

***Ad IDEM/CANADIAN MEDIA LAWYERS
ASSOCIATION***

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Re: Broadcasting Notice of Consultation CRTC 2011-14 Call for comments on amendments to the Radio Regulations, 1986, Television Broadcasting Regulations, 1987, Pay Television Regulations, 1990, Specialty Services Regulations, 1990, and the Broadcasting Information Regulations, 1993

February 9, 2011

Please accept this as the submission of the Ad IDEM / Canadian Media Lawyers' Association ("CMLA") in respect of the call for comment on the regulatory amendments under consideration. The CMLA is a leading organization whose membership includes leading lawyers dealing with media law issues across Canada, and which has been granted intervener status before the Supreme Court of Canada several cases touching upon freedom of expression and media issues.

1) The prohibition on broadcasting false or misleading news. The CRTC proposes replacing the regulations prohibiting the broadcast of "any false or misleading news", with regulations prohibiting the broadcast of "any news that the licensee knows is false or misleading and that endangers or is likely to endanger the lives, health or safety of the public".

The prohibition to be replaced has been in place since long before the enactment of the *Charter of Rights and Freedoms* in 1982. Breach of the regulation is an offence, and penalties are prescribed in s.32(2) of the *Broadcasting Act*. Nevertheless, its constitutionality has been in doubt since the adoption of the *Charter* and especially since 1992, when the Supreme Court of Canada struck down a parallel *Criminal Code* section, s.181, as unconstitutional, on the basis that it was overbroad.

In that case, *R. v. Zundel*, Justice McLachlin (as she then was) speaking for the majority of the court which struck down the "false news" provision of the *Criminal Code*, noted numerous problems with the prohibition, including the difficulty of separating opinion from fact, and determining factual truth and falsity in the range of circumstances in which the section could be invoked. She wrote:

"A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. ... The result is that a statement that is true on one level or for one person may be false on another level for a different person. ...

What is false may, as the case on appeal illustrates, be determined by reference to what is generally ... accepted as true, with the result that the knowledge of falsity required for guilt may

be inferred from the impugned expression's divergence from prevailing or officially accepted beliefs. This makes possible conviction for virtually any statement which does not accord with currently accepted "truths", and lends force to the argument that the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas. ..."

The result the majority found was to inhibit legitimate expression. The majority decision continues:

"Should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? Should a concerned citizen fear prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood "is destroying the health of the children living nearby" for fear that scientific studies will later show that the injury was minimal? Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that his statement is a deliberate assertion of a false fact? Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight?"

The existing prohibition clearly suffers from this same overbreadth. The question is whether the proposed prohibition, which at its broadest speaks of being "likely to" endanger "lives, health or safety" is sufficiently specific to overcome the issues of overbreadth identified by the Supreme Court. Based on the questions raised by Justice McLachlin, it seems clear that the proposed amendments would nevertheless leave the provision similarly overbroad and unconstitutional.

It is not difficult to imagine, for example, a drug company complaining that a criticism of one of its drugs by an investigative program would be "likely to" endanger "health" by stating risks in a manner which they consider knowingly "misleading", because their point of view and their version of the "facts" given earlier to the producers did not receive the weight they feel it ought to have had.

The Supreme Court has recently held, in *Grant v Torstar* (December 22, 2009), that there can be value to false defamatory expression on matters of public interest. The value can lie in reducing libel chill which discourages the publication of facts deserving of public examination, that cannot be proven true but which are believed to be true after investigation. Permitting it also encourages dialogue and the process of grappling with versions of events that assists in the path to revealing the truth. Matters of public interest were held to include not just politics, but science, and the arts, environment, religion and morality. In defining what matters are of public interest and therefore deserving of protection when responsibly handled, the court said: "It is enough that some segment of the community would have a genuine interest in receiving information on the subject."

In this constitutional climate, the CRTC, as custodian of Canada's means of electronic expression, should be loathe to add a prohibition that can chill legitimate or valuable expression. This is particularly so in news, where the process of revealing the truth often involves the emergence of some information, explanation and further information coming out, all in a process which leads to better understanding of publicly important matters. The value of that process is not diminished by the fact that, the early steps in the journey involve version of events which could be alleged, in hindsight, to have been misleading.

We note that this prohibition is not to be enacted as a "standard" of preferred behaviour. It is to be a regulation, breach of which is an offence. The CRTC should only adopt such regulations when they are shown to be necessary.

We are unaware of any case in Canadian broadcast regulatory experience which points to the necessity of a prohibition worded in this manner. We see no pressing and substantial objective being served by its adoption now. Without an objective that addresses specific broadcast concerns that are not covered by existing criminal or tort law, the CRTC should not add a regulation simply to replace one that has been found to be unconstitutional.

The existing prohibition should, though, be repealed.

The appropriate way to deal with false news (over and above already existing protections such as the law of defamation) is through monitoring compliance with the Codes of Conduct to which broadcasters are already subject, such as:

CAB Code:

5. News

It shall be the responsibility of broadcasters to ensure that news shall be represented with accuracy and without bias.

RTNDA Code:

1. Broadcast journalists will inform the public in an accurate, comprehensive and fair manner about events and issues of importance.

CBC Journalistic Standards and Practices Accuracy We seek out the truth in all matters of public interest.

Corrections: Principles

We make every effort to avoid errors on the air and online. In keeping with values of accuracy, integrity and fairness, we do not hesitate to correct a significant error when we have been able to establish that one has occurred. This is essential for our credibility with Canadians. When a correction is necessary, it is made promptly given the circumstances, with due regard for the reach of published error.

2) the prohibition on broadcasting programming that contains obscene or profane language.

The proposal to add a definition for obscene material is useful. We support use of a definition based on the one in the *Criminal Code*, which reads:

Obscene publication

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

The proposed definition for the regulations, however, reads this way:

"material is obscene if a dominant characteristic of the material is the undue exploitation of sex, or if a dominant characteristic is sexual, in combination with any one or more of the following subjects, namely, crime, horror, cruelty and violence.

The difference is that in the *Criminal Code* provision the words "undue exploitation" also apply to the combination of sex with crime. In the proposed CRTC regulation, they do not. That means, for example, that material that has a dominant characteristic that is sexual, in combination with crime, would be a breach of the regulation... whether or not the exploitation was undue, or could otherwise be defended on the basis that it is a necessary component of news and information programming.

The the key concept of "undue exploitation" no longer applies to the second part of the phrase, as it should. This should be rectified. The difference is significant, because in "undue exploitation" lies an important defence that should apply throughout.

The case of Col. Williams is instructive. Not all pictorial evidence was made available by the court, but some was made available by the court for publication. Some of this publishable and published material would arguably offend the new proposed regulation, if undue exploitation does not apply to both parts of the definition. That cannot be acceptable. Similar concerns might arise in the news coverage of the Pickton murder trial in BC, or other important public events which have deeply disturbing subject matter, reported responsibly and not for any exploitive reason. While it is likely that no one would think of prosecuting a broadcaster for such reporting, the wording should not permit that possibility.

We would add two recommendations to the discussion on the second proposed amendment:

1) In the *Criminal Code*, there is a defence which is absent from the proposed modification of the CRTC regulation:

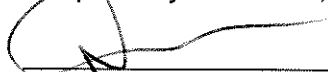
Defence of public good

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

CRTC regulations should mirror such a defence like this, in the interests of permitting defensible free expression.

2) As well, the proposed amendment does not address the included prohibition on "profane language or pictorial representation". The constitutionality of this prohibition is also doubtful. There is no defence built into the regulation for news or information programming in which it is often very important to reflect to the community what is really taking place around the world. As for entertainment, the recent controversy about the Dire Straits song "Money for Nothing" demonstrates that this issue a matter to be resolved through Codes of Conduct and public debate, but not a regulatory offence.

Respectfully submitted,



Canadian Media Lawyers' Association / Ad IDEM
Per Daniel W. Burnett, Vice President