' compliance with the regulations. Licensees may even be encouraged to surpass the regulatory minima in certain programming areas.

### 3. Enforcement

The CRTC's informal sanctions do not appear to deter subsequent non-compliance, and have not been applied equally to all licensees. Therefore, the CRTC should modify its enforcement approach. Allowing repeated instances of non-compliance to occur brings the administration of justice into disrepute, and suggests that certain licensees receive preferential treatment. An enforcement approach that relies on the formal sanctions of Canada's broadcasting legislation would meet Parliament's intentions, and ensure equal treatment of licensees.

Regulatory breaches should be prosecuted swiftly to maximize their deterrent effect. Past efforts to sanction non-compliant behaviour have not always been prompt. CFRB Toronto was convicted and fined in 1974, for an incident that occurred in 1971; CKIQ Kelowna was convicted and fined in 1979 for a 1974 incident. Programming that one broadcaster aired on 30 July, 1987 was finally identified as breaching the CRTC's regulatory requirements more than two years later, in September 1989.<sup>172</sup> Swift prosecution would maximize the general deterrent effects of the CRTC's regulation and supervision of the *Broadcasting Act, 1991*.

The CRTC should also enforce the legislation and its regulations consistently. Given the Commission's repeated assurances that it will penalize any non-compliance, it is unclear why some instances of non-compliance are punished by non-renewal, while others are addressed through short-term renewals or stern reminders that regulations exist. Are some licensees more equal than others? Or is one breach acceptable, but 15 are not?

In particular, the CRTC should reconsider its approach to logger-tape non-compliance. The single source to assess the validity of a listener or viewer's complaint about abusive or illegal programming content consists of the logger-tapes that broadcasters are required to retain. Despite the CRTC's repeated requests that stations meet the requirement, and a plethora of short-term renewals, many do not. While such failures may be understandable in newly established stations or stations operated by volunteers, it is unclear why profitable stations that have been on air for years, or even decades, may treat this requirement so lightly. Stations that fail to retain recordings more than once should therefore be held to account under the provisions of the Act.

#### 4. Administrative penalties

Under the *Broadcasting Act, 1991*, breach of a regulation could result in a maximum fine of \$250,000 for a corporation. However, no prosecutions have been reported since this legislation was enacted. The fines levied in the prosecutions before 1991, moreover, were quite low — in the order of a thousand dollars or so. Fines that represent a fraction of the maximum set out by Parliament suggest that neither the objectives identified by Parliament, nor the CRTC's administration of the broadcasting legislation need be taken seriously. Low fines are unlikely to spur instant compliance with the CRTC's regulations. Yet it is unclear whether courts will concur that repeated failures to submit logger-tapes warrant a fine of up to \$250,000.

The CRTC now performs a dual role for licensees, acting not only as an administrative agent of the state (responsible for granting or denying admission to the Canadian broadcasting system), but also as a police officer and judge. The CRTC grants applications, monitors licensee compliance, and decides how to penalize non-compliance. As a result, it lies in a perpetual state of conflicted interests: seeking to ensure that Canadians receive Canadian broadcasting services and that these services are financially viable, while trying to reduce non-compliance by threatening the financial stability and survival of these services with financial penalties or non-existence (through non-renewal, suspension or revocation, however unlikely, statistically speaking).

In the past, the CRTC has resisted extensions of the government's authority to review and amend its licensing decisions, stressing the imperative for actual and perceived independence of political interference.<sup>173</sup>

Yet the data presented here suggest that the CRTC's enforcement activities fail to deter licensees from breaching its regulations and Canada's broadcasting policy. Parliament's will is therefore not being enforced.

It has occasionally been suggested that the CRTC be granted the authority to impose administrative fines of its own. This authority might enable the CRTC not only to recoup some of its own administrative costs, but to deter non-compliant behaviour by its regulatees more effectively. Provided the CRTC used this formal sanction, imposing the maximum fines possible would increase the likelihood of remedying the damage — intangible though it may be — incurred by the broadcasting system due to non-compliant licensees.

Given that the results of the analysis of the data collected for this paper establish that the CRTC has relied on informal, rather than formal, sanctions in the past, it may be tempting to conclude that the Commission would not use a new formal administrative fine, continuing to rely instead more on the informal sanctions of the past. Tempting though this thought may be, it is surely unfair, since the specific purpose of the new administrative penalty would be to facilitate the CRTC's use of stronger deterrent penalties. After all, the CRTC has used its "new" mandatory order authority since 1991. Of more concern, however, is the CRTC's demonstrated historical tendency to apply its penalties unequally to different types of licensee. It is unclear what would prevent the same tendency from being applied to a new administrative sanction. The prospect of continued inequitable treatment of licensees by the regulator suggests a different course should be followed.

One solution might be to introduce an independent agency to enforce regulatory non-compliance. Transferring this responsibility from the CRTC to an equally independent agency free from government influence would eliminate at least one conflict of interest. The responsibility of levying administrative fines could also be granted to this separate agency. The CRTC could provide the agency (and the public) with an annual report detailing licensee compliance with the regulations, and the agency could levy the appropriate fines accordingly. Licensees might comply more readily with the Act and the CRTC's regulations if fines were more than token gestures and were clearly labelled as penalties.

#### 5. Competitive licence renewal process

A simple mechanism to encourage licensees to adhere to the terms of their licence, to the CRTC's regulations, and to the objectives of the *Broadcasting Act, 1991*, would be for the CRTC to adopt a competitive licence renewal process. Currently, the renewal process is non-competitive: since its earliest days the CRTC has chosen not to consider applications for the use of a frequency whose use is already licensed to another. As a result, the current renewal process is virtually automatic,

even for non-compliant stations. Stations that have only breached the regulations once during a normal seven-year term are not called to a public hearing, and after a paper-based process may anticipate receiving at least a four-year licence renewal. Stations that commit repeated breaches may be called to a public hearing, but realistically need not fear that their licence will not be renewed. (The peak of licence non-renewal occurred in the 1980s: since 1990, the CRTC has denied just one application to renew a licence.<sup>174</sup>) Did Parliament intend broadcast licences to be granted in perpetuity? Are the interests of Parliament and Canadians well served when those licensed to use Canada's airwaves retain these licences almost regardless of their adherence to the legislation and the regulations?

Nothing in the *Broadcasting Act, 1991* requires the CRTC to renew licences, and nothing stipulates the manner in which the renewal must occur.<sup>175</sup> A competitive licensing process should be adopted in the case of stations that breach either the regulations or the legislation more than once. As the date for these stations'<sup>176</sup> licence expiration approaches, the CRTC should issue an open call for applicants interested in the licence, including, of course, the current licensee.

Assuming that some applicants for a broadcast licence actually would adhere to the legislation and regulations, allowing them to apply for and obtain the licences currently held by repeatedly non-compliant licensees offers several benefits. Licensees may be prepared to improve the quality of their programming, to attract supporters at the time of licence renewal, and to compare favourably to new programming proposed by applicants seeking the same licence. The fear of losing their licence may convince non-compliant licensees to reform well before their licence term expiry approaches. As previously recalcitrant licensees reform or are replaced by licensees that comply with the legislation and regulations, the CRTC's costs of enforcement may

decrease. More importantly, the objectives of Parliament's broadcasting may be met to a greater degree.

There are several negative aspects to competitive licence renewal proceedings. These include the increased cost of holding the hearings to the CRTC, the potential for "greenmail" by those posing as applicants in the process in the hopes of being compensated to withdraw, and the risk to listeners of having a new station replace the one to which they are accustomed. Presumably, however, rational licensees would ensure the compliance of their stations and reduce the overall negative impact of these factors, in particular the listeners' prospective disappointment at losing access to a familiar station. The potential for "greenmail" that would also logically exist in the current process for issuing new licences does not appear to have discouraged either existing or prospective applicants from continuing to apply for new licences.

Monitoring and enforcing regulatory compliance is time-consuming, costs money, requires planning, and may reveal unpopular results. As one CRTC commissioner noted at the beginning of the twenty-first century, "the devil is in the details".<sup>177</sup> Yet the CRTC's failure to deter regulatory non-compliance by its licensees misleads Parliament and Canadians who may now believe the *Broadcasting Act, 1991* is being enforced and that licensees are complying with its broadcasting policy.

Even if discussions of socio-cultural issues such as broadcasting are doomed never to achieve a fully satisfactory resolution, transparent monitoring and enforcement would at a minimum enable Canadians and parliamentary decision-makers to assess the impact and effectiveness of Canada's broadcasting policy. At present, however, the CRTC's approach to the responsibilities delegated to it by Parliament should be viewed not with mere "concern", or even "serious concern", but "grave concern".

## Appendix 1: Prosecutions under Canadian Broadcasting Legislation

Year	Issue	Case
1930	Illegal operation of radiotelegraph set (no licence)	<i>Nolan v. McAssey</i> , [1930] 2 D.L.R. 323 (P.E.I. Sup. Ct.) 28 January 1930 Arsenault J. convicts M of operating a radiotelegraph apparatus without a licence, contrary to the <i>Radiotelegraph Act</i> , S.C. 1913, c. 43, when M operated a radio receiver.
1952	Broadcast is publication for defamation	<i>Jenner v. Sun Oil C. Ltd. et al.</i> , [1952] 2 D.L.R. 526, O.R. 240 (Ont. Sup. Ct.). Plaintiff claimed damages for allegedly defamatory statements made during a radio broadcast of the NBC radio network carried on WBEN Buffalo (NY). Defendant argued that even if defamation published, was done abroad on the “etherwaves”, so that the act was not committed entirely in Ontario. Fundamental common sense principles governed: radio broadcasts were made to be heard by a large audience; publication is critical to defamation actions; radio broadcasts are not “unilateral operations”, but transmissions of messages, requiring both a recipient and a transmitter.
1954	Live telecast does not have copyright	<i>Canadian Admiral Corp. Ltd. v. Rediffusion Inc.</i> , [1954] Ex. C.R. 382, 20 C.P.R. 75 (Ex. Ct.). Live telecasts cannot be subject of copyright, being neither “artistic works”, nor “dramatic works” since not “fixed in writing or otherwise”, but merely fleeting images for which no negatives were produced.
1957	CBC vs. prerogative writ	<i>Caron v. Canadian Broadcasting Corporation</i> , [1957] Que. SC 279 (Que. Sup. Ct.) C wanted equitable share of free broadcast time for Labour Progressive Party, under the <i>Broadcasting Act</i> and the Regulations. As an agent of the Crown, CBC was not subject to prerogative writ.
	CBC committed tort	<i>Robbins v. Canadian Broadcasting Corp.</i> (1957), 12 D.L.R. (2d) Que. Sup. Ct) R wrote to CBC criticizing a program and said, “I wonder if [the CBC] will read this letter along with some of the others they get from viewers”; CBC read letter and moderator invited audience to call or write plaintiff to cheer him up; plaintiff had to change telephone numbers. CBC staff committed actionable wrong and plaintiff entitled to damages of \$3,000 for diminution of income, health impairment, humiliation, invasion of privacy.
1965	BBG order quashed	<i>Radio Iberville Ltée. v. Board of Broadcast Governors</i> , [1965] 2 Ex. C.R. 43 (Ex. Ct.). BBG issued notice to CHRS licensee Radio Iberville, stating its opinion that licensee had failed to comply with a condition of licence re logging practices, and set hearing time/place; BBG did not question licensee about the matter at the hearing, and suspended the licence for one week for breaching conditions of licence. On appeal, held that BBG order should be quashed as insufficient opportunity to be heard was offered to the licensee.
1968	Convicted of breaching Regulations (logging, ad time)	<i>R. v. Radio Saguenay Ltée.</i> (2 December 1968) (Que. Sess of the Peace). Licensee of CKRS-TV Jonquière prosecuted for 3 breaches of s. 8 of TV Regulations (excess of commercials) and one of s. 4 (mislogging). Accused found guilty of 2 breaches of s. 8 and fined \$25 for each offence; other charges dismissed.
1971	Status at renewal hearing	<i>Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission</i> , [1971] S.C.R. 906, 19 D.L.R. (3d) 290. CKPM renewed for 9 months, after which it would be thrown open to competition. Confederation denied status to apply for further renewal. It was held CRTC had no authority under Act to restrict right of application for renewal. Court ordered a rehearing. (Following the appeal, CRTC granted 1-year renewal to licensee in Ottawa-CKPM (Decision CRTC 72-6 (21 Jan 1972)); station later sold (Decision CRTC 72-99 (21 April 1972)).
	Intervener status	<i>National Indian Brotherhood v. Juneau et al. (No. 1)</i> , [1971] F.C. 66 (F.C. T.D.). Four Indian associations objected to CTV film on grounds of racism, inaccuracy, and slander. CRTC decided against public hearing under s. 19(2)(c) of <i>Broadcasting Act</i> . Associations sought <i>mandamus</i> and <i>certiorari</i> to compel public hearing. Walsh J. held applicants “though not individuals specifically affected by the CRTC order, had status as ‘persons’ under s. 19(2) to make this application”.
	Injunction to prevent broadcast required defamation or legal wrong	<i>National Indian Brotherhood v. CTV Television Network Ltd.</i> , [1971] F.C. 127 (F.C. T.D.). Four Indian associations applied for an interim injunction to restrain the CTV network from telecasting a film, pending a decision by the Federal Court on an application for <i>mandamus</i> directing the CRTC to hold a public inquiry into a complaint that the film was defamatory of Indians; application dismissed. It was doubtful the Court had jurisdiction to enjoin CTV from broadcasting a program, other than one that is legally actionable by reason of being defamatory or otherwise. To exercise such jurisdiction would give parties an opportunity to frustrate, delay, and interfere with broadcasting and the Court would, in effect, be exercising functions of regulation and supervision entrusted to the CRTC. Moreover, the application should be dismissed on the merits, given the historical character of the film, its earlier broadcast, the lack of action of the CRTC after considering the complaints, CTV’s right to freedom of expression, and the fact that there was no plaintiff showing that the case would violate some legal right or that it was defamatory of any living person.

	Administrative decision re public hearing not subject to <i>certiorari</i> or <i>mandamus</i>	<i>National Indian Brotherhood v. Juneau et al. (No. 3)</i> , [1971] F.C. 498 (F.C. T.D.). FC dismissed applicant for <i>certiorari</i> to review CRTC's decision not to hold a public hearing re this matter, and for <i>mandamus</i> to compel CRTC to hold public hearing Decision to hold public hearing was administrative, and not reviewable by the Court on an application for <i>certiorari</i> or <i>mandamus</i> . Parliament did not intend to give CRTC authority to act as a censor of programs to be broadcast or televised. Its only control over the nature of programs is by its power to revoke, suspend or fail to renew the licence of an offending station. S. 3(d) (varied, comprehensive, balanced, high standard, predominantly Canadian) and associated regulations enacted under s. 16(1)(b)(i) intended to refer to general programming and not any individual program. In any event, the only sanction would be in relation to the licence.
1972	Unknown result	Teleprompter Cable Communications Corp. charged with carrying on a broadcasting receiving undertaking without a valid licence, contrary to s. 29(3) of the <i>Broadcasting Act</i> . Cases were not heard by March 1973 CRTC, '72-'73 <i>Annual Report</i> at 49.
1973	Convicted of breaching Act (elections)	<i>Re C.F.R.B. Ltd. and A-G Canada</i> , [1973] 3 O.R. 819, 38 D.L.R. (3d) 335, aff'g [1973] 1 O.R. 79, 30 D.L.R. (3d) 279 (Ont. C.A.). Charged with broadcasting a partisan (political) comment one day before the 21 October, 1971 Ontario provincial election, contravening s. 28(1) of the <i>Broadcasting Act</i> . <ul style="list-style-type: none"> <li>● On 31 May, 1972, CFRB Limited filed notice of application for judicial review; on 31 October, 1972 Mr. Justice Campbell Grant dismissed the motion with costs <i>Re C.F.R.B. Ltd. and A-G. Canada (No. 1)</i>, [1973] 1 O.R. 57, 9 C.C.C. (2d) 320;</li> <li>● CFRB Limited filed notice of appeal on 14 November, 1972 arguing that CRTC jurisdiction extended only to physical means of communication, and not program content;</li> <li>● Kelly J.A. dismissed the appeal: "It would be flying in the face of all practical considerations and logic to charge Parliament with the control over what is the only reason for the existence of the carrier system, <i>i.e.</i>, the transmission and reception of intellectual material."</li> <li>● In implementing the broadcasting policy in the <i>Broadcasting Act</i>, franchises are granted conferring on the older the exclusive right.</li> <li>● S. 28 did not contravene the rights of the station to equality before the law and freedom of speech as assured by the Canadian <i>Bill of Rights</i>, ss. 1(b) and 2. No restriction on freedom of speech that offended the provisions of the Canadian <i>Bill of Rights</i> was thereby placed on the holders of broadcasting licences, nor was there any discrimination against such licensees of the type enjoined by s. 1 of the Canadian <i>Bill of Rights</i>. The prohibition applied without distinction to every broadcaster and every licensee of a broadcasting receiving undertaking.</li> <li>● Ontario Provincial Court of Judicial District of York found CFRB guilty on 29 March, 1974; CFRB fined maximum fine of \$5000.</li> </ul> On 17 April, 1974, CFRB appealed this conviction (to the County Court of the District of York); appeal dismissed.
	Convicted of breaching Act (elections)	<i>R. v. Maple Leaf Broadcasting Co. Ltd.</i> (1972) (Ont. Co. Ct.). CHML Hamilton broadcast partisan announcement in relation to be held to referendum held in Hamilton the next day, contrary to s. 28(1) of <i>Broadcasting Act</i> . Bennett Prov. Ct. J. dismissed charge on basis that the question on the ballot was not a referendum, since the result was not binding on City Council. On appeal, Warrender C.C.J. held question on the ballot was a referendum, and convicted accused. Intent of s. 28 of the <i>Broadcasting Act</i> was to permit broadcasters to use their influence to sway electors on a question being put to them, whether or not the council had to act on the opinion expressed, only up to the day directly preceding the election day, but not to allow them to use their influence in a partisan matter on such preceding day.
1974	Convicted of breaching Regulations (ad time)	CJTR Radio Trois-Rivières Ltée charged in April with four counts of broadcasting advertising content in excess of the limits of s. 7(1) of the <i>Radio (A.M.) Broadcasting Regulations</i> . <ul style="list-style-type: none"> <li>● CJTR pled guilty to the charges on 5 June, 1974;</li> <li>● Fined \$745 by the Court of the Sessions of the Peace in Trois-Rivières.</li> </ul>
	Pled guilty to breaching Regulations (ad time)	CJMT Ltée, licensee of CJMT Chicoutimi charged with seven counts of broadcasting excessive ads, contrary to s. 7(1) of the <i>Radio (A.M.) Broadcasting Regulations</i> . CJMT pled guilty and on 17 June, 1974 was fined \$1,200 by the Court of the Session of the Peace in Chicoutimi.
	Pled guilty to improper logging	CHAM (Rogers Broadcasting Ltd.) pled guilty to improper logging of names of sponsors and fined \$500; other charges withdrawn (case decided 10 January, 1974).
1975	Convicted of breaching Regulations (offensive content)	<i>Regina v. C.H.L.T. Radio Sherbrooke Ltée</i> . (29 April, 1975) (Que. Sess. Of the Peace) Peloquin J.C.P. In June, CHLT was charged with broadcasting abusive comments and profane language and with improperly logging commercials, contrary to ss. 5(1)(b),(c) and 4(1)(e) of the <i>Radio (A.M.) Broadcasting Regulations</i> . The trial began on 5 August; the station argued its "time-delay" equipment malfunctioned The station was convicted and fined \$300. Peloquin J.C.P. noted that broadcasters have the obligation to take necessary steps to ensure that time delay equipment is functioning when dealing with open-line programs where one knows ahead of time that some people are argumentative and may begin to swear, blaspheme, or utter obscenities or indecent statements. Offensive content occurred during sixty minutes, and station should have given the announcer authority to stop program and substitute music, where time delay device unavailable. A fine would have been more severe, except that conviction is considerable penalty in itself for a public institution.
1976	Pled guilty to breaching Regulations (logger-tapes)	<i>CRTC v. Multiple Access Ltd.</i> Charged in March 1976, CFCF pled guilty to failure to provide logger-tapes; 3 other counts on same charge withdrawn. <ul style="list-style-type: none"> <li>● Fined \$500 and costs (CRTC '76-'77 <i>Annual Report</i> at 20).</li> </ul>

	Pled guilty to breaching Regulations (logger-tapes)	<i>CRTC v. Radio Ste-Agathe Inc.</i> CISA charged with 2 counts of failing to provide logger-tapes per the Regulations. Station pled guilty to first count; 2 <sup>nd</sup> dropped by request of both parties; Licensee fined \$300 (CRTC, '76-'77 <i>Annual Report</i> at 20).
	Pled guilty to breaching Regulations (logger-tapes)	<i>CRTC v. Moffat Communications Ltd.</i> In February 1976 CKY Winnipeg charged with failing twice to provide air-check tapes per the Regulations. On 14 June, 1976, Moffat pled guilty to both charges. Fines of \$500 and costs on first offence, and \$1,000 and costs on the second offence (CRTC '76-'77 <i>Annual Report</i> at 20).
	Pled guilty to breaching Regulations (logger-tapes)	<i>CRTC v. Shoreacres Broadcasting Co. Ltd.</i> In September 1976 CKEY pled guilty to failing to provide logger-tapes. Fined \$25 on 6 January, 1977 (CRTC '76-'77 <i>Annual Report</i> at 20).
	Convicted of breaching Act (elections)	<i>Regina v. C.F.R.B. Ltd.</i> , (1976), 30 C.C.C. (2d) 386, 31 C.P.R. (2d) 13 (Ont. C.A.). Licensee for CFRB Toronto charged with broadcasting partisan political character on day before the provincial election, contrary to s. 28(1) of <i>Broadcasting Act</i> . Licensee convicted at trial, fined \$5,000 and appealed. Appeal dismissed (per Arnup J.A.) because the broadcast was partisan, even in the absence of a sponsor or connection between the program speaker and any political party.
	Public participation	<i>Re Canadian Radio-TV Commission and London Cable TV Ltd.</i> , [1976] 2 F.C. 621, 67 D.L.R. (3d) 267 (F.C. C.A.). Consumers' Association of Canada appealed CRTC amendment to London Cable's licence allowing it to raise rates from \$5 to \$6. Argued that not permitted to view certain documents. Court held that the <i>Broadcasting Act</i> requires meaningful hearing to consider public as well as private interest, not a public hearing where public members are merely allowed to "blow off steam". Court held CRTC decision should be set aside.
	Pled guilty to breaching Regulations (logger-tapes)	<i>CRTC v. Radio Futura Ltée</i> CKVL charged with failing to provide logger-tapes per the Regulations. Station pled guilty (explaining that labour dispute led to breach). Fined \$1000 (CRTC, '76-'77 <i>Annual Report</i> at 20).
1976/77	Convicted of breaching Regulations re Canadian content	Kawartha Broadcasting Company Limited, licensee of CHEX-TV Peterborough prosecuted for Canadian content violations during the 1976-77 year. Convicted and fined \$2,000. See Clifford, <i>supra</i> note 10 at para. 336.
1977	Injunction granted to allow plaintiff to participate in open-line programs	<i>Pazitch v. C.J.A.V. Limited</i> , [1977] 4 W.W.R. 524 (B.C. S.C.). Plaintiff asked for damages and injunction because station adopted policy prohibiting her from participating in open-line programs. Station applied to have statement of claim struck on grounds that it was frivolous/vexatious and disclosed no reasonable cause of action. Moreover, case was in CRTC's jurisdiction, not the court's. Court held that station's application should be dismissed. Per Millward J: "In my view, a licensee under the <i>Broadcasting Act</i> of Canada does not enjoy quite the same freedom to reject communications from other persons as does an individual not so licensed. The provisions of s. 3(c) and (d) of the <i>Broadcasting Act</i> must be interpreted to mean that, with reference to the application before me, every individual has a right to participate in an "open line" program on the same basis as ever other individual in the listening area, provided he or she complies with all reasonable rules imposed with respect thereto. . . . there is a triable issue as to whether the plaintiff is entitled to the relief claimed or any relief."
	Convicted of breaching Act (elections).	<i>Regina v. Radio NW Ltd.</i> , (B.C. Prov. Ct.) (Shaw P.C.J.). CKNW New Westminster charged with broadcasting partisan program the day of a provincial by-election in Vancouver East, when program host Garry Bannerman invited calls about federal politics. Licensee convicted of offence at trial. Bannerman's good intentions were not a defence to the charge. On June 22 1977, station fined \$750. (CRTC, '76-'77 <i>Annual Report</i> at 20).
	Pled guilty to breach of Regulations (logger-tapes)	<i>CRTC v. CHTK Radio Ltd.</i> CHTK Prince Rupert charged with failing to provide logger-tapes under s. 4(5) of <i>Radio (AM) Broadcasting Regulations</i> . Station pled guilty (7 March, 1977) to one count. Fined \$100. (CRTC '76-'77 <i>Annual Report</i> at 20).
		<i>Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al.</i> , [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609. Rogers Cable wanted to amend its licence to delete commercials and substitute US programs. It was held (among other things, related to Havana <i>Convention</i> ), CRTC is not an agent/arm of the Canadian government.
1978	Charges of breaching canon Regulations dismissed	In the unreported decision of <i>R v. Newfoundland Broadcasting Co. Ltd.</i> , (3 August 1978) (N.L. Prov. Ct.) (Luther P.C.J.) CJON-TV St. John's is prosecuted for violating TV regulation s. 6(a)(i) regarding Canadian content in the 1976/77 broadcast year — but the charges are dismissed for "non-substantive reasons" as the information did not state where the offence was alleged to have occurred. See Clifford, <i>supra</i> note 9 at para. 361.
	Pled guilty to breaching Regulations (logger-tapes)	Radio Niagara Ltd. CJRN failed to maintain and furnish logger-tapes contrary to the AM Regulations. <ul style="list-style-type: none"> <li>● Pled guilty and fined \$500 on first offence, \$1000 on second offence;</li> <li>● Decided 14 June, 1976.</li> </ul>

Pled guilty to breaching Regulations (cancon)	<p><i>Regina v. Enterprises Télé-Capitale Limitée</i> (10 August 1978) (Que Sess of the Peace, Fortin J.S.P.). Licensee charged with broadcasting on CFCM-TV an excessive amount of non-Canadian programs, contrary to the regulations (42.7% non-Canadian from 1 October 1976 to 30 September 1977). Licensee pled guilty and argued for light fine (less than \$300) while Crown argued for a fine ranging between \$3,000 and \$5,000.</p> <p>Conviction and fine of \$1,500: "The wrong that should be suppressed is not therefore widespread but statutory interpretation appropriate by an adequate sentence to suppress the present offence and to demonstrate to radio and television licensee's the CRTC's firm determination to have the laws and regulations respected."</p>
Convicted of breaching Regulations (offensive content)	<p><i>Regina v. Buffalo Broadcasting Co. Ltd.</i>, (10 November 1978) (unreported), rev'g (1977), 36 C.P.R. (2d) 170 (Sask C.A.). CRTC received a complaint after CKRM broadcast an offensive comment, contrary to s. 5(1)(b) of the Radio (AM) Broadcasting Regulations.</p> <p>Court held the program was abusive but dismissed the charge on the basis that the CRTC had no authority to enact the regulation given that the CRTC did not have the right to act as censor of the comments.</p> <p>On appeal, the Sask C.A. held that trial judge erred in law in holding that s. 5(1)(b) was <i>ultra vires</i> the CRTC.</p> <p>Order of acquittal set aside and conviction entered.</p>
1977/ 78 Pled guilty to breaching Regulations (Canadian content)	CKCO-TV Prosecuted and pleads guilty to violating Canadian content regulations for prime-time and the full broadcast day during the 1977/78 broadcast year.
Convicted of breaching Regulations (interviews)	<p><i>CKOY Limited v. Her Majesty, The Queen</i>, [1979] 1 S.C.R. 2, 90 D.L.R. (3d) 1 Licensee charged with breaching s. 5(1) of the <i>Radio (A.M.) Broadcasting Regulations</i> (contract) prohibiting the broadcasting of any telephone interview unless the interviewee called the station to participate in the broadcast or had consented to the interview's broadcast.</p> <p>In August information laid against for airing telephone conversation without consent on two occasions:</p> <ul style="list-style-type: none"> <li>● Judge R. B. Hutton finds consent on one occasion and dismisses other charge on ground that, "however desirable", the regulation was <i>ultra vires</i> the CRTC's authority as set out in s. 16 of the <i>Broadcasting Act</i>;</li> <li>● CRTC appealed.</li> </ul> <p>J. Reid reserved his decision.</p> <p>At trial and on appeal by stated case, charge dismissed as regulation held to be <i>ultra vires</i> the CRTC under the <i>Broadcasting Act</i></p> <p>On appeal to the Ont. C.A., conviction upheld; court held 2-1 that the regulation was properly within CRTC jurisdiction to enact: although the courts have jurisdiction to determine whether an impugned regulation, viewed objectively, can be fairly brought within the power conferred upon the Commission by the Act, it is not the Court's function to determine whether the regulation will promote the policies and attain the objects entrusted to the CRTC or evaluate the various competing factors that a particular regulation may involve.</p> <p>S.C.C. dismissed the appeal of the Ont. C.A. decision 6-3.</p>
1979 Convicted of breaching Regulations (Cancon)	<p><i>Regina v. Thunder Bay Electronics Limited</i> (5 April, 1979) (Prov. Mag. Cts.) (Sargent P.C.J.). Prosecuted for CKPR-TV's Canadian content violations during the 1976/77 year.</p> <ul style="list-style-type: none"> <li>● Convicted in an unreported decision (on 5 April, 1979) by Sargent P.C.J. (found to be a public welfare offence of strict liability per <i>Sault Ste. Marie</i>, in which prosecution need not prove <i>mens rea</i>).</li> <li>● Fined \$3000.</li> </ul>
Convicted of breaching Regulations (rebroadcasts)	<p><i>Regina v. Four Seasons Radio Ltd.</i> (April 12, 1979) (B.C. Co. Ct. of Yale), Dohm C.C.J. On 8 August, 1974, information laid against Four Seasons Radio Ltd., licensee of CKIQ Kelowna, for having picked up and rebroadcast a portion of a program without the written consent of the CRTC, contrary to s. 14 of the <i>Radio (A.M.) Regulations</i>.</p> <p>Licensee of CKIQ Kelowna charged with breaching s. 14 of the <i>Radio (AM) Broadcasting Regulations</i> which prohibited program rebroadcasts.</p> <p>At Prov. Ct., charge dismissed on the basis that s. 14 was <i>ultra vires</i> the CRTC.</p> <p>On appeal to the Co. Ct. the licensee should be convicted.</p> <p>The CRTC power to enact regulations to promote high standards of programs had been upheld by the S.C.C. in <i>CKOY</i>.</p>
	<p>CITY-TV Toronto is prosecuted for violating Canadian content regulations (during the 1976/77 broadcast year, it carried 56.49% Canadian content, a shortfall of 3.51% or 76.65 hours); See Clifford, <i>supra</i> note 10 at para. 392. Improper adjournments lead to a loss of jurisdiction and results in the charge being dismissed. An appeal of the case is subsequently withdrawn following decisions by the S.C.C. in <i>R. v. Krannenberg</i> (1980), 31 N.R. 206; and <i>R. v. Thompson</i> (1981), 34 N.R. 271.</p>



- 1980 *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission et al. (No. 2)*, [1980] 1 F.C. 396, 101 D.L.R. (3d) 669 (F.C. C.A.). CBL applied for leave to appeal CRTC decision approving transfer of control of CCL cable systems to Rogers. It was held CBL had sufficient status to appeal the CRTC's decision under s. 26 of *Broadcasting Act*, by virtue of its objects, its well-established role as an advocate of consumer interest in broadcasting.  
Per Le Dain J., concurred in by MacKay D.J. and Ryan J.: "Broadcasting is a matter of interest to all Canadians. While it involves pecuniary, proprietary and other material interests, it involves interest of a non-material nature affecting the welfare of Canadians, all of whom are in some measure affected by the service it provides. ..."  
"In the *London Cable* case this Court held that by virtue of s. 19 [now s. 10] of the *Broadcasting Act*, the public had a 'statutory right of presentation', and that this included the right to disclosure of sufficient information concerning the nature of the issues to enable members of the public to exercise this right. ..."
- Convicted of breaching Regulations (Cancon) *Regina v. Western Manitoba Broadcasters Limited* (31 March, 1980) (Man. Prov. Ct.(Crim. Div.)), Mykle P.C.J.). Licensee of CKX-TV Brandon charged with breaching s. 6A(1) of the *Television Broadcasting Regulations* for carrying in excess of 40% (41.3%) non-Canadian content between October 1977 and September 1978.  
It was held that accused should be convicted; offence was strict liability; accused failed to establish that it exercised reasonable care to meet the Cancon regulations. Court felt high standards imposed on broadcasting undertakings was justified: "Broadcasting is not a simple business. Aside from the production and technical problems which are peculiar to that field, individual stations must conform not only to a host of regulations, but also to a philosophy of national interest contained in the *Broadcasting Act*. It is not only a matter of selling advertising and running films indiscriminately; it is also a matter of satisfying public taste, providing public service, education and entertainment. Under the government Act, higher standards of performance are demanded of broadcasting entities than of corporations in other fields of endeavour. Broadcasting touches every citizen in a unique and intimate way, in a way no manufacturing or other enterprise can achieve. Broadcasting is not a simple business. But then perhaps that is how it should be."
- Defamation *Bassett v. Canadian Broadcasting Corp.* (1980), 116 D.L.R. (ed.) 332, 30 O.R. (2d) 140 (Ont. H.C. of J.) (Southey J.). B commenced action for libel against CBC. CBC applied for order striking out claim on ground that Court lacked jurisdiction to hear (only F.C. had jurisdiction under s. 7(1) of *Crown Liability Act*).  
Application dismissed; "any obligation ... incurred" meant torts.
- 1981 Not guilty (Canadian content)  
Dismissed (Canadian content)  
2 charges dropped (Canadian content)  
*Regina v. Cambrian Broadcasting Limited* (1981), (Ont. Prov. Ct. (Crim. Div.)). Licensee for CICI-TV Sudbury station prosecuted for contravening Canadian content requirement in s. 8(1)(a) of *Television Broadcasting Regulations*.  
Defence made motion of nonsuit on grounds that the prosecution had led no evidence that the defendant was a "network or station" as defined in the Regulations to mean "any television station licensed under the *Radio Act*".  
Motion granted and charges dismissed. Since licensee was licensed under the *Broadcasting Act* and no evidence that licensed under the *Radio Act* and therefore no proof that defendant was station within meaning of the Regulations.  
Four television stations had been charged with carrying excessive foreign content, contrary to the *Television Regulations*: CHSJ-TV, CICI-TV Sudbury, CKWS-TV Kingston, CJON-TV St. John's.  
● CHSJ-TV found not guilty on 24 April 1981;  
● CICI-TV's charge dismissed on 10 December 1981 because the regulation refers to stations licensed under the *Radio Act*, not the *Broadcasting Act*;  
● CRTC, therefore, decides not to proceed with charges against CKWS-TV and CJON-TV, and not to appeal the CICI-TV decision.  
CRTC decides to amend the Regulation.
- Convicted of breaching Act (elections) *R. v. Newfoundland Broadcasting Co. Ltd.* (N.L.C.A.), leave to appeal to S.C.C. refused, (1981), 39 N.R. 594. CRTC prosecuted licensee of CJON-TV St. John's for broadcasting political advertisements on 24 September, 1979, day before municipal by-election, contrary to s. 28(1) of *Broadcasting Act*.  
Convicted at trial, licensee appealed to C.A., in part on ground that trial judge erred in finding the offence to be one of absolute liability under *Sault Ste. Marie*.  
Appeal dismissed; offence was absolute rather than strict because defendant was in the business of broadcasting and should find it easy to become aware of any regulations or statutes governing it. Any mitigating factors could be applied to the sentence imposed; the appeal Court was not prepared to interfere with these conclusions.  
Fined \$500.

1982	Condition of licence is in CRTC's jurisdiction	<p><i>Canadian Radio-television and Telecommunications Commission v. CTV Television Network Limited et al.</i>, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193, rev'g [1981] 2 F.C. 248, 116 D.L.R. (3d) 741 (F.C. C.A.). CTV appealed CRTC decision to impose condition of licence re Canadian content. F.C.A. rejected CTV's arguments that CRTC had no substantive jurisdiction to impose licence conditions of this kind but breach of rules of natural justice for failure to give adequate notice of the particular condition being considered. Set aside decision and referred renewal back to CRTC for reconsideration.</p> <p>On appeal by CRTC and CTV to S.C.C., Court restored CRTC decision.</p> <ul style="list-style-type: none"> <li>● Freedom of expression not impinged by imposing drama condition;</li> <li>● No vagueness or uncertainty;</li> <li>● S. 17 conveys broad authority;</li> <li>● No failure of natural justice, since CRTC had notified CTV it would discuss possible content condition at public hearing ("An applicant seeking a statutory privilege has no right to know in advance of a probable decision unless the statute commands it or the administering Tribunal wishes to disclose it. It cannot be said that CTV was being misled here or had not the slightest reason to apprehend the likelihood of a condition such as that attached here to the licence renewal.")</li> </ul>
1984	Non-renewal is legal	<p><i>CJMF-FM Ltée v. Canadian Radio-television and Telecommunications Commission</i>, [1984] F.C.J. No. 244 (Appeal No. A-398-84) (F.C.A.). Licensee of CJMF-FM appealed to FCA after CRTC refused to renew the station's licence on the grounds that it had not lived up to its promise of performance. Appeal should be dismissed (per Pratte J). "Applicant's second argument, based on freedom of expression ... must also be dismissed. Applicant had obtained the licence some years earlier because it promised to broadcast certain types of musical program. It did not keep this promise, and the Commission concluded had made no effort to do so. In these circumstances, it appears to the Court that the Commission could base its refusal to renew applicant's licence on the latter's conduct without infringing the freedom of expression of applicant or contravening the Charter."</p>
	Direction re newspapers is legal	<p><i>Re New Brunswick Broadcasting Co. and Canadian Radio-television and Telecommunications Commission</i> (1984), 13 D.L.R. (4th) 77, [1984] 2 F.C. 410 (F.C.A.), leave to appeal to S.C.C. granted (3 December, 1984). Appeal later dismissed on consent without costs when Direction to the CRTC revoked by OIC P.C. 1985-1735 (30 May 1985, SOR/85-492). The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It does not give anyone the right to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property subject to the licensing provisions of the <i>Broadcasting Act</i>. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence: it would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by paragraph 2(b) does not include a right for anyone to use the property of another or a public property, the use of which is governed by statute, there is no need to resort to the limitation clause in section 1 of the Charter to justify the licensing system established by the <i>Broadcasting Act</i>.</p>
1988	Abusive content	<p>Public Notice CRTC 1988-121, "Proposed Guidelines for Open Line Programs" (29 July 1988). "Recently, Fundy Broadcasting Co. Limited pleaded guilty to charges laid against it for contravening paragraph 3(b) of the <i>Radio Regulations, 1986</i> concerning abusive comments relating to Jews and Blacks aired by radio station CFBC, Saint John, New Brunswick on 6 November 1987. These comments were made during a guest appearance by Mr. Terry Long of the Aryan Nation group on a CFBC open line program."</p>
Total	Prosecutions	25
	Summary Convictions	14 convictions 6 guilty pleas 20 convictions
	Unsuccessful prosecutions	2 dismissed 1 not guilty 2 dropped 5 unsuccessful

## Appendix 2: Codes used to describe non-compliance and sanctions

Code	Issue		Sanction
0	No discussion of actual breaches	0	No discussion of breach
<b>1</b>	<b>Regulation breached</b>	<b>1</b>	<b>Licensing</b>
101	Offensive content (3(b))	101	Short-term renewal
102	Unclear/incomplete/unavailable/incorrect logger-tape (s. 8(6))	102	Non-renewal
103	Insufficient Canadian content (ss. 2.2(3), 2.2(5))	103	CoL imposed
104	Insufficient French vocal music	104	Licensee appears at hearing on another matter
105	Program logs incomplete or inaccurate (s. 8(1), 8(4))	105	Licensee called to hearing on issues
106	Insufficient Canadian content on the the day analyzed and no further analysis undertaken	106	Licensee to be called to another hearing within specified time
107	Carrying programs without CRTC approval	107	Proposed amendments discussed for renewal are denied
108	Air telephone conversation without consent (s. 14)	108	Proposed amendments discussed for renewal are approved
109	Abusive content	109	Proposed amendments denied for now, but to be favourably considered later
110	Profane language	110	Short-term renewal, to consider with other stns in the area
111	Improperly logging commercials	111	Ownership transfer approved
112	Excessive advertising	112	Proposed amendments discussed for ownership transfer are approved
113	Canadian content not scheduled reasonably	113	Proposed amendments discussed for ownership transfer are denied
114	Music list incomplete or incorrect (s. 9.3)	114	Submit new PoP
115	Ads in French; licence is for English-language	115	Ownership transfer denied
116	Delay in submitting logger-tapes	116	<i>Broadcasting Act</i> high standard requirement breached
117	Logs do not reflect logger-tape		
118	Program logs not submitted		
119	Canadian/ FVM selection not played in its entirety (ss. 2.2(5), 2.2(8))	120	Proposed amendments are approved
120	Insufficient foreground (s. 17)	121	Proposed amendments are denied
121	FD Act clearances not obtained		
122	Excessive ethnic programs (s. 7(2))	130	Some proposed amendments are approved
123	Self-evaluation does not match lists/CRTC analysis		
124	Certificate of accuracy missing	140	Proposed application approved
125	Poor logger-tape quality	141	Proposed application denied
126	Other stations owned not in compliance	143	Must meet prior CoL
127	Repeated non-compliance with regulations	144	Non-compliance with FM policy
128	Cat. 2 music interrupted (s. 2.2(5))		
129	Insufficient spoken word	150	CRTC suspends commercial portion of the licence
130	Policy re scheduling reasonably not met	151	CRTC may call licensee to public hearing
140	Cat. 3 music not clearly identified	160	This is a breach of regulation
141	Specify year of music's release	161	This is an alleged breach of regulation
142	Insufficient trad'l/spec. int. music (s. 2.2(3))	163	Station did not comply with regulation
143	PSAs too commercial	164	This constitutes non-compliance with the regulation
144	Instrumentals not sched'd as required	165	Commercial broadcaster complaint justified

145	Ads not identified	166	We note your admission of non-compliance as indicated in your self-evaluation
146	Alcoholic consumption should not be encouraged	167	Act actually or possibly contravened
147	Insufficient Cat 3 music / Selections are not montages	168	CRTC notes this failure to comply with the regulatory requirements
148	Offensive content	170	Submit revised PoP
149	Issues re program quality for which CRTC has received complaints	171	Alleged breach of CoL
150	Too many hours aired for community radio	172	Breach of CoL
151	Failure to forward required materials	173	Apparent non-compliance with CoL
152	Insufficient Cat. 3 music		
153	Insufficient Canadian Cat. 3 Music		
154	SAR report incomplete	180	Show cause why CRTC should not issue mandatory order
155	Insufficient Cancon 6am-6pm (s. 2.2(9))	181	Mandatory order issued
156	Incomplete musical selections (ss. 2(5, 8, 9, 10))		
157	Control changed without CRTC's prior approval		
<b>2</b>	<b>Condition of licence (CoL) breached</b>	<b>2</b>	<b>Moral suasion</b>
200	CoL breached	201	Expectation introduced
201	Cancon amount	202	CRTC expects compliance (with Regs) at all times
202	Cancon expenditures	203	CRTC will follow station practice closely
203	CoL re news breached	204	Reminder that station should comply with regulations
204	CoL re ads breached	205	Reminder of the regulations / policy / CoL
205	CoL re pledging licence	206	Comments requested
206	Unauthorized change in ownership	207	Suggestion that station take steps to improve performance
207	Unauthorized increase in broadcast time	208	Provide more news
208	Kids Kode	209	Expected to reduce commercial content
209	Vocal/instrumental commitment not met	210	Please call us
210	Insufficient Cat. 3 music	211	Please submit another tape for another day/we will be asking for a tape on another day
211	French-language vocal music not met	212	Tell us what concrete steps you will take to correct
212	CoL hits not met	213	Are these numbers accurate?
213	CoL Traditional music (Cat 6) not met	214	Non-compliance may be discussed at upcoming renewal hearing
214	Playlist # too low	215	Report quarterly
215	Insufficient ... programming	216	We've taken note of your steps taken
216	Excessive hits	217	Comments requested and of steps taken
217	Programming policy re journalistic standards	218	Reminder of the Public Notice CRTC
218	Sex-role stereotyping	219	Thank you for your explanation/comments
219	Cree language requirement	220	You may want to comment
220	CoL re CTD not met	221	We'd appreciate your keeping us up to date
221	Pre-1956 music requirement not met	222	Depending on analysis results, s-t renewal then call to hearing to justify further renewal
		223	Take immediate action to respond to CRTC concerns
		224	At next renewal, CRTC may/will consider licensee's compliance
		225	Licensee should follow through with hearing commitment to report

<b>3</b>	<b>PoP/Expectation not met</b>	226	CRTC will conduct another programming analysis
301	Promise of performance not met	227	You are invited to discuss results with CRTC staff
302	Programming commitments not met	228	You may be called to a public hearing to revoke your licence
303	CRTC expectation not met	229	Submit weekly reports indefinitely
304	Prospective PoP deficient	230	Met with CRTC staff (to discuss problems)
305	Insufficient news aired	231	We will be asking for tape for another day
306	Authority to broadcast not implemented	232	CRTC expects substantial compliance by FM stations to their PoPs
307	Programming plans vague and uncertain	233	CRTC will monitor licensee performance
308	Inadequate foreground programming	234	CRTC expects licensee to take whatever measures necessary to meet commitments
309	Unacceptable FM format	235	CRTC will consider compliance at next renewal and may impose COLs
310	Plans for Cancon uncertain or imprecise	236	Submit report in 6 months re compliance
311	Insufficient foreground content	237	Submit report in 1 month re compliance
312	Music aimed at wrong demographic	238	CRTC requires licensee to take immediate measures to operate in full compliance
313	Station in "substantial compliance" with PoP	239	Report in 3 months
314	Serious shortfalls in station performance	240	Report in 2 months
315	Excessive sports	241	Report in 60 days about logger-tapes
316	Excessive English-language content	242	Report about local / Canadian talent
317	Canadian talent plans too vague	243	Report in 30 days about logger-tapes
318	Too many hits	244	Derogatory generalizations are unacceptable
319	Unauthorized format	245	CRTC expects licensee to take whatever measures necessary to ensure compliance
320	Too much music	246	Repetition of this programming would call for stringent action by CRTC
321	Insufficient local news	247	This notice is a form of censure
322	Musical diversity insufficient	248	Sign attestation about log's accuracy
323	Uneven distribution of foreground	249	You can discuss with CRTC staff
324	Unauthorized language	250	Submit an annual progress report
325	Shortfall in Cat. 6 music	251	CRTC views any violation of its Regulations with serious concern
326	Insufficient local programming	252	Further non-compliance may result in another call to appear at public hearing
327	Wrong format	253	CRTC views violation of regulations, policies and licensee's own commitments with serious concern
328	Insufficient Instrumentals	254	CRTC views repeated non-compliance with concern
329	Automation not documented	255	Report in 6 months about steps taken
330	Regional news insufficient	256	CRTC expects licensees to obtain information they need to comply with FM policy
331	Excessive ads	257	CRTC discussed non-compliance at the hearing
332	Insufficient distinct selections / playlist	258	Reminder that PoP is CoL and CRTC reviews compliance when considering renewal
333	Insufficient mosaic	259	Failure to comply may jeopardize licence renewal
334	Insufficient Cancon	260	Reminder that PoP foreground policy to be maintained at all times
335	Insufficient traditional music	261	Strong expectation that will meet its commitments
336	Insufficient Cancon Cat. 6	262	Reminder that by CoL licences cannot be assigned
337	No local programming, though not a rebroadcaster	263	CRTC will not tolerate any deviation

338	Insufficient CTD \$	264	Reminder that PoP is CoL
339	Insufficient French vocal music	265	Station must show cause why licence should be renewed
340	Substantial compliance with PoP (suggests some non-compliance)	266	CRTC views failure to adhere with PoP with grave concern
341	Insufficient Cat. 3 music	267	CRTC analysts will visit to help you
		268	In last renewal station found to be in non-compliance
	<b>Broadcasting Act breached</b>	269	CRTC expects adherence to Radio Regs at all times
401	s. 28 — broadcast of partisan comment before election	270	You haven't submitted comments; please do so
402	Previous renewal decision not complied with	271	Please ensure future compliance with the regulations
403	High standard provision complaints	272	CRTC reiterates importance of adhering to regulations and PoP at all times
404	Licensee not in full control	273	CRTC has noted measures taken
405	Lack of balance	274	Report in 90 days about SRS
		275	CRTC will review performance at next renewal
<b>5</b>	<b>Inadequate programming</b>	276	CRTC views failure to comply with fundamental regulations with concern
501	Insufficient news	277	CRTC does not accept licensee's reasons for non-compliance
502	Insufficient community reflection	278	If you don't take necessary steps, CRTC may call you to hearing to show why it should not suspend your licence
503	Insufficiently Canadian orientation/content	279	CRTC views any violation of its regulations with grave concern
504	Commitment to CBC programming not met	280	If you don't take necessary steps, CRTC may call you to hearing to show cause why it should renew your licence
505	Cease original programming	281	CRTC views lack of internal balance guidelines with grave concern
506	Inadequate contribution to network entertainment	282	Submit guidelines in 3 months
507	Commercial character of programs	283	CRTC views persistent non-compliance with grave concern
508	Foreign programs chosen are too violent	284	CRTC views non-compliance with PoP with concern
509	Insufficient choice and low quality	285	CRTC may want to discuss at next hearing
510	Low-quality programming (\$)	286	Compliance expected/required at all times
511	Insufficient carriage of CBC network programs	287	
512	Provide reasonable balanced opportunity for expression of differing views	288	We trust you will take appropriate steps to ensure future compliance
513	FM Policy not fully met	289	Have the logs signed
514	Poor quality of spoken language	290	Views failure to meet regs and PoP with considerable concern
515	Concern about scheduling of news	291	Licensee's explanation is unacceptable
516	Insufficient local news	292	Submit additional information
517	Unauthorized automation	293	We want to draw this to your attention
518	You haven't submitted comments	294	We suggest a maintenance check
519	No guidelines for open-line programming in place	295	Report in 1 year on measures taken
		296	CRTC is concerned about non-compliance with PoP & regs
<b>6</b>	<b>Complaints</b>	297	Views failure to comply with concern
601	Complaints about quality of CBC affiliate service	298	Response is inadequate

602	Improved CBC service sought	299	CRTC will attach considerable importance to this regulation in coming years
603	Commercial broadcaster complained		
604	Complaint about lack of balance in programming on matters of public concern	<b>3</b>	<b>Application (unrelated to renewal) denied</b>
605	Complaint about programming content	301	Application to become rebroadcaster
606	Complaints re adherence to common ownership policy	302	Application to transfer ownership (shares)
		303	Application to provide service as an affiliate
		304	Application to provide separate programming on rebroadcasters
		305	Application to amend PoP
<b>7</b>	<b>Unauthorized control</b>		
701	Control changed contrary to CoL	<b>4</b>	<b>Legal remedy?</b>
702	Control disclosed inaccurately	401	Prosecuted
703	Control changed contrary to Act	402	Fine imposed
704	Assigned the licence to secure bank loan	403	Conviction under s. 28 election provision
		404	Conviction under s. 7(1) ad limit regulation
		405	Found not guilty
<b>8</b>	<b>Advertising practices</b>	406	CRTC dropped charges
801	Inserted commercials into rebroadcast programming		
802	Rates are too low	<b>5</b>	<b>Requirements</b>
803	Excessive ads, compared to spoken word	501	Broadcast minimum amount of weekly news
		<b>6</b>	<b>Moral suasion sanctions, continued</b>
<b>9</b>	<b>Technical/service standards</b>	601	In last renewal CRTC warned it might use other measures if additional non-compliance occurred
901	Inadequate reception	602	Please ensure future compliance
902	Signal quality	603	Station was non-compliant in previous year
903	Extend CBC service	604	We'd appreciate your giving the matter some consideration
		605	We had to remind you several times to submit self-evaluation
		606	CRTC previously denied your request to reduce traditional music
		607	Views with great concern . . . .
		608	Advisory committee
		609	Right of reply expectation
		610	Very serious concerned about repeated non-compliance
		611	Submit quarterly report
		612	Submit monthly report
		688	If further non-compliance CRTC may take any enforcement measures available under Act
		<b>7</b>	<b>CRTC Policy</b>
		701	Common ownership policy not respected
		<b>9</b>	<b>No sanctions imposed</b>
		901	No sanction discussed

## Notes:

<sup>1</sup> Parliament created the CRTC under s. 3 of the *Broadcasting Act*, R.S.C. 1967-68, c. B-11. When responsibility for telecommunications was added to the CRTC mandate in 1972, its name changed to the Canadian Radio-television Telecommunications Commission.

<sup>2</sup> S.C. 1991, c. 11 [Act].

<sup>3</sup> *Telecommunications Act*, S.C. 1993, c. 38.

<sup>4</sup> Act, *supra* note 2, Part II, ss. 9–21.

<sup>5</sup> CRTC, *Building On Success — A Policy Framework For Canadian Television*, Public Notice CRTC 1999-97 (11 June 1999).

<sup>6</sup> CRTC, *Review of Certain Aspects of the Regulatory Framework for Over-the-air Television*, Broadcasting Notice of Public Hearing CRTC 2006-5 (12 June 2006).

<sup>7</sup> *Order in Council by the Governor in Council*, P.C. 2006-519, C. Gaz. 2006.1.1577 (appended to CRTC, *Call for Comments on a Request by the Governor in Council Pursuant to Section 15 of the Broadcasting Act to Prepare a Report Examining the Future Environment Facing the Canadian Broadcasting System*, Broadcasting Public Notice CRTC 2006-72 (12 June 2006)).

<sup>8</sup> Special Senate Committee on Mass Media, *Report: The Uncertain Mirror*, vol. 1 (Ottawa: Queen's Printer, 1971). The Committee studied the mass media in general, rather than focussing on broadcasting, noting at 194 that:

... broadcasting is so much a beast of burden that we have saddled it with responsibility for holding the country and our Canadian culture intact. No other communications medium has this charge laid upon it by act of Parliament: "to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada". We rely for this on the same medium that is the principal advertising mainstay of the soap industry.

<sup>9</sup> John Charles Clifford, *Content Regulation in Private FM Radio and Television Broadcasting: A Background Study about CRTC Sanctions and Compliance Strategy*, (Ottawa: October 1983) [Clifford]; Law Reform Commission of Canada, *Policy Implementation, Compliance and Administrative Law*, Working Paper 51, (Ottawa: Law Reform Commission of Canada, 1986) [Policy implementation].

<sup>10</sup> Canada, *Report of the Task Force on Broadcasting Policy*, (Ottawa: Minister of Supply and Services Canada, 1986) [Task Force Report]. Co-chaired by Gerald Lewis Caplan and Florian Sauvageau, the report of the task force is also popularly referred to as the Caplan-Sauvageau report.

<sup>11</sup> Deterrence has been defined as the "act or process of discouraging certain behaviour particularly by fear; especially as a goal of criminal law, the prevention of criminal behaviour by fear of punishment". Bryan A. Garner, ed. in chief, *Black's Law Dictionary*, 8th ed. (Thomson, St. Paul Minn.: West, 2004) at 481.

<sup>12</sup> 4 & 5 Edw. 7, c. 49.

<sup>13</sup> Wade Rowland, "Some Milestones in Communications Technology," *Spirit of the Web: The Age of Information from Telegraph to Internet*, (Toronto: Key Porter Books, 1999); (np.) at 120. Legislation had been enacted to control telegraphy well before this time. In 1848, for instance, the Nova Scotia legislature passed the *Electric Telegraph Act* (see n. 12); s. 24 specified that no one could build any electric telegraph line or equipment without the legislature's prior approval. See "History of Nova Scotia", online <<http://alts.net/ns1625/nshist08.html>>.

<sup>14</sup> Marconi's company had exclusive rights to build any radio stations in the country. Media Awareness, "Radio in Canada: A Timeline", online: Media-awareness.ca <<http://www.media-awareness.ca/english/index/radio/timeline.htm#1800s>> (24 February 2003); Dominion Bureau of Statistics, *The Canada Year Book 1937* (Ottawa: King's Printer, 1937) at 719. XWA later became CFCF.

<sup>15</sup> Order in Council 1246 of 14 June, 1922 had transferred authority for licensing and regulating radio communications from the Department of Naval Service to the Department of Marine and Fisheries.

<sup>16</sup> F. Foster, *Broadcasting Policy Development* (Frankfost Communications Limited: Ottawa, 1982) at 6 [Foster]. The requirement to hold a private receiving station licence was abolished three decades later, on 1 April, 1953. *Ibid.*, at 154.

<sup>17</sup> *The Canada Year Book 1937*, *supra* note 14. 1922 also marked the year that the agricultural term, "broadcasting", meaning to sow seeds, was first applied to radio as a communications medium; see Brian Winston,

*Media Technology and Society A History: From the Telegraph to the Internet*, (London: Routledge, 1998) at 77.

<sup>18</sup> In 1929, the Manager of the Trans-Canada Broadcasting Company "complained that sardines had a better time in a tin than most broadcasters had in Canada's share of the broadcast band. Seventy-four Canadian stations were jammed on seventeen channels, eleven of which were shared with the United States". Foster, *supra* note 16 at 25.

<sup>19</sup> The Minister responsible for broadcasting told the House of Commons that "there is a lot of broadcasting of jazz from the United States that is not worth listening to, and I should be pleased to stop it if I could; but ... when you are near the broadcasting point you cannot escape interference. I may say that I have in my home here in Ottawa one of the latest receiving-sets of the Marconi company, but when CNRO is broadcasting I can get nothing else. ...". See *House of Commons Debates* (31 May 1928) at 3626 (Mr. Cardin).

<sup>20</sup> Hours of operation and wavelength to be used were specified within the one-year licence. *House of Commons Debates* (28 April 1930) at 1500 (Mr. Cardin).

<sup>21</sup> In Toronto, March 1928, for example, three stations shared one frequency, two stations shared a second frequency, while only one station (CKGW, owned by the Gooderham and Worts distillery company of Ontario) had a single frequency all to itself. *House of Commons Debates* (31 May 1928) at 3623 and 3627.

<sup>22</sup> Although the first and second Radio Conventions took place in Berlin, Germany in 1903 and 1906, respectively, the first one to deal with "radio" as we use it today was the International Radio Telegraph Convention, held in London, England in 1912; see Foster, *supra* note 16 at 1, 3. Even by 1912, radio was primarily used in ship-to-ship and ship-to-shore communications: *ibid.*, at 9. The first conference to deal with new uses of radio frequency spectrum happened in 1927, in Washington, and was marked by Canada's insistence on its right to vote independently from Great Britain: *ibid.*, at 21.

<sup>23</sup> During the 1920s the "lack of effective controlling legislation over American operators and of an equitable international agreement between [Canada and the United States] Canadian air channels were subject to continual invasion and appropriation during this period.

The U.S. stations [with 680,000 watts in combined power in 1932] were ... better financed and a great deal more powerful than their Canadian counterparts [with 50,000 watts in combined power in 1932]". Negotiations between the two countries over channel allocations broke down by 1928. D. Ellis, *Evolution of the Canadian Broadcasting System: Objectives and Realities, 1928-1968* (Ottawa: Department of Communications, 1979) at 1-2 [Ellis]. The negotiations appeared to have ended because the United States representatives in the negotiations demanded a division "based primarily on the relative populations of the two countries", a proposal that Canada's representatives did not accept. *House of Commons Debates* (31 March 1930) at 1086 (Mr. Cardin). Apparently, Canada had originally sought use of 12 channels to serve an area 3,000 miles long and 600 miles wide, while the U.S. had proposed fewer than 6 exclusive channels, possibly only 4: see Foster, *supra* note 16 at 16-17 and 22.

Money and wattage aside, the U.S. courts decided earlier that American stations using Canadian channels without licensing authority were not guilty of "air piracy" because ambiguity in the *Wireless Telegraph Act* left the U.S. Secretary of Commerce unable to deny licence applications or to assign specific channels to individual radio stations. As a result, "U.S. stations were free to occupy other Canadian 'clear' channels — which they did." *ibid.* at 14. Even "repeated warnings from the [U.S.] government and ... personal appeals from members of the President's Cabinet that national good faith and international goodwill were at stake" did not dissuade private American broadcasters from continuing to appropriate Canadian frequencies: *ibid.* at 17.

In 1937 Canada organized the Havana Conference; its attendees (including the United States, Mexico and Cuba as well as other countries in the Americas) agreed on the allocation of radio frequencies to reduce interference. CRTC, "The CRTC's Origins" online: CRTC Homepage <<http://www.crtc.gc.ca/eng/BACKGRND/Brochures/B19903.htm>> (date accessed: 2 November 2002). Yet lack of control over Canadian airwaves continued until 1938: by then, American broadcasters unable to secure wave lengths in the United States had "simply moved over to Mexico and established high-power stations there using exclusive Cana-



dian channels. The result [was] that not one of the six channels allotted to [Canada] [was] free from interference from Mexican sources". *House of Commons Debates* (8 February 1938) at 246 (Mr. Howe).

<sup>24</sup> *House of Commons Debates* (31 May 1928) at 3622 (Mr. Guthrie). The Minister's department had apparently received a single complaint about the licensee's programming, "months and months" earlier: *ibid.*, at 3621 (Mr. Woodsworth).

<sup>25</sup> *Ibid.*, at 3626 (Mr. Cardin).

<sup>26</sup> *Ibid.*, at 3623 (Mr. Guthrie).

<sup>27</sup> *Ibid.* The House of Commons was told that the licence was cancelled because the Bible Students' programs "condemned" other religious bodies, "declared there was one law for the rich and another for the poor", "opposed ... military service" and "hogged the air": *ibid.* at 3620-3621 (Mr. Woodsworth).

<sup>28</sup> According to the acting Leader of the Opposition, in "this very important question of radio telegraphy [t]he only policy we have to-day is one of absolute autocracy and dictatorship in regard to the use of the air for radio services": *ibid.*, at 3622 (Mr. Guthrie).

<sup>29</sup> At the time, frequencies were shared among stations because of spectrum scarcity: the Radio Branch usually issued one channel or frequency to an area or city, but granted three licences to use the channel. One was granted to the owner of the broadcasting equipment, and the other two were granted to the "phantom stations". All three stations shared the broadcast time of the channel, and each was assigned its own call sign: see Foster, *supra* note 16 at 12-13.

The opposition challenged the government's motives in first giving the frequency that United Radio had been authorized to use "half-time", to a relatively low-powered station owned by the *Toronto Star*, and then revising conditions of use of other, higher-powered stations in the Toronto area so that the *Toronto Star* station was able to use the frequency full-time. The opposition asserted that "preference [had been] given to the [broadcasting] system run in connection with the *Toronto Star* newspaper, a newspaper which has always been very strong in its support of the present government". *House of Commons Debates* (31 May 1928) at 3624 (Mr. Guthrie).

While the Minister of Marine and Fisheries later said that "it is more proper to grant a broadcasting licence to a newspaper [than] to a distillery or to any other company", he also pointed out that licences had been granted to the *London Free Press* and *Halifax Herald*, newspapers that were "not Liberal". *House of Commons Debates* (1 June, 1928) at 3662 (Mr. Cardin).

<sup>30</sup> In announcing the commission, the Minister told the House: "We have made up our minds that a change must be made in the broadcasting situation in Canada. We have reached a point where it is impossible for a member of the government or for the government itself to exercise the discretionary power which is given by the law and by the regulations as they stand today, for the very reason that the moment the minister in charge exercises his discretion, the matter becomes a political football and a political issue all over Canada. This is not desirable. ... We should ... take radio broadcasting away from the influences of all sorts which are brought to bear by all shares of political parties. This will avoid much trouble for the minister and for the government, and I think will result in greater satisfaction to the public at large." *Ibid.* at 3662 (Mr. Cardin).

<sup>31</sup> Bearing in mind the accusations made about interference in the licensing process, it is interesting to note that the second member of the three-member Commission was Charles Bowman, Editor of the *Citizen* newspaper in Ottawa. The third Commissioner was Dr. Augustin Frignon, Director of Montreal's Polytechnic School. Foster, *supra* note 16, at 29; "Report ... from the Minister of Marine and Fisheries" *Canada Gazette* (19 January 1929) 2306 at s. 12.

<sup>32</sup> At the time, noted the Commission, Canadian broadcasting consisted of ... stations owned by private enterprise and with the exception of two, owned by the Government of Manitoba, are operated by the licensees for purposes of gain or for publicity in connection with the licensees' business. We believe that private enterprise is to be commended for its effort to provide entertainment for the benefit of the public with no direct return of revenue. This lack of revenue has, however, tended more and more to force too much advertising upon the listener. ...

Royal Commission on Radio Broadcasting, *Report*, (Ottawa: September 1929) at 6.

<sup>33</sup> *Ibid.*

<sup>34</sup> Federal jurisdiction over broadcasting was confirmed in *Re Regulation and Control of Radio Commission in Canada*, [1932] A.C. 304.

<sup>35</sup> S.C. 1932, c. 51.

<sup>36</sup> Media Awareness, *supra* note 14.

<sup>37</sup> For a time those who owned radios were also required to obtain licences. The Navy's Radio Branch began licensing household radio (receiving) sets) in September 1922 "... to give the government a measure of control if it were needed. The authorities were of the opinion they could refuse to grant a licence for a household receiver to anyone who was suspected of subversive activities". Foster, *supra* note 16 at 6-7.

The radio receiver licence fee was abolished on 1 April 1953, replaced by excise tax on receivers and parts: see CBC, *Annual Report 1952-53*, (Ottawa: 1953) at 5.

<sup>38</sup> See, e.g., Canada, Royal Commission on Radio Broadcasting, *Report*, (Ottawa: September 1929) at 5-6 (Chair: Sir John Aird).

<sup>39</sup> *Canadian Broadcasting Act*, 1936, 1 Edw. 8, c. 24, s. 3.

<sup>40</sup> S.C. 1958, c. 22.

<sup>41</sup> Under s. 10, Parliament's objective for the BBG was

... insuring [*sic*] the continued existence and efficient operation of a national broadcasting system and the provision of a varied and comprehensive broadcasting service that is basically Canadian in content and character.

<sup>42</sup> *House of Commons Debates* (1 November 1967) (Hon. Judy LaMarsh, Secretary of State) at 3748. Ms. LaMarsh noted that the BBG's percentage-based formula for Canadian content

... has failed in practice to implement what Parliament clearly intended in the 1958 Act. ... Since many broadcasting stations have seized the opportunity to meet the quota imposed on them by regulation by broadcasting Canadian programs that cost the least possible amount of money at times when the audience is negligible or non-existent. ...

<sup>43</sup> Foster, *supra* note 16 at 216.

<sup>44</sup> 1967-1968, c. 25, s. 1 [1968 *Broadcasting Act*].

<sup>45</sup> One element of the broadcasting system that had led to concerns about the BBG's effectiveness consisted of broadcast redistribution undertakings — cable companies. These services typically originated no programming of their own, but re-transmitted local and other signals to their subscribers. Subscribers to such services not only obtained access to more signals, but to improved picture clarity.

Although cable services were licensed by the federal Department of Transport beginning in the early 1950s on the recommendation of the BBG, jurisdiction over program re-distribution services was not clearly established in Canadian broadcasting legislation until the 1968 *Broadcasting Act*. The Act incorporated program re-distribution services within the concept of "broadcaster". (Foster, *supra* note 16 at 246-247). The new broadcasting legislation explicitly dealt with cable. Under s. 2 of the 1968 legislation, "broadcasting undertaking" included broadcasting undertakings whose transmissions were intended for the public (radio and television services), networks (which typically did not transmit to the public, but to network affiliates who then transmitted programming to the public) and broadcast receiving undertakings (cable companies).

<sup>46</sup> 1968 *Broadcasting Act*, *supra* note 44, s. 15.

<sup>47</sup> During the mid-1980s the CRTC's Chairman commented that,

... [t]he Commission's relationship with the government is such that the CRTC has been described as an agency of the most independent type — mainly because it makes its own regulations and decisions, following broad public input and without prior government approval.

André Bureau, "Notes for an Address" Law Society of Upper Canada, Conference on Communications Law and Policy (Toronto: 25 March 1988), at para. 5.

<sup>48</sup> *Supra* note 44, ss. 16(1)(a), (b), (c). The CRTC's authority was never absolute. The Governor in Council had the authority to issue directions to the CRTC from time to time (s. 27(1)), and to set aside or refer back to the CRTC for reconsideration and hearing, "[t]he issue, amendment or renewal by the Commission of any broadcasting licence" (s. 23(1)).

<sup>49</sup> *Supra* note 44, ss. 17(1)(a) and (b).

<sup>50</sup> *House of Commons Debates* (1 November 1967) (Hon. Judy LaMarsh, Secretary of State) at 3748.

<sup>51</sup> *Ibid.*, at 3749.

<sup>52</sup> Under s. 24(1)(b)(i), "No broadcasting licence shall be revoked or suspended ... unless, after a public hearing ... the person to whom the

broadcasting licence was issued has violated or failed to comply with any condition thereof. . . .": see 1968 *Broadcasting Act*, *supra* note 44.

<sup>53</sup> *Supra* note 44, s. 17(d).

<sup>54</sup> *Supra* s. 24(1)(a) and (b). From the 1920s through to 1968 it was not uncommon for non-Canadians to operate Canadian broadcasting services. General Tire and Rubber Co. of Akron, Ohio, for instance, controlled R.K.O. Distributing Corporation of Canada Limited, and in turn Western Ontario Broadcasting Co. Ltd, the licensee of CKLW, CKLW-FM and CKLW-TV in Windsor, Ontario: see Foster, *supra* note 16 at 261.

In the 1968 *Broadcasting Act* Parliament took the first steps towards reducing foreign control over Canadian broadcasting, by requiring that the CRTC comply with directions issued by the Governor in Council. S. 24(1)(b)(ii) enabled the CRTC to revoke or suspend the licence of any person listed in a direction from the Governor in Council, and Order in Council P.C. 1969-2229 (20 November 1969) SOR/69-590, *Canada Gazette Part II* (10 December 1969) at 1695, as amended, directed the CRTC to neither issue to nor renew broadcasting licences held by non-Canadian citizens, corporations or governments.

<sup>55</sup> *Supra* note 44, s. 29(1).

<sup>56</sup> *Supra* note 44, s. 29(3). S. 29(2) stipulated that broadcast licensees who violated s. 28 (related to political broadcasts) were also "guilty of an offence and . . . liable to summary conviction to a fine not exceeding five thousand dollars".

<sup>57</sup> *Task Force Report*, *supra* note 10 at 176, citing Daniel Jay Baum, "Broadcasting Regulation in Canada — The Power of Decision" (1975) 13 *Osgoode Hall L.J.* 693. While every decision or order of the Commission was "final and conclusive" (see *supra* note 44, s. 25), decisions and orders could be appealed to the Federal Court of Appeal, with the Court's leave, on a question of law or jurisdiction (see *supra* note 44, s. 26(1)).

<sup>58</sup> C.C. Johnson, *The Canadian Radio-television and Telecommunications Commission: A Study of Administrative Procedure in the CRTC* (Study Paper) (Ottawa: Ministry of Supply and Services, 1980) at 121.

<sup>59</sup> Clifford, *supra* note 9 at para. 460 (emphasis in original).

<sup>60</sup> *Ibid.* at para. 461 (emphasis in original).

<sup>61</sup> *Policy implementation*, *supra* note 9 at 22.

<sup>62</sup> *Task Force Report*, *supra* note 9 at 178.

<sup>63</sup> S. 3 ("Broadcasting Policy for Canada") of the 1968 *Broadcasting Act* comprised 10 subsections; the same section in the *Broadcasting Act, 1991* contains 20 subsections related to broadcasting policy.

<sup>64</sup> *Supra* note 2, s. 5(2).

<sup>65</sup> *Supra* note 2, ss. 9(1)(a) & 10.

<sup>66</sup> *Supra* note 2, ss. 9(b) & 9(b)(i).

<sup>67</sup> *Supra* note 2, s. 9(1)(e).

<sup>68</sup> *Supra* note 2, ss. 32(2)(a) & (b), respectively. Penalties increase with subsequent offences, to a maximum of \$50,000 for individuals, and \$500,000 for corporations.

<sup>69</sup> *Supra* note 2, ss. 787(1) & 735(1)(b), respectively.

<sup>70</sup> *Supra* note 2, s. 33. In the 1968 legislation, breaching a condition of licence constituted a ground for the suspension or revocation of a broadcast licence.

<sup>71</sup> *Supra* note 2, s. 12(2).

<sup>72</sup> *Supra* note 2, s. 13(1). S. 13(2) explains the procedure for transforming a section 12(2) order into an order of the court.

<sup>73</sup> *Supra* note 2, s. 31(2).

<sup>74</sup> Approximately 100 conventional television stations, 500 conventional radio stations, several hundred pay and specialty services, and several hundred cable and other distribution systems.

<sup>75</sup> CRTC, *Application to Obtain a Broadcasting Licence to Operate Commercial Radio Undertaking (Including Low-power) General Instructions*, online: CRTC <<http://www.crtc.gc.ca/ENG/forms/efiles/f101.htm>>.

<sup>76</sup> See s. 1.3 d) in CRTC, *Application to Renew Broadcasting Licence for a Commercial Radio Programming Undertaking*, online: CRTC <<http://www.crtc.gc.ca/ENG/forms/efiles/f106.htm>>.

<sup>77</sup> The *Broadcasting Information Regulations, 1993* and *Broadcasting Licence Fee Regulations, 1997* apply to all broadcasters, and specify requirements for licensees to provide information to the CRTC as requested, as well as the calculations of the fees paid by licensees for use of the publicly owned airwaves.

<sup>78</sup> *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212.

<sup>79</sup> S. 8(1)(a) of the CRTC's Radio Regulations, 1986, SOR/86-982 requires each licensee to "keep, in a form acceptable to the Commission, a program log or a machine readable record of the matter broadcast by the licensee". S. 8(1)(c) specifies the information to be included in the program log, which includes the time of broadcast, the duration and the origin of the programming content. Under s. 8(1)(b), licensees must retain this log for one year after the programming material was broadcast. S. 8(4) requires licensees to submit the log along with a certificate attesting to the accuracy of its contents if the CRTC so requests. Broadcast distribution undertakings, such as cable and satellite distribution systems need not keep these logs, however, since they typically re-distribute the programming that television and radio services originate and already describe in their program logs.

<sup>80</sup> S. 9(2) of the CRTC's Radio Regulations, 1986, *ibid.*, for instance, requires each licensee to submit an annual return describing its financial situation, while s. 8(6) of the same regulations requires a licensee to submit to the CRTC "a clear and intelligible" recording or copy of the material it has broadcast within the preceding four weeks.

<sup>81</sup> CRTC, *Broadcasting Policy Monitoring Report 2006* (Ottawa: 2006) at 27.

<sup>82</sup> Radio Regulations, 1986. *Supra* note 79, s. 2.2(8). S. 2.2(9) stipulates that at least 35 per cent of the musical selections aired between 6 a.m. and 6 p.m. from Monday to Friday must be Canadian.

<sup>83</sup> Television Broadcasting Regulations, 1987 S.O.R./87-49, s. 4(6). The broadcast year comprises the total hours broadcast by a licensee from 6 a.m. to midnight each day.

Levels of Canadian content for pay and specialty television or audio services are set by condition of licence.

<sup>84</sup> CRTC, *Letter to Operations Manager, Telephone City Broadcast Limited*, (3 May, 2002) at 2: "... we draw your attention to the quality of the CD containing the programming for September 30, October 1 and 2, 2001. This CD is badly scratched and as a result, some of the programming was not easily accessible".

<sup>85</sup> CRTC, *Broadcasting Policy Monitoring Report*, (Ottawa: 2000) at 14 (Table 15); CRTC, *Broadcasting Policy Monitoring Report 2001*, (Ottawa: 2001) at 17 (Table 18); CRTC, *Broadcasting Policy Monitoring Report 2002*, (Ottawa: 2002) at 29 (Table 22); CRTC, *Broadcasting Policy Monitoring Report 2003*, (Ottawa: 2003) at 29 (Table 2.23); CRTC, *Broadcasting Policy Monitoring Report 2004*, (Ottawa: 2004) at 35 (Table 2.23); and CRTC, *Broadcasting Policy Monitoring Report 2005*, (Ottawa: 2005) at 14 (Table 15).

Data for 2006 are available, but may not be comparable to the data of previous years. In 2006, the CRTC, for the first time, presented separate data for Popular (category 2) music stations, for Special interest (category 3) music stations, and for French-language vocal music stations. Within each of these groups the CRTC showed results separately for commercial and for not-for-profit stations (including the CBC and community stations and networks). The CRTC did not reproduce data for previous years using the new format. Since it is unknown what stations were included in the previous years' reports, it is unknown whether the 2006 data are comparable with the data of the preceding years. The 2006 data are therefore not shown here, but are available online at CRTC, "Reports and Other Publications", online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports.htm#monitoring>>.

<sup>86</sup> Senate Standing Committee on Transport and Communications, *Proceedings*, (25 September 2003) (Charles Dalfen) [Senate Transcript].

<sup>87</sup> CRTC, *A Review of Broadcasting Concerns in Windsor, Ontario*, Public Notice CRTC 1984-22 (23 January 1984).

<sup>88</sup> CRTC, *CJMF-FM Ltée*, Decision CRTC 84-209 (29 February 1984). The licensee had not broadcast the minimum levels of foreground and music content to which it had committed.

<sup>89</sup> CRTC, *Provision of Logger-tapes Regulations*, Public Notice CRTC 1986-268 (29 September 1986). The Public Notice noted that 9 licensees had breached this regulation.

<sup>90</sup> CRTC, *Compliance with the Provisions of the Radio Regulations, 1986 Relating to Logger-tapes*, Public Notice CRTC 1993-122 (19 August, 1993).

<sup>91</sup> CRTC, *Practices Regarding Radio Non-Compliance*, Circular No. 444 (7 May 2001) at paras. 3-4.

<sup>92</sup> CRTC, *Grasslands FM Swift Current*, Decision CRTC 95-73 (1 March 1995).

<sup>93</sup> CRTC, *Campus Laval FM Inc.*, Decision CRTC 96-734 (6 November 1996).

<sup>94</sup> In September 2003, when Senator Laurier LaPierre asked Charles Dalfen, "How many times has [the CRTC removed a licence from someone who breached the terms of the licence] since the birth of this kind of control that we have had through the Board of Broadcast Governors?", Mr. Dalfen replied, "I have the answer to that, zero. ... Licences have been given up voluntarily in various cases, but compulsory giving up for offences, not to my knowledge. I do not think we have ever revoked a licence. ... The ultimate weapon of revocation denies that service to the public so the threshold is understandably very high." Senate Transcript, *supra* note 86.

<sup>95</sup> In CRTC, *Public Announcement* (26 February 1973), regarding Decision CRTC 73-71, the CRTC revoked the licence of Wawa Cable Vision Limited because the licensee (after several renewals granted to allow it to improve service) was "unable to provide an adequate service to the area licensed to it".

In CRTC, *Revocation of the Licence for the Cable Distribution Undertaking that was to Serve Saints-Anges, Quebec, Issued to Huges Roberge, Doing Business under the Name and Style of "Telecâble Saints-Anges Enr."*, Decision CRTC 91-883 (17 December 1991), the CRTC revoked the licence held by Huges Roberge because, although it had issued the licence in October 1988, the licensee had by 1991 failed to implement it. The CRTC, therefore, called the licensee to a public hearing in March 1991, where it promised to be in operation in October 1991. However, by the end of October 1991, it still had not implemented the licence. CRTC therefore revoked the licence and announced it would call for applications to serve the area.

<sup>96</sup> CRTC, *CFBC-FM Saint John*, Decision CRTC 77-418 (20 July 1977); CRTC *CFCQ-FM Trois-Rivières*, Decision CRTC 87-192 (20 March 1987); CRTC *CHIN-FM Coaticook*, Decision CRTC 87-756 (17 September 1987); CRTC, *CFOU-FM Sainte-Thérèse*, Decision CRTC 87-949 (23 December 1987); CRTC, *CHIN Toronto*, Decision CRTC 70-72 (25 March 1970); CRTC, *CHNL-FM Kamloops*, Decision CRTC 81-894 (16 December 1981); CRTC, *CHOI-FM Quebec City*, Decision CRTC 2004-271 (3 July 2004); CRTC, *CHSM Steinmach*, Decision CRTC 89-523 (28 July 1989); CRTC, *CIGO Port Hawkesbury*, Decision CRTC 89-614 (29 August 1989); CRTC, *CION-FM Rivière-du-Loup*, Decision CRTC 87-754 (17 September 1987); CRTC, *CJLS Yarmouth*, Decision CRTC 68-44 (3 October 1968); CRTC, *CJLX Thunder Bay*, Decision CRTC 73-19 (12 January 1973); CRTC, *CJMF-FM Quebec City*, Decision CRTC 84-209 (29 February 1984); CRTC, *CJRN Niagara Falls*, Decision CRTC 88-887 (23 December 1988); CRTC, *CKLE-FM Rimouski*, Decision CRTC 87-753 (17 September 1987).

<sup>97</sup> *CJMF-FM Ltée v. Canadian Radio-television and Telecommunications Commission*, [1984] F.C.J. No. 244 (Appeal No. A-398-84) (F.C.A.). The licensee of CJMF-FM appealed to the Federal Court of Appeal after the CRTC refused to renew its licence for CJMF-FM on the grounds that it had not lived up to its promise of performance. The Court dismissed the appeal, noting (per Pratte J.) that:

[a]pplicant's second argument, based on freedom of expression ... must also be dismissed. Applicant had obtained the licence some years earlier because it promised to broadcast certain types of musical program. It did not keep this promise, and the Commission concluded had made no effort to do so. In these circumstances, it appears to the Court that the Commission could base its refusal to renew applicant's licence on the latter's conduct without infringing the freedom of expression of applicant or contravening the Charter.

In a second case from 1984, the Federal Court of Appeal commented that under the *Canadian Charter of Rights and Freedoms* freedom of expression does not refer to a right to use property (the spectrum), but relates to the ability to

...communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property subject to the licensing and other provisions of the *Broadcasting Act*.

The Court continued on to say that the freedom of a licensee such as the appellant

... to broadcast what it wishes to communicate would not be denied by the refusal of a licence: it would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by paragraph 2(b) does not include a right for anyone to use the property of another or a public property, the use of which is governed by statute, there is no need to resort to the limitation clause in section 1 of the Charter to justify the licensing system established by the Act.

*Re New Brunswick Broadcasting Co. and Canadian Radio-television and Telecommunications Commission* (1984), 13 D.L.R. (4th) 77, [1984] 2 F.C. 410 (F.C.A.), leave to appeal to S.C.C. granted (3 December 1984). The appeal to the S.C.C. was later dismissed on consent without costs when Cabinet's Direction to the CRTC, which prohibited newspaper owners to hold broadcast licences (and under which direction the CRTC had not renewed the licence of New Brunswick Broadcasting Co., was revoked by OIC P.C. 1985-1735 (30 May 1985, SOR/85-492).

These cases occurred when the courts had had little experience in interpreting the *Canadian Charter of Rights and Freedoms*, however. More recently, however, the Federal Court of Appeal dismissed a challenge mounted by Genex Communications Inc. against the CRTC's decision not to renew its licence; Genex had argued in part that the decision infringed its freedom of expression: see *Genex Communications Inc. v. Canada (Attorney General) and Canadian Radio-television and Telecommunications Commission*, 2005 FCA 283 (F.C.A.).

<sup>98</sup> *Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission*, [1971] S.C.R. 906, 19 D.L.R. (3d) 290 (S.C.C.). In this case, the CRTC renewed the CKPM's licence for 9 months. The CRTC would then accept applications to use its frequency, but denied Confederation status to apply for a further renewal. The Supreme Court of Canada held that the CRTC had no authority under the 1968 *Broadcasting Act* to restrict applicants' right to apply for renewal, and ordered the CRTC to rehear the matter. Following the appeal, the CRTC granted a 1-year renewal to Confederation in CRTC, *Ottawa-CKPM*, Decision CRTC 72-6 (21 Jan 1972). Confederation sold the station several months later. CRTC, Decision CRTC 72-99 (21 April 1972).

<sup>99</sup> *Canadian Radio-television and Telecommunications Commission v. CTV Television Network Limited et al.*, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193, rev'g [1981] 2 F.C. 248, 116 D.L.R. (3d) 741 (F.C. C.A.). In this case television network CTV appealed the CRTC's decision to impose a condition of licence concerning Canadian programming content on its licence. The Federal Court of Appeal had rejected CTV's arguments that CRTC had no substantive jurisdiction to impose licence conditions of this kind, but that the Commission had breached the rules of natural justice by failing to give adequate notice of the particular condition being considered. The Court, therefore, set aside the decision and referred the matter back to the CRTC for reconsideration. On appeal by the CRTC and CTV to the Supreme Court, the Court restored the CRTC's decision, finding that the *Broadcasting Act* conferred broad authority on the CRTC, and that no breach of natural justice had occurred.

<sup>100</sup> CRTC, *Licence to Carry On a Broadcasting Transmitting Undertaking*, (CJRP, Licence Number 80-837-85) of 1 April 1981. See also CKCL — Licence Number 85-269-89) of 1 October 1985. Regulatory prohibitions regarding the transfer of licences, or changes in undertakings' control existed from the earliest days in broadcasting. Concerns about unauthorized transfers of licences are longstanding: a 1923 "Licence to use Radio" included the statement at s. 21, that "[e]xcept with the consent in writing of the Minister, the licensee shall not assign or sublet this licence". Department of Marine and Fisheries, "Licence to use Radio" (18 April 1923), Public Archives of Canada, RG 97, Vol. 149, 6206-72-1.

<sup>101</sup> In some cases, every broadcaster of a class has received the same condition of licence. From the late 1980s to the mid-1990s, for instance, the CRTC imposed identical conditions of licence related to children's advertising and gender portrayal to every radio and television broadcaster licence. The legality of using conditions of licence to regulate the behaviour of an entire class of licence has apparently never been challenged before the Federal Court of Appeal.

<sup>102</sup> Foster, *supra* note 16 at 274. A 1964 BBG regulation required FM broadcasters to carry separate FM programming for at least two hours daily (SOR/64-249).

<sup>103</sup> Initially, FM broadcasters were required to specify the amount (in hours and minutes), and percentage of time they would allocate between 6 a.m. and midnight, in a "Promise of Performance" as follows: Total

Broadcast Time, News, Community Services, Backgrounding, Hobbies, Games, Crafts, Skills, Sports, Human Interest, Spoken Word — Other, Music — General, General Popular, Rock and Rock-Oriented, Country and Country-Oriented, Folk-Oriented, Jazz-Oriented, Music Traditional and Special Interest, Classic, Opera, Operetta and Musical, Folk, Jazz, Non-Classic Religious, Production, and Advertising and Station Con- tests.

<sup>104</sup> Clifford, *supra* note 9 at para. 68.

<sup>105</sup> CRTC, *Radio QX-FM Inc.*, Decision CRTC 85-696 (23 August 1985).

<sup>106</sup> In Decision CRTC 85-359 (22 May 1985), the Commission said that to be fair to licensees competing in the same market and to safeguard the integrity of its licensing process, it was "not prepared to render decisions on applications for amendments to FM licences until it has made the required analyses to assess whether the licensees were operating in compliance" with their conditions of licence.

<sup>107</sup> CRTC, *VOCM Radio Newfoundland Limited*, Decision CRTC 87-932 (17 December 1987).

<sup>108</sup> CRTC, *Proposed Guidelines for Open Line Programs*, Public Notice CRTC 1988-121 (29 July 1988).

Recently, Fundy Broadcasting Co. Limited pleaded guilty to charges laid against it for contravening paragraph 3(b) of the *Radio Regulations, 1986* concerning abusive comments relating to Jews and Blacks aired by radio station CFBC, Saint John, New Brunswick on 6 November 1987. These comments were made during a guest appearance by Mr. Terry Long of the Aryan Nation group on a CFBC open line program.

(emphasis in original)

<sup>109</sup> CRTC, *Non-Compliance by Radiomutuel Inc. with Provisions of the Radio Regulations, 1986 with Respect to Canadian Content and French-language Vocal Music* Public Notice CRTC 1994-105 (23 August, 1994) at 3.

<sup>110</sup> CRTC, *Radio Carleton Inc.*, Decision CRTC 98-124 (17 April 1998) at para. 11.

<sup>111</sup> CRTC, *Broadcast Policy Monitoring Report*, (Ottawa, 2000) at 14, Table 15.

<sup>112</sup> *Ibid.*

<sup>113</sup> The remaining services consist of the CBC's radio services and religious radio services. Although the data exclude information concerning full-time rebroadcasters, they include data concerning part-time rebroadcasters such as CFTH-FM-2, a community radio station in La Tabatière, Quebec, as the CRTC might address regulatory issues regarding the originating content offered by such stations.

<sup>114</sup> According to the CRTC's *Broadcast Policy Monitoring Report 2005*, Table 1.2, online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2005/bpmr2005.htm>>, there were 602 AM and FM private commercial stations, 90 Type A or B community radio stations, and 43 community-based campus radio stations.

<sup>115</sup> These documents were published separately. Until the mid-1980s, the CRTC also compiled and published volumes of decisions and public notices each year, regrettably without a subject index. The BBG also published its decisions and announcements; these are available at the CRTC's library.

<sup>116</sup> Other terms included "logger-tape", "abusive", "offensive", and "high standard".

<sup>117</sup> The CRTC usually alerts broadcasters to instances of non-compliance through written correspondence. For example, when it found that CKRW was in breach of a regulatory requirement, the CRTC advised the station about the breach, writing that

[t]he Commission would appreciate being kept informed of the specific measures taken to ensure that the problem which arose does not recur. The Commission expects you to comply fully and at all times with section 8 of the *Radio Regulations, 1986*.

See CRTC, *Letter to CKRW Radio* (23 August 1990).

Some elements of these public examination files, such as completed application forms, are now being made available online, but for the most part the CRTC's correspondence with its licensees is only available in its public examination files

<sup>118</sup> Unfortunately, it became clear that the CRTC public examination files were often incomplete. In some cases CRTC decisions referred to specific programming analyses it had conducted to determine levels of Canadian content, levels of advertising or FM station format. Reviewing

the relevant station files found that, contrary to CRTC practice, these analyses were not consistently placed on the public examination files.

<sup>119</sup> National Archives has materials related to CRTC operations, but virtually no information about individual licensees.

<sup>120</sup> The CRTC attempted to computerize licence applications and conditions of licence beginning in 1979, but discontinued the project in 1980 due to budget cuts. Clifford, *supra* note 9 at para. 78.

<sup>121</sup> Stacked vertically, the public examination files for CHOI-FM alone are close to a metre high.

<sup>122</sup> In order to determine whether musical selections are Canadian, CRTC analysts have compiled, and continue to maintain, information about performing artists' selections as well as the location where recordings were made. Very new or rarely played selections may not be included in the Commission's database.

<sup>123</sup> CRTC, *Radio MF Charlevoix*, Decision CRTC 92-627 (25 August 1992).

<sup>124</sup> CRTC, *Canadian Broadcasting Corporation*, Decision CRTC 75-305 (Ottawa, 18 July 1975).

<sup>125</sup> Canadian Communications Foundation, "Canada's Broadcasting History", online: <<http://www.broadcasting-history.ca/index2.html>>.

<sup>126</sup> CRTC, *CFCP Radio Ltd.*, Decision CRTC 88-326 (11 May 1988) provides an example. CFNI Port Hardy was unable to provide tapes for 19 March 1987. The tapes for 18 June 1987 were unintelligible for almost six hours and the tape for 1 September 1987 was "incomplete, with 25 minutes missing, and of poor quality due to variable tape speed and a high level of static interference".

The problems were sometimes minor. In CRTC, *Letter to CHLO Radio Limited* (18 June 1990) the CRTC noted that

... play-back of the logger-tape reveals that approximately 2:33 minutes were missing at 17:00 and 8:00 minutes were missing at 23:00. May I suggest that changing your logger-tapes shortly after midnight would alleviate this problem.

<sup>127</sup> CRTC, *Letter to Vice-President, Industry Affairs, CHUM Limited*, (15 July, 1997) Report #4 ("Canadian Content Analysis (Category 2)").

<sup>128</sup> CRTC, *Haliburton Broadcasting Group Inc.*, Decision CRTC 99-404 (31 August, 1999).

<sup>129</sup> CRTC, *Radio One Broadcasting Corporation*, Decision CRTC 99-502 (17 November 1999) at para. 4; CRTC, *Pelmorex Radio Inc.*, Decision CRTC 95-136 (Ottawa, 7 April 1995).

<sup>130</sup> CRTC, *Grand Slam Radio Inc.*, Decision CRTC 2000-766 (21 December, 2000) at para. 10.

<sup>131</sup> CRTC, *Fundy Broadcasting Co. Limited*, Decision CRTC 77-418 (20 July 1977) [re CFBC-FM]; CRTC, *Téléduc Inc.*, Decision CRTC 87-192 (20 March 1987) [re CFQC-FM]; CRTC, *Coaticook FM Inc.*, Decision CRTC 87-756 [re CFIN-FM]; CRTC, *Radio communautaire des Basses-Laurentides*, Decision CRTC 87-949 (23 December 1987) [re CFOU-FM]; CRTC, *Public Announcement*, Decision CRTC 70-72 (25 March 1970) [re CHIN]; CRTC, *NL Broadcasting Ltd.*, Decision CRTC 81-894 (16 December 1981) [re CHNL-FM]; CRTC, *Genex Communications Inc.*, Broadcasting Decision CRTC 2004-271 (13 July 2004) [re CHOI-FM]; CRTC, *Golden West Broadcasting Ltd.*, Decision CRTC 89-523 (28 July 1980) [re CHSM]; CRTC, *Eastern Group of Companies Limited*, Decision CRTC 89-614 (29 August 1989) [re CIGÓ]; CRTC, *Communications communautaires des Portages*, Decision CRTC 87-754 (17 September 1987) [re CION]; CRTC, *Public Announcement*, Decision CRTC 68-44 (3 October 1968) [re CJLS]; CRTC, *Public Announcement*, Decision CRTC 73-19 (12 January 1973) [re CJLX]; CRTC, *CJMF-FM Ltée.*, Decision CRTC 84-209 (29 February 1984) [re CJMF-FM]; CRTC, *CJRN 710 Inc.*, Decision CRTC 88-887 (23 December 1988) [re CJRN]; and CRTC, *Radio communautaire du Bas St-Laurent Inc.*, Decision CRTC 87-753 (17 September 1987) [re CKLE-FM].

<sup>132</sup> Decision CRTC 84-209.

<sup>133</sup> CRTC, *Radio CHOQ Inc.*, Decision CRTC 84-653 (16 August 1984).

<sup>134</sup> See Public Notice CRTC 1986-269, and Decision CRTC 87-845. A similar problem — revocation of a licence, subsequent re-licensing of the licensee and non-compliance afterwards — occurred in a number of other cases.

<sup>135</sup> CRTC, 1976-1977 Annual Report, (Ottawa: 1977) at 20

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

- <sup>138</sup> *Ibid.*
- <sup>139</sup> *Ibid.*
- <sup>140</sup> *Ibid.*
- <sup>141</sup> *Ibid.*
- <sup>142</sup> The CRTC may also issue short-term renewals for administrative reasons unrelated to compliance. In the data set, only stations for which the CRTC granted short-term renewals specifically due to non-compliance were coded as receiving short-term renewals due to non-compliance.
- <sup>143</sup> Clifford, *supra* note 9 at para. 22.
- <sup>144</sup> Examples include: CFAI-FM, CFBC-FM, CFCB, CFCR-FM, CFDA, CFEI-FM, CFGL-FM, CFIN, CFJR, CFLG-FM, CFLM, CFLX-FM and CFMF-FM.
- <sup>145</sup> At times the CRTC appears to plead for compliance:
- [t]he Commission notes that this is the fourth time in five years that the licensee has submitted incomplete or unintelligible logger-tapes in response to Commission requests and the third time that it has been issued a short-term licence renewal for that reason.
- CRTC, *Radio Cape Breton Limited*, Decision CRTC 94-91 (18 March 1994).
- <sup>146</sup> Canadian Communications Foundation, "Radio Station History: CHER", online: < <http://www.broadcasting-history.ca/index3.html> >.
- <sup>147</sup> CRTC, *Radio Cape Breton Limited*, Decision CRTC 92-187 (27 March 1992) (emphasis in original).
- <sup>148</sup> CRTC, *Standard Radio Inc.*, Decision CRTC 96-91 (29 March 1996) (emphasis added).
- <sup>149</sup> CRTC, *Radio Cape Breton Limited*, Decision CRTC 94-91 (18 March 1994) (emphasis added):
- [t]he Commission was also unable to analyze the level of Canadian content broadcast by CHER for the entire week in question because, for the hours [of the logger-tape] which were intelligible and complete on the tapes, the corresponding music lists did not reflect the musical selections actually broadcast. In response to questioning at the hearing regarding the inaccurate music list, [the licensee] stated that its "computer crashed and ... some of the people were not used to writing down their music".
- The Commission then notes the inaccuracy of CHER's music lists indicates an apparent violation of s. 9(3) of the Regulations.
- <sup>150</sup> "The Commission notes your comments regarding your admission of 28.6% Canadian content, Category 2 music, for the above-mentioned week as contained in your covering letter and reflected in the station's Self-Assessment Report. This constitutes an alleged violation of Section 2.2 subsection 3 of the amended *Radio Regulations, 1986*." CRTC, *Letter to CKCL Radio re CKCL Truro*, (17 September 1993) at 1 (emphasis in original).
- <sup>151</sup> CRTC, *Letter to CKCI Parksville*, (8 October 1998) at 1:
- ... Please be assured that we note your comments concerning the problems encountered with the logger-tapes of June 1 (Monday) and June 5 (Friday), which resulted in a total missing time of 10 hours 30 minutes. We further note that measures have been taken to rectify the situation.
- However, the incomplete logger-tapes constitute an alleged violation of Section 8(5) and 8(6) of the amended *Radio Regulations, 1986*. ... [emphasis in original].
- <sup>152</sup> CRTC, *Letter to Radio CHYM re CHYM Kitchener*, (25 May 1990) at 1:
- The Commission notes your admittance [*sic*] of non-compliance to Section 13(2) of the *Radio Regulations, 1986* as well as your comments as to the reasons why CHYM did not meet the 30% Canadian content requirement on February 12, 1990. Nevertheless, this constitutes an alleged violation to [*sic*] the above mentioned regulations.
- <sup>153</sup> CRTC, *Letter to Pelmorex Radio Inc. re CKOY Timmins*, (12 February) at 1.
- <sup>154</sup> Former CRTC Vice-Chairman Lawrence, "The Regulatory and Licensing Power of the CRTC", in *Broadcasting and Cable TV: Law and Administrative Practice*, Workshop Materials, Law Society of Upper Canada (May 1973) at 2.33 and 2.35, cited in Clifford, *supra* note 9, at n. 59.
- <sup>155</sup> CRTC, *Community Radio Society of Saskatoon Inc.*, Decision CRTC 2001-677 (7 November 2001) at para. 18
- <sup>156</sup> CRTC, *Radio One Broadcasting Corporation*, Decision CRTC 99-502 (17 November 1999) at para. 4. The licensee did not meet CRTC expectation. In 2000, CRTC approved an application to transfer assets of CKST Vancouver to Grand Slam Radio Inc., noting that the monetary "obligation remains unfulfilled. Accordingly the Commission notes the purchaser's commitment to make a contribution of \$34,500 to FACTOR on the closing date of this transaction". CRTC, *Grand Slam Radio Inc.*, Decision CRTC 2000-766 (21 December 2000) at para. 10.
- <sup>157</sup> CRTC, *Letter to General Manager, CISN-FM, Shaw Radio Limited*, (29 May 1991) at 1:
- ... the distribution of Canadian selections over the day, which the revised FM policy (Public Notice CRTC 1990-111) announced will become an important consideration following the enactment of the amended regulations later this year. Please note that the drive and "6 a.m.-7 p.m." percentages would raise serious concern under the new policy.
- <sup>158</sup> CRTC, *Harvard Developments Limited*, Decision CRTC 90-890 (13 September 1990).
- <sup>159</sup> That is, the CRTC granted one or more requests by a station, while denying one or more other requests by the station.
- <sup>160</sup> CRTC, *Radio Saint-Hyacinthe (1978) Ltée*, Decision CRTC 90-548 (21 June 1990). Radio station CKRC also failed to provide logger-tapes as requested, and also did not air the required level of Canadian content in music, but nevertheless received a full, five-year licence renewal. CRTC, Decision CRTC 89-539 (3 August 1989). In CRTC, *Great Valleys Radio Ltd.*, Decision CRTC 93-418 (19 August 1993), CIGV-FM was granted a full licence term as the CRTC was "satisfied that CIGV-FM is now being operated in compliance with the regulations." But in letters dated 1 and 30 June 1992, the CRTC had noted the station's non-compliance with respect to logger-tape requirements during the week of 12-18 January 1992.
- <sup>161</sup> Decision CRTC 86-932. The CRTC renewed the licence for 4 years, which facially resembles a short-term renewal, but noted this was for administrative reasons — the term would enable the CRTC to consider the licence's renewal at the same time as it considered licence renewals of other radio undertakings in the region.
- <sup>162</sup> Clifford, *supra* note 9 at para. 286.
- <sup>163</sup> *Ibid.* at 336. "The very fact that [the agencies] have such draconian authority ... means that business cannot ignore them." John Walker Braithwaite and Peter Grabosky, "An Enforcement Taxonomy of Regulatory Agencies" (1987) 9 *Law & Policy* 323. Braithwaite and Grabosky conclude that these agencies never or rarely use their enormous powers, preferring instead to regulate their generally large clients "by raised eyebrow". The results of this research lead me to conclude, however, that inconsistent enforcement means precisely that business can afford to ignore the regulator.
- <sup>164</sup> Clifford, *supra* note 9 at para. 73: "Commission follow-up procedures related to conditions of licence are eclectic"
- <sup>165</sup> For reasons of space, this paper does not speculate about CRTC reasons not to use the powers granted to it by Parliament. There may be many: sincere belief that education and persuasion more effectively deter non-compliance, than prosecution; concern that low fines imposed by court's for regulatory breaches lead the administration of the broadcasting legislation into disrepute; fear that Canadians or media editorialists will mount yet another round of attacks on the CRTC and its existence by prosecuting what, to the layperson, are trivial matters (to paraphrase the comments one might expect to hear, "The station forgot to turn on the tape recorder? To record four-week old programming? Again? So?"). Regardless, the net effect is that, as was noted in 1986, reform is still due: "what the law seems to suggest administrators should be doing, and what actually is done, are often significantly different." *Policy implementation, supra* note 9 at 77 (emphasis in original).
- <sup>166</sup> CRTC correspondence reviewed for this paper included documents regarding compliant and non-compliant licensee behaviour; the documents that referred only to non-compliant licensee acts amounted to 5,428 pages, consuming several metres of bookshelves.
- <sup>167</sup> In 1983, before computers and personal computers were widely used, Clifford concluded that "[t]he Commission cannot possibly monitor all of its licensees continuously to determine their respective degrees of compliance: staff resources could not possibly comprehend continuous

detailed monitoring of all licensees' programming." Clifford, *supra* note 9 at para. 471 (emphasis in original).

If the author of this paper — at the time a full-time student with a four-year old notebook computer and a borrowed scanner — could read, scan, print, review, code and undertake data entry of over 5,000 pages of documents related to radio licensee performance over eight months, it seems likely that the CRTC would be able to undertake a similar task with even greater efficiency, alacrity and enthusiasm.

In all fairness, however, CRTC resources may not have increased over time, and this may account for any decisions it may have made related to non-compliance reporting as the numbers of licensees have grown. The CRTC is now fully funded by licence fees paid to the government by telecommunications companies and broadcasters to use the spectrum. According to the CRTC's Part III Main Estimates, its expenditures have remained relatively flat, even though the licence fees paid to government have increased. Uncertainty about the CRTC's actual staff numbers and expenditure levels exists, however, because the information it provides to Parliament appears to consist of forecasts, rather than actual staff and spending numbers.

<sup>168</sup> This clearly begs the question of whether the existence of a broadcast regulator is required at all, at a time when the Internet appears as a tempting panacea. Notwithstanding the Internet's popularity, conventional over-the-air broadcast media continue to attract audiences. On average Canadians allocate more than 40 hours a week listening to the radio or watching television. Moreover, even while digital signals can consume less spectrum than analog-based services, insufficient spectrum exists to provide every Canadian who wants one, with his or her channel. As long as the demand to provide current or new services to different communities exists, therefore, decisions to allocate the existing spectrum must be made. Unless a federal government is willing to assume this decision-making role — and the risk of being seen to control media content or to sell the broadcast spectrum owned by all Canadians to the highest bidder in an auction — an independent regulator will continue to play a useful part.

<sup>169</sup> In the case of CFNL Fort Nelson, CRTC, *Nor-Net Communications Ltd.*, Decision CRTC 92-635 (25 August 1992) indicated a second instance of regulatory non-compliance following CRTC, *Nor-Net communications Ltd.*, Decision CRTC 89-514 (28 July 1989) — yet it was actually the third, following CRTC, *Western Communicon Ventures Ltd.*, Decision 87-784 (2 September 1987). In the case of CKLY Lindsay, CRTC, *McNabb Broadcasting Limited*, Decision CRTC 90-466 (25 May 1990) noted the licensee's failure to meet Canadian content requirements on 11 May 1989, but not its failure to schedule Canadian content reasonably on 28 November 1990. In the case of CHGA-FM, CRTC, *Radio communautaire FM. de la Haute-Gatineau Inc.*, Decision

CRTC 2001-146 (28 February 2001) did not mention four earlier short-term renewals for non-compliance.

<sup>170</sup> CRTC, *O.K. Radio Group Ltd.*, Broadcasting Decision CRTC 2002-354 (6 November 2002).

<sup>171</sup> In CRTC, *Craig Broadcast Systems Inc.*, Decision CRTC 94-580 (11 August 1994), the Commission renewed CKX-FM Brandon for a two-year term due to non-compliance, but did not call licensee to a hearing; the decision was processed through Public Notice CRTC 1994-38 (30 March 1994).

<sup>172</sup> Decision CRTC 89-789.

<sup>173</sup> In a speech to the Canadian Bar Association, then CRTC chairman André Bureau noted that

... we are concerned that if the powers of direction and review coexist, there may well develop a public perception that the Commission is merely one level in the process, that it anticipates government reaction, that it looks over its shoulder on every decision it makes — in short, that the Commission has ceased to be an independent agency. Not only is it important that the Commission be independent, it is important that it be perceived to be independent.

André Bureau, "Notes for an Address" Law Society of Upper Canada, Conference on Communications Law and Policy (Toronto: 25 March, 1988) at para. 46.

<sup>174</sup> 1960s: 1; 1970s: 3; 1980s: 10; 1990s: none; 2000s: 1. See n. 96.

<sup>175</sup> S. 18.(1)(b) of the Act requires the CRTC to hold a public hearing if it considers suspending or revoking a licence. Under s. 18.(2) allows the CRTC not to hold a public hearing about a licence amendment or licence renewal if satisfied this is in the public interest. *Supra* note 2, s. 18.

<sup>176</sup> Nothing in the Act requires the CRTC to adopt the same licence renewal process for all stations. Currently, the CRTC uses a paper-based proceeding for compliant or almost-always compliant stations, and a public hearing proceeding for stations that are not consistently compliant. See, *supra* note 2.

<sup>177</sup> Then CRTC Commissioner Andrée Wylie, *Transcript of Proceedings for the CRTC*, Broadcasting Applications, TV Renewals — CTV/Global Across Canada Vol. 2 (18 April 2001) at para. 1662. Commissioner Wylie was questioning representatives from CTV about how diversity in news would be maintained if BCE's application to acquire the assets of CTV's television stations were approved, given BCE's concomitant ownership of *The Globe & Mail*.