

A Fine Balance: The Regulation of Canadian Religious Broadcasting

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The Canadian Radio-television and Telecommunications Commission (CRTC) has created special rules for religious radio and television stations. The author critically reviews the evolution of the CRTC's religious broadcasting policy since it was first set out in 1983. He argues that the policy's central tenet—the "balance programming" requirement—is flawed and should be revisited.

When the CRTC began to award licences to religious broadcasters, it required that they offer programming from a variety of faith perspectives. These rules were based on the 1968 Broadcasting Act, which required that programming in Canada provide a "balanced opportunity for the expression of differing views on matters of public concern". Religious broadcasting was not addressed in the Act, but the CRTC, regarding religion as controversial, classified it as a "matter of public concern" and therefore as subject to a balance requirement. Over the past three decades, the CRTC has gradually allowed many types of programming to be used to balance religious content. Though the word "balance" was removed in the 1991 Broadcasting Act with respect to matters of public concern, the balance programming objective has remained central to the CRTC's religious broadcasting policy.

The author argues that the balance requirement is no longer appropriate on a proper interpretation of the governing statute and given the CRTC's dissimilar application of the rules to other broadcasters. Further, developments in distribution technology, the broadcasting industry and consumer behaviour have undermined any rationale that may once have existed for the balance requirement.

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Introduction

The story of religious broadcasting is about access to the privilege of broadcasting, “a field in which the stakes are high [and] the competition fierce”.¹ It is about religious groups seeking to enter the broadcasting fellowship only to be turned away time and again by the federal regulator, the Canadian Radio-television and Telecommunications Commission (CRTC), due to concerns about the impact on the public interest. Since religious licences first became available, these concerns have led the CRTC to impose stringent requirements on religious broadcasters.

Religious broadcasting refers to radio and television stations (called undertakings in the *Broadcasting Act*) licenced by the CRTC to offer religious-themed programming. In the 1920s, before government regulation officially began, religious radio broadcasters were granted licences by the Minister of Marines and Fisheries, but these were phased out after 1932.² In that year, the federal government established the

1. Donna Soble Kaufman, *Broadcasting Law in Canada: Fairness in the Administrative Process* (Toronto: Carswell, 1987) at v.

2. One of the first church radio services took place on 11 February 1923 on CKCK Regina. See Michael Nolan, “An Infant Industry: Canadian Private Radio, 1919–36”

Canadian Radio Broadcasting Commission (1932–1936) to regulate broadcasting. That role was later given to the Canadian Broadcasting Corporation (1936–1958), the Board of Broadcast Governors (1958–1968) and the CRTC (since 1968). Not until the CRTC changed its policy in 1983 were any broadcasting licences awarded to religious applicants.³

Over the decades, the various reasons for denying religious broadcasting licences have included a lack of available spectrum,⁴ a desire to avoid favouring one denomination over another,⁵ a concern with potential undue political influence or political content,⁶ the one-sidedness of a single-faith worldview,⁷ and the inappropriateness of using

(1989) 70:4 *Canadian Historical Review* 496 at 515. By 1924–1925, “many” Canadian churches and religious organizations were granted radio licences for radio stations. See Mary Vipond, *Listening In: The First Decade of Canadian Broadcasting* (Montreal: McGill-Queen’s University Press, 1992) at 196. More generally, in 1922–1923, there were thirty-four radio licences issued for commercial radio in Canada. By 1927, there were seventy-five such licences, “a number” of which were religious. See Marc Raboy, *Missed Opportunities* (Montreal: McGill-Queen’s University Press, 1990) at 21 [Raboy, *Missed Opportunities*]. For a discussion on the cancellation and non-renewal of the early religious radio licences, see Frank W Peers, *The Politics of Canadian Broadcasting: 1920–1951* (Toronto: University of Toronto Press, 1969) at 29–34; Dorothy Zolf & Paul W Taylor, “Redressing the Balance in Canadian Broadcasting: A History of Religious Broadcasting Policy in Canada” (1989) 18:2 *Studies in Religion* 153 at 156–57; John Bennett, “The Licensing of Religious Radio Stations in Canada” (1969) 1 *Can Comm L Rev* 1 at 2.

3. Kaufman, *supra* note 1 at 3.

4. Peers, *supra* note 2 at 33.

5. Vipond, *supra* note 2 at 196. One view is that in the 1930s there was a desire to prevent non-mainstream religious groups, such as Jehovah’s Witnesses and certain evangelical Christians, from receiving broadcasting licences. One commentator notes that “[t]he *Broadcasting Act* of 1936 supported the interests of the major denominations and favoured the churches”. See David Marshall, “Premier E.C. Manning, *Back to the Bible Hour*, and Fundamentalism in Canada” in Marguerite Van Die, ed, *Religion and Public Life in Canada: Historical and Comparative Perspectives* (Toronto: University of Toronto Press, 2001) 237 at 240. See also Peers, *supra* note 2 at 120.

6. Liora Salter & Felix Nii Lantei Odartey-Wellington, *The CRTC and Broadcasting Regulation in Canada* (Toronto: Carswell, 2008) at 280.

7. Zolf & Taylor, *supra* note 2 at 159–60.

public airwaves to raise money for religious organizations.⁸ Also pertinent was the idea that Canadian broadcasting policy should be a check against the influence of American programming on Canadian identity and culture.⁹

Broadcasting regulators, including the CRTC, were able to avoid religious broadcasting for nearly six decades.¹⁰ Eventually, advances in broadcast technology (especially the availability of pay and specialty television services) and the entrenchment of freedom of expression and freedom of religion in the *Canadian Charter of Rights and Freedoms* obliged the CRTC, in 1983¹¹ and again in 1993,¹² to modify its policy on religious programming. Since then, religious programming undertakings have appeared on both radio and television. Today, there are eighty-one licenced religious radio and television stations in Canada.¹³

In 1983, the CRTC issued a policy which interpreted the word “balance” in section 3 of the 1968 *Broadcasting Act* (the 1968 Act), and specified how balance must be struck by religious broadcasters. Section 3

8. Salter & Odartey-Wellington, *supra* note 6; Marci McDonald, *The Armageddon Factor: The Rise of Christian Nationalism in Canada* (Toronto: Random House, 2010) at 253–54.

9. Paul Audley, “Cultural Industries Policy: Objectives, Formulation and Evaluation” (1994) 19:3 *Canadian Journal of Communication* 317 at 319; Michel Fillion, “Broadcasting and Cultural Identity: the Canadian Experience” (1996) 18:3 *Media, Culture & Society* 447 at 449–52; Raboy, *Missed Opportunities*, *supra* note 2 at 17–18. An ironic by-product of the early broadcasting policy was that Canadian viewers who wanted religious programming tuned primarily to American content, which was available on commercial American stations. See Dennis R Hoover, “The Christian Right under Old Glory and the Maple Leaf” in Corwin E Smidt & James M Penning, eds, *Sojourners in the Wilderness: The Christian Right in Comparative Perspective* (Lanham, Md: Rowman & Littlefield, 1997) at 207–08.

10. Salter & Odartey-Wellington, *supra* note 6.

11. *Religious Broadcasting Policy* (2 June 1983), 1983–112 [1983 *Religious Broadcasting Policy*] cited in *Religious Broadcasting Policy* (3 June 1993), 1993–78, online: CRTC <<http://www.crtc.gc.ca>> [1993 *Religious Broadcasting Policy*].

12. 1993 *Religious Broadcasting Policy*, *supra* note 11.

13. Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report* (Ottawa: CRTC, July 2011) at 36, 56, online: <<http://www.crtc.gc.ca>> [2011 *Communications Monitoring Report*]. This figure is limited to over-the-air religious broadcasting and does not include religious specialty services such as Category 2 satellite services (Category 2 services are explained in Part IV(B)(i), below).

set out numerous policy objectives for the broadcasting system, including the objective that all programming “provided by the Canadian broadcasting system . . . should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern”.¹⁴ The CRTC classified religion as a matter of public concern, and therefore concluded that religious programming would need to be “balanced” with other programming. The CRTC believed that if a religious broadcaster presented a variety of religious views, it would achieve the required balance. This has come to be known as the “balance programming” objective, and it is the foundation of the CRTC’s 1983 and 1993 religious broadcasting policies.

As we will see below, the balance programming objective has since been interpreted more liberally, to the extent that it is no longer the impediment to obtaining a religious broadcasting licence that it once was. Yet “balance” continues to be used as a pliable concept to regulate content. Today, all religious licencees must adhere to detailed rules which require them, as a condition of their licence, to air certain types of programs in quantities specified by the CRTC. Like “Canadian content” requirements, the balance programming requirement appears to be treated by religious broadcasters as a cost of doing business.

By increasing flexibility for religious broadcasters, the CRTC has perhaps acknowledged that aspects of its previous policies were unworkable in practice. This paper will argue that it is insufficient to allow more flexibility, and that it is time for a reassessment of the religious broadcasting policy—and that in particular, the CRTC should withdraw or at least revisit its balance programming requirement.

The argument in this paper is twofold: first, that there are inadequacies in the CRTC’s interpretation of the *Broadcasting Act* and in its application of the balance requirement; and second, that the balance requirement makes little sense today. As will be shown, the requirement is based on a problematic interpretation of the 1968 and 1991 *Broadcasting Acts*, and has been applied less favourably to religious broadcasters than to political and conventional commercial broadcasters. Further, the conventional rationales for balance programming have been

14. *Broadcasting Act*, SC 1968, c 25, s 3(d) [1968 *Broadcasting Act*].

overtaken by contemporary realities, particularly technological advances and changing audience demand. This article adds to the literature on broadcasting law and policy by tracing the evolution of religious broadcasting policy since 1983 in order to critically evaluate its effectiveness and legitimacy.¹⁵ More broadly, as a case study of the evolution of religious broadcasting regulation, it offers unique insights into how Canadian broadcasting regulation functions.

Part I overviews the current state of religious broadcasting in Canada. In Part II, the legislation and policy governing religious broadcasting over the past three decades is summarized. Part III critiques the evolution of the CRTC's interpretation of the terms "balance" and "religious", and Part IV explains why the balance programming requirement should be withdrawn. The final part concludes and makes recommendations.

I. The State of Religious Broadcasting in 2011

The Canadian broadcasting system consists of both public and private elements, offering a variety of radio and television services on a number of delivery platforms. The public element is represented by the national public broadcaster, the Canadian Broadcasting Corporation. The private elements are represented by a variety of broadcasters, including conventional mainstream television networks such as CTV and Global, specialty and pay television broadcasters, ethnic radio and television broadcasters, and religious radio and television broadcasters. The delivery platforms include conventional over-the-air transmission (radio or television transmitted free of charge to the general public) in analog signals or more recently, in digital signals;¹⁶ cable or satellite

15. For literature on broadcasting law and policy pre-1983, see Bennett, *supra* note 2; Zolf & Taylor, *supra* note 2; Peter G Cook & Myles A Ruggles, "Balance and Freedom of Speech: Challenge for Canadian Broadcasting" (1992) 17:1 Canadian Journal of Communication 37 at 42-47.

16. As of August 31, 2011, most of Canada's local over-the-air television stations switched from broadcasting in analog signals to broadcasting in digital signals, as part of Canada's transition to digital television. See Canadian Radio-television and Telecommunications Commission, "On August 31, 2011, Canadian local over-the-air

platforms, through which providers transmit radio and television programming over their networks to subscribers for a monthly fee; and more recently, the internet.¹⁷ Specific providers offer anything from mainstream commercial programming to community programming, educational programming, aboriginal and ethnic programming, and religious programming.¹⁸

Religious programming undertakings fall along a spectrum from small-scale not-for-profit operations¹⁹ to large commercial operations. Some are broadcast only over-the-air, while others have some combination of over-the-air, cable, satellite and discretionary digital availability. Most religious broadcasters are owned by religious

television stations converted to digital television" (22 September 2011) online: CRTC <<http://www.crtc.gc.ca>>.

17. 2011 *Communications Monitoring Report*, *supra* note 13 at 27.

18. *Ibid* at 36, 56. It is difficult to compare Canadian religious broadcasting accurately to other types of broadcasting, such as ethnic broadcasting, because of how the CRTC publishes its data. Data on ethnic radio and television tends to be included in the statistics for conventional broadcasters. With respect to data that is publicly available, in 2008 there were twenty-five ethnic over-the-air radio stations as compared to seventy-three religious over-the-air radio stations, and six ethnic over-the-air television stations as compared to seven religious over-the-air television stations. See Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report 2009* (Ottawa: August 2009) at 91, 120–21, online: CRTC <<http://www.crtc.gc.ca>>. However, ethnic specialty and pay television services seem to outnumber their religious equivalents substantially. In 2008 there were twenty-eight ethnic digital specialty television services and six ethnic digital pay services, with another 160 ethnic digital specialty and pay services approved for distribution (*ibid* at 120–21).

19. An example of this type of broadcaster is CFEG-TV, which is licenced as a low-power television station in Abbotsford, BC and is owned and operated by the Clearbrook Mennonite Brethren Church. See *CFEG-TV Abbotsford—Licence Renewal* (9 February 2006), 2006-35, online: CRTC <<http://www.crtc.gc.ca>>. The station was created primarily to serve senior members of its congregation who found it difficult to attend church. The station's programming includes its English-language and German-language church services. See "New church TV channel cleared to broadcast", *Mennonite Brethren Herald* (16 July 2000), online: MB Herald <<http://old.mbherald.com>>.

organizations, but some religious licences are owned by conventional communications entities.²⁰

Currently, there are seventy-three over-the-air religious radio services and eight over-the-air religious television services licenced in Canada,²¹ accounting for approximately six per cent of all radio services and one per cent of all television services.²² As Table 1 indicates, the number of religious programming undertakings increased swiftly from 2002 to 2008, and may have levelled off since then. That growth in numbers is directly linked to changes in CRTC policy in 1983 and 1993, described below.

Table 1: Licenced Religious Over-the-Air Radio and Television Services²³

	2002	2006	2008	2009	2010
Radio	24	67	73	75	73
Television	5	5	7	7	8
Total	29	72	80	82	81

Religious radio services have shifted from being predominantly French-language services in 2002 (20 of 24)²⁴ to being mostly English-language in 2010 (45 of 73, with one third-language and 27 French-

20. Joy TV (CHNU-TV) in greater Vancouver was owned by Rogers Communications, then by S-Vox, and is now owned by ZoomerMedia. See Joytv 10, "About Joytv 10", online: Joytv 10 <<http://www.joytv10.ca>>.

21. 2011 *Communications Monitoring Report*, *supra* note 13.

22. In 2010, there were 1 208 radio services and 716 television services in the Canadian broadcasting system. *Ibid* at iii, 55.

23. Canadian Radio-television and Telecommunications Commission, *The Future Environment Facing the Canadian Broadcasting System: A Report Prepared Pursuant to Section 15 of the Broadcasting Act* (Ottawa: CRTC, 14 December 2006) at paras 12, 29, online: CRTC <<http://www.crtc.gc.ca>> [*Future Environment Report*]; Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report* (Ottawa: CRTC, July 2010) at 32, 52, online: CRTC <<http://www.crtc.gc.ca>>; 2011 *Communications Monitoring Report*, *supra* note 13.

24. *Future Environment Report*, *supra* note 23.

language broadcasters).²⁵ All five of the religious television services in 2002, and all eight in 2010, were English-language.²⁶ The full reach of religious radio may not be reflected in these figures because it is not uncommon for licencees to apply to the CRTC for retransmitters in neighbouring towns.²⁷

II. Religious Broadcasting Legislation and Policy

This section will outline the legislation and policies most relevant to the regulation of religious broadcasting in Canada: the 1968 and 1991 *Broadcasting Acts*, and CRTC decisions and policies in the area. Regulations, which tend to be of tangential importance in practice, will not be discussed.

A. No Religious Broadcasting Licences Before 1983

Until 1983, the CRTC did not issue licences to religious broadcasters at all. That refusal was based primarily on spectrum scarcity and on the objective of “balanced” programming set out in section 3(d) of the 1968 Act. This provision stated that “the programming provided by the Canadian broadcasting system should . . . be varied and comprehensive and should provide reasonable, balanced opportunity for the expression

25. 2011 *Communications Monitoring Report*, *supra* note 13 at 36.

26. *Future Environment Report*, *supra* note 23 at para 29; 2011 *Communications Monitoring Report*, *supra* note 13 at 56.

27. For example, CKJJ-FM is licenced in Belleville, Ontario, but has received approval for retransmitters in Bancroft, Cobourg and Kingston. *CKJJ-FM Belleville—New FM Transmitters at Brockville and Cobourg* (17 January 2007), 2007-24, online: CRTC <<http://www.crtc.gc.ca>>; *CKJJ-FM Belleville—New FM Transmitter at Kingston* (3 March 2008), 2008-54, online: CRTC <<http://www.crtc.gc.ca>>; *CKJJ-FM—New FM Transmitter at Bancroft* (20 May 2008), 2008-109, online: CRTC <<http://www.crtc.gc.ca>>. Since there does not seem to be publicly available CRTC data on retransmitters, their actual numbers cannot be determined.

of differing views on matters of public concern”.²⁸ In 1981 the CRTC, referring to section 3(d), explained:

The Commission and its predecessors have held the view that a denominational station would by definition carry a particular point of view and, therefore, find it extremely difficult to satisfy the “balance” requirements of the Act. Because the number of radio and television frequencies available . . . is limited, it was considered . . . impossible to grant a licence to every special interest group.²⁹

Since religious programming was not specifically addressed in the 1968 Act and the CRTC saw religion as “controversial”,³⁰ it was classified as a “matter of public concern”,³¹ a phrase that is not defined in the Act or by CRTC policy. Because religious programming was so classified, it was subject to the “balance” objective in section 3(d). The CRTC’s policy implied that balance would be a requirement of each individual station’s programming, rather than a requirement at a system level. The CRTC reasoned that since a “denominational station” was inherently one-sided, it was unlikely that any religious programmer could provide balanced offerings.

B. The CRTC’s 1983 Policy on Religious Broadcasting

A public notice issued by the CRTC in 1983 (the 1983 policy) was the first official policy on religious broadcasting. It opened the door to religious broadcasting by indicating that the CRTC would licence multi-faith broadcasters with multi-faith ownership and management.³² As for the balance requirement, it was to be met by offering programming from a variety of faith backgrounds, and the CRTC made this a part of

28. 1968 *Broadcasting Act*, *supra* note 14, s 3(d).

29. *Notice of Public Hearing* (17 August 1981), 1981-54, cited in Cook & Ruggles, *supra* note 15 at 42-43.

30. 1983 *Religious Broadcasting Policy*, *supra* note 11 at s III(A)(2).

31. *Ibid.* See also Cook & Ruggles, *supra* note 15 at 42.

32. 1983 *Religious Broadcasting Policy*, *supra* note 11 at s III(A)(2); *Canadian Interfaith Network* (formerly David Nostbakken and Randolph Lyle Naylor, on behalf of a company to be incorporated)—871212700 (1 December 1987), 87-900, online: CRTC <<http://www.crtc.gc.ca>> [*Canadian Interfaith Network*].

the broadcaster's conditions of licence.³³ The prohibition against single-faith broadcasters remained in place.³⁴ In 1987, the CRTC awarded a licence to Canada's first (and still only) multi-faith religious broadcaster, Vision TV.³⁵

C. Developments Leading to the 1993 Policy

In the years following the licencing of Vision TV, demand for single-faith programming did not subside.³⁶ Religious groups responded to the continued prohibition on single-faith broadcasting in two ways. Some avoided the policy by paying for religious programming to air on conventional stations. One such example is provided by the syndicated television program *100 Huntley Street*, which has been on the air since 1977. It is one of Canada's longest-running programs, outlived only by *Hockey Night in Canada* and the broadcast of Canadian Football League games.³⁷ Other religious groups simply turned a blind eye to the 1983 policy. In 1986, the Victory Christian Fellowship church in Lethbridge, Alberta, armed with a covert television transmitter, retransmitted programming from the Californian Trinity Broadcasting Network (TBN), including popular US televangelists such as Jimmy Swaggart.³⁸ The CRTC issued two mandatory cease-and-desist orders, both of which

33. 1983 *Religious Broadcasting Policy*, *supra* note 11 at s III(A)(2).

34. Zolf & Taylor, *supra* note 2 at 163.

35. *Canadian Interfaith Network*, *supra* note 32. Vision TV is licenced as a satellite-to-cable religious specialty programming service. For an in-depth discussion on the initial development of Vision TV and its programming and management structure, see Zolf & Taylor, *supra* note 2 at 161-65. For a general overview, see House of Commons, Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting* (June 2003) at 231 (Chair: Clifford Lincoln).

36. Laurence JE Dunbar & Christian Leblanc, *Review of the Regulatory Framework for Broadcasting Services in Canada* (Ottawa: no publisher, 2007) at 264, online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.pdf>> [Dunbar/Leblanc Report].

37. *100 Huntley Street* continues to be produced by Crossroads Communications in Burlington, Ontario. See McDonald, *supra* note 8 at 246.

38. *Ibid* at 249-53.

were ignored by Victory.³⁹ By 1992, six unlicensed transmitters were rebroadcasting TBN programming across the prairies.⁴⁰ Additionally, the developing *Charter* jurisprudence on freedom of expression and freedom of religion,⁴¹ along with changes in distribution technology which enabled greater viewer choice,⁴² may have prompted the CRTC to revise its policy.

39. *Ibid* at 252.

40. *Ibid*.

41. Zolf & Taylor, *supra* note 2 at 156. While *Charter* issues are outside the scope of this paper, the CRTC's policy on religious broadcasting may be contrary to the *Charter*'s freedom of expression and freedom of religion guarantees. In 1982, Douglas Barrett asserted that the newly introduced *Charter* could enable Evangelicals to challenge the CRTC's religious broadcasting policy. Nearly 30 years later, no group has launched a *Charter* challenge against the policy, so its constitutionality remains unresolved. Barrett ran through a hypothetical *Charter* analysis and concluded that because broadcasting is a licensed activity, the denial of a licence application cannot be a denial of an applicant's freedom of expression. He suggested that the policy may infringe section 15, under which the government must provide privileges in a non-discriminatory manner. However, Barrett believed that the CRTC's policy may be reasonable and demonstrably justified under section 1 of the *Charter*, so long as there is spectrum scarcity. See Douglas E Barrett, *The Charter of Rights and Freedoms and Religious Broadcasting* (Toronto: Canadian Bar Association (Ontario), 1982). For a more recent argument that the CRTC's religious broadcasting policy infringes the freedom of expression and freedom of religion provisions, see The Evangelical Fellowship of Canada, *Response to the CRTC's Television Policy Review* (29 June 1998) at 2–3, online: EFC <<http://files.efc-canada.net/si/Media/TVPolicyReview1998.pdf>>. Balance requirements may also be an example of "forced expression": state action that compels media to communicate something to an audience. See *Pacific Press v AGBC*, 2000 BCSC 248 at paras 166–67, 179, 73 BCLR (3d) 264. Zolf & Taylor, *supra* note 2 at 168–69, caution that if a *Charter* challenge was successful and the current religious broadcasting policy was struck down, the absence of an alternative might result in "unfettered access" by religious broadcasters—"both the conscientious and the unscrupulous"—to the broadcasting system. This, they argue, would be adverse to the interests of the CRTC and most religious broadcasters.

42. Sheryl N Hamilton, *Law's Expression: Communication, Law and Media in Canada* (Markham: LexisNexis Canada, 2009) at 6–7.

D. The CRTC's 1993 Policy on Religious Broadcasting

In 1993, the CRTC issued a public notice entitled "Religious Broadcasting Policy" (the 1993 policy) which permitted single-faith broadcasters for the first time.⁴³ In the years since the 1983 policy was issued, a new version of the *Broadcasting Act* (the 1991 Act) had come into effect. Like its predecessor, the 1991 Act did not mention religious broadcasting and the 1993 policy therefore continued to treat religion as a "matter of public concern". However, the 1991 Act no longer required that programming achieve "balance" on "matters of public concern"; instead, the term "balance" was only used in a separate provision (section 3(1)(i)(i)), while the 1993 policy was based on section 3(1)(i)(iv):

- 3(1)(i) the programming provided by the Canadian broadcasting system should:
- (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes; . . .
 - (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern;⁴⁴

Despite these changes, both the CRTC's religious policy and its general policy on matters of public concern maintained the balance programming requirement.⁴⁵ However, the 1993 policy did liberalize how balance could be achieved in religious broadcasting and, for the first time, it permitted single-faith broadcasting on the condition that programming about *other* faiths aired within the station's program schedule. Key elements of the 1993 policy include the following:

- To attain balance, broadcasters must provide differing points of view to a "reasonably consistent viewer or listener" over a "reasonable period of time".⁴⁶

43. 1993 *Religious Broadcasting Policy*, *supra* note 11.

44. *Broadcasting Act*, SC 1991, c 11, s 3(1)(i)(i), (iv) [1991 *Broadcasting Act*].

45. *Dunbar/Leblanc Report*, *supra* note 36 at 262; 1993 *Religious Broadcasting Policy*, *supra* note 11 at s V.

46. *Ibid* at s III(A)(2).

- Religious discretionary TV services (paid for directly by consumers, as opposed to services available over-the-air) are exempt from the balance requirement altogether.⁴⁷
- A multi-faith ownership and management structure is no longer necessary.⁴⁸
- Vision TV is given a reserved spot on basic cable.⁴⁹

The CRTC's religious broadcasting policy contained an atypically strong dissent. Six commissioners maintained that religious programming distributed solely on a discretionary basis should not be relieved from the balance requirement. They felt that "continued exposure of consistently one-sided views may prove to be a destructive force in Canadian society" and that "removing the requirement for balance . . . will promote religious, cultural, and racial intolerance in Canada and will lead to a weakening of the cultural, political, social and economic fabric of Canada".⁵⁰

Like their predecessors, neither the 1991 Act nor the 1993 policy defines "matters of public concern". The 1993 policy says only that "the Commission acknowledges that there remains a 'degree of controversy' frequently associated with religious practices and beliefs. Accordingly, the Commission will continue to view religious matters to be of public concern".⁵¹ CRTC jurisprudence suggests that issues which stimulate "lively public discussion"⁵² will also be deemed to be of public concern. Designating issues as "matters of public concern" is meant to expose the public to various points of view and put it in a better position to reach informed opinions.⁵³ To date, the CRTC has labelled such topics as

47. *Ibid* at s III(A)(3).

48. *Ibid* at s III(B)(2)(b).

49. *Ibid* at s III(B)(4).

50. *Ibid* at Dissenting Opinion, paras 17-18, 20.

51. *Ibid* at s III(A)(2).

52. *Proposed Guidelines for Open Line Programs* (29 July 1988), 1988-121, online: CRTC <<http://www.crtc.gc.ca>>.

53. *Policy Regarding Open-Line Programming* (23 December 1988), 1988-213, online: CRTC <<http://www.crtc.gc.ca>> [*Open-Line Programming Policy*].

religion, politics and public affairs programming as matters of public concern for the purposes of the 1991 Act.⁵⁴

III. Concerns with the Religious Broadcasting Policy

A. Evolution of the “Balance” Requirement

Meeting the balance programming requirement has not been a straightforward task for licencees. Since the 1993 policy was promulgated, that requirement has been diluted so much that it is no longer faithful to its original rationale. It initially required programming about other faiths, but can now be met through such diverse options as American sitcoms, non-religious movies, news broadcasts, public service announcements and commercial advertisements.

In its 1993 policy, the CRTC recommended several methods by which a broadcaster could provide balance: offering open-line programming, where viewers or listeners can express their opinions; giving on-air time to someone who has complained about a program; searching out alternative points of view; and using “its own resources to produce or acquire programming in order to satisfy the balance requirement”.⁵⁵

54. Although the CRTC has not explicitly said that politics and public affairs are matters of public concern, I make the inference based on a 1988 public notice that the CRTC would regard them as such. See *Proposed Guidelines for Open Line Programs*, *supra* note 52. Along with its 1993 policy on religious broadcasting, the CRTC issued “Guidelines on Ethics for Religious Programming”, which set out rules for on-air religious fundraising and the representation of other groups and faiths during programming. 1993 *Religious Broadcasting Policy*, *supra* note 11 at s IV. The ethics guidelines regulate how religious programs are to be presented rather than what types of programs must appear, so they are beyond the scope of this article.

55. *Balance in Programming on Community Access Media* (29 September 1988), 1988-161, online: CRTC <<http://www.crtc.gc.ca>>.

In 1994, the CRTC issued a public notice to clarify its expectations on what balance meant for religious broadcasters.⁵⁶ The notice affirmed the idea articulated in the 1993 policy that it required off-setting one religious view with programming about other faiths.⁵⁷ The CRTC clarified that religious broadcasters could not rely solely on open-line programming to provide balance; they would have to “ensure that different points of view are broadcast”, for example, by regularly booking guests from other faith groups, and would have to actively solicit programming about other religions.⁵⁸ Applicants for licences had to commit to airing a minimum quota of such other-faith programming.

The requirements began to shift in a 2002 decision on a proposed religious television station in Winnipeg. In that decision, the CRTC redefined balance programming as “programming devoted to providing differing views on issues and events presented during the station’s primary programming”, and said that it “*includes* the presentation of different religions”.⁵⁹ This implied for the first time that balance could include non-religious programming.

This relaxation of the CRTC’s earlier interpretation was exemplified by the licence requirements imposed on the Winnipeg Christian television station: of the 18 hours per week of mandated balance programming, only two and a half hours (or less than 14 per cent) had to be from a non-Christian perspective.⁶⁰ In addition, the CRTC

56. *Victory Christian Fellowship of Lethbridge (1983) Inc* (30 August 1994), 1994-110, online: CRTC <<http://www.crtc.gc.ca>> [*Victory Christian Fellowship*].

57. This conception of balance was typical of the CRTC’s decisions throughout the 1990s. In a 1995 public notice, the CRTC stated that “the Commission’s policy calls for those who broadcast religious programming to expose their audiences to different points of view on religion itself”. *Denial of Applications for Broadcasting Licences to Carry on New, Religious Television Programming Undertakings at Various Locations in Western Canada* (24 November 2011), 1995-198 at para 6, online: CRTC <<http://www.crtc.gc.ca>>. See also *Crossroads Television Network* (4 December 1996), 96-773 at para 3, online: CRTC <<http://www.crtc.gc.ca>> and *Trinity Television, Inc* (4 December 1996), 96-774 at para 3, online: CRTC <<http://www.crtc.gc.ca>>.

58. *Victory Christian Fellowship*, *supra* note 56.

59. *Proposed Television Station for Winnipeg* (8 August 2002), 200-229 at para 11, online: CRTC <<http://www.crtc.gc.ca>> [*Winnipeg Television Station*] [emphasis added].

60. *Ibid* at para 17.

approved the use of movies (nowhere limited to religious-themed movies) as a form of balance programming. While acknowledging that “scheduling movies as balance programming is not a traditional approach for religious broadcasters and does not provide a local perspective on religious issues”, the CRTC said that “an annual maximum of 26 movies” could count as balance.⁶¹ Other than noting that this “would not represent a significant portion of the station’s total annual balance programming”,⁶² the CRTC did not offer any insight into why it had decided that movies could now qualify as balance programming. The principle, if we can disentangle one, seems to be that anything non-religious may qualify, as long as it is a small enough part of the station’s overall balance programming. This was a noticeable relaxation of the earlier interpretation.

A year later, in 2003, the CRTC seemed to add ethnic programming as yet another way of attaining balance. In a licence application which was approved by the CRTC, a Christian radio station stated that part of its balance requirement would be met with “ethnic programming, some of which would be religious programming directed to the Spanish, Portuguese, Korean and Ukrainian communities”.⁶³ The decision did not specify how much of the ethnic programming had to be religious, or whether it could be, or must be, about non-Christian faiths. Given the spiritual demographics of the listed ethnic groups,⁶⁴ this religious programming would likely be some variant of Christian programming. This decision seems to mean that where ethnic and religious programming overlap, the fact that it is “ethnic” is enough to qualify it

61. *Ibid* at para 13.

62. *Ibid*.

63. *Christian Music Radio Station in Kitchener-Waterloo* (14 May 2003), 2003-154 at para 5, online: CRTC <<http://www.crtc.gc.ca>>.

64. A large majority of the citizens of Spain (94%), Portugal (87%) and Ukraine (96%) are Christian. See Central Intelligence Agency, *Spain*, online: World Factbook <<https://www.cia.gov/library>>; Central Intelligence Agency, *Portugal*, online: World Factbook <<https://www.cia.gov/library>>; Central Intelligence Agency, *Ukraine*, online: World Factbook <<https://www.cia.gov/library>>. In South Korea, the most practiced religion is Christianity (26% of citizens). See Central Intelligence Agency, *Korea, South*, online: World Factbook <<https://www.cia.gov/library>>.

as balanced, even though it might be from the same religious perspective as that of the single-faith station itself.

Although the CRTC relaxed its definition of balance, it became more demanding about when balance programming was to be aired: it would have to be during peak viewing times. This compromise—freeing up the content of balance programming but limiting when it would count—was recognized in a 2006 decision:

In order to avoid interference with freedom of expression . . . the Commission had permitted broadcasters great flexibility in determining . . . how balance can best be achieved. . . . The Commission is of the view that a religious programming service should offer balance programming during peak viewing periods throughout the broadcast week. Without safeguards to ensure a prominent place in the broadcast schedule, balance programming is at risk of being relegated to token expressions of alternate points of view.⁶⁵

While scheduling balance programming at obscure hours contradicts the spirit of the balance policy, so does diluting what constitutes balance. As explained above, the CRTC has not always required that such programming be about other faiths. However, there is an exception for licencees in large urban markets with well-documented religious diversity. Here, the CRTC requires that some programming about other faiths be offered during peak viewing hours.⁶⁶ At first glance, the requirements for urban broadcasters appear to be onerous, but given the relaxation of the balance requirement, they are not as difficult to satisfy as they might seem.

The balance programming requirement has shifted from its original focus on programming about other faiths to the point where almost anything can qualify, if it is characterized cleverly and is not relied on too heavily. In an interview with the author, one Christian radio station

65. *CHNU-TV Fraser Valley—Licence amendments* (24 February 2006), 2006-48 at paras 17, 20, online: CRTC <<http://www.crtc.gc.ca>> [*CHNU-TV*].

66. Even in the Vancouver market, programming about other faiths still accounts for less than 50% of this station's total balance programming requirements (*ibid.*). See also *CIIT-TV Winnipeg—Acquisition of Assets, New Transmitter in Victoria, and New Licences* (20 May 2005), 2005-207 at appendix 1, para 3, online: CRTC <<http://www.crtc.gc.ca>> [*CIIT-TV*].

confirmed that it relies on Israeli tourism advertisements and “pro-Israel” public service announcements to fulfil part of its balance requirement.⁶⁷ However, it should be noted that in a 2007 decision involving an application from a Christian television station, the CRTC defined balance as “the presentation of differing views from the station’s overall Christian perspective”.⁶⁸ The CRTC held that the station’s flagship public affairs program and an interview show about prominent women in the province did not qualify. Unlike earlier decisions in which the CRTC liberalized the balance programming requirement, it here required the broadcaster to present differing religious views, further confusing the CRTC’s stance on what “balance” means.

In sum, the interpretation of the term “balance” has changed to the point where it now has little substantive meaning. Although the 1991 Act removed the reference to balance in the “matters of public concern” provision, the CRTC has maintained the requirement but has used discretion in interpreting it.

B. Evolution of the Meaning of “Religious” and its Effect on Balance

Parallel to the evolution of “balance” has been the evolution of what the CRTC is willing to accept as religious programming. Flexibility on the latter score is a more recent development, and the CRTC’s policy in this regard does not yet seem to be definitive.

In the 2002 decision concerning a Winnipeg television station,⁶⁹ discussed in the previous section, the CRTC seemed to tacitly expand its definition of “religious” for the first time to include US sitcoms and news programs that were contextualized with religious content. In an attempt to fulfil its balance requirement, the station had been airing programs such as *The Dick Van Dyke Show*, *The Andy Griffith Show* and *The Beverly Hillbillies*, on the basis that they reflected family values and

67. Interview of a Canadian Christian radio station (26 November 2010). [Editor’s note: the radio station requested that its name not be provided.]

68. *Complaint Regarding Conditions of Licence Relating to the Broadcast of Religious Programming on CHNU-TV Fraser Valley* (29 June 2007), 2007-210 at paras 31, 33, online: CRTC <<http://www.crtc.gc.ca>> [CHNU-TV Complaint].

69. *Winnipeg Television Station*, *supra* note 59.

dealt with moral and ethical issues. Additionally, the station interspersed the shows with material from a Christian comedian who provided spiritual context for the programming. It used a similar practice of “Christian contextualization” during episodes of the news programs *60 Minutes* and *Dateline*, with an in-studio host highlighting the spiritual implications of the issues being raised. Although the CRTC did not comment on these practices specifically, it ultimately approved the licence; it must either have considered this material to be “balance programming” or have believed that a non-religious program could be made “religious” with the proper contextualization.

Three years later, in a decision on CIIT-TV, the CRTC gave religious broadcasters an explicit alternative to strictly religious programming. In that decision, the CRTC seemed to relax its conception of “religious” programming by creating a new category which could be called “quasi-religious”: programming that is not overtly religious but reflects “religious, spiritual, ethical or moral values”.⁷⁰ Up to twenty-five per cent of a station’s balance programming could be drawn from this new category. CIIT-TV responded by airing a number of US sitcoms, such as *Full House*, *Everybody Loves Raymond* and *Home Improvement*.

In 2007, several commercial stations complained that a religious station owned by Rogers Communications was airing programs that were not “religious”. In reply, Rogers argued that its US sitcoms and current affairs programs were either religious or quasi-religious. In its decision,⁷¹ the CRTC clarified its policies on the meaning of these terms, and considered their application to nine specific programs.

The CRTC stated that in order to be “religious”, a program must “have ‘religion and religious teachings or discussions of the human spiritual condition’ as its primary theme”.⁷² It held that these criteria

70. *CIIT-TV*, *supra* note 66 at appendix 1, para 2.

71. *CHNU-TV Complaint*, *supra* note 68.

72. In this decision, the CRTC was obliged to reconcile two somewhat differing definitions of “religious”. The 1983 *Religious Broadcasting Policy*, *supra* note 11 at s III(B)(1), defines religious as “anything directly relating to, inspired by, or arising from an individual’s relationship to divinity, including related moral or ethical issues”. The CRTC defines “Category 4 Religion” as “[p]rograms dealing with religion and religious

were met by the US dramas *7th Heaven*, about a Protestant pastor and his family, and *Touched by an Angel*, about an angel who visits people in times of need.⁷³

In order to qualify as quasi-religious, a program must “convey moral or ethical values as a [primary] theme”.⁷⁴ After analyzing certain episodes, the CRTC held that *Dharma and Greg*, a sitcom about a young married couple, was quasi-religious because it “conveys moral or ethical values, especially honesty and compassion for others, in a consistent fashion and typically portrays the characters struggling with the challenge of deciding on the appropriate course of action to resolve moral or ethical dilemmas”.⁷⁵ *Malcolm in the Middle*, a sitcom about a quirky middle child and his family, also qualified as quasi-religious for similar reasons. However, *Friends* did not qualify:

Although some of the values identified by Rogers (such as loyalty among friends) may be present, the frequent use of offensive language and the incorporation of adult themes surrounding sexual relationships and behaviour is a clear indicator that such programming does not reflect broadly accepted religious, spiritual, moral or ethical values.⁷⁶

The sitcoms *Everybody Loves Raymond*, *Home Improvement*, *Full House*, *Reba* and *Saved by the Bell* were held not to qualify as quasi-religious either, because their primary purpose was “to entertain”. Further, “[w]hile each of these programs displayed occasional themes or portrayals of moral or ethical values to varying degrees in one or two episodes, moral or ethical values are referenced in passing only or simply as comedic devices”.⁷⁷

teachings, as well as discussions of the human spiritual condition”. See *Definitions for New Types of Priority Programs; Revisions to the Definitions of Television Content Categories; Definitions of Canadian Dramatic Programs that Will Qualify for Time Credits Towards Priority Programming Requirements* (23 December 1999), 1999-205 at appendix I, section II, online: CRTC <<http://crtc.gc.ca>>.

73. *CHNU-TV Complaint*, *supra* note 68 at para 16.

74. *Ibid* at para 28.

75. *Ibid* at paras 23–24, 26.

76. *Ibid* at para 23.

77. *Ibid* at para 24.

As in the decision on the Winnipeg television station, the CRTC held that any program that does not qualify as quasi-religious may nevertheless be considered so with the proper contextualization.⁷⁸ Rogers was asked to either remove the programs that did not qualify or provide the required contextualization.

A number of points may be taken from the Rogers decision. The CRTC's new found flexibility on what is religious programming seems to show that the policy of balance programming as a whole has become increasingly tenuous, or even vacuous. Material previously justified as balance programming may now be justified as religious or quasi-religious under some circumstances. The fact that some religious broadcasters are now attempting to air sitcoms as religious or quasi-religious casts serious doubt on whether the balance requirement is necessary. Further, it is unclear whether "quasi-religious" programming, which can now include secular sitcoms, still needs to be balanced and if so, whether it can be balanced using other secular sitcoms, which have qualified as balance programming in the past. Finally, given what is now considered "religious", it is possible that *7th Heaven*, for example, is considered by the CRTC to be the kind of one-sided religious programming that requires balance to protect the public interest.

As highlighted in this decision, the balance programming requirement requires the CRTC to rule on what is religious and what is not. Is the regulator capable of (or even interested in) making such decisions? Such an approach may promote deliberations on the concepts of "religious" and "balance" that are based on misperceptions or conjecture.⁷⁹

78. *Ibid* at para 40.

79. The point was not lost on the authors of an independent 2007 report: "This decision exposes the weakness of the balance programming aspect of the Commission's religious broadcasting policy". See *Dunbar/Leblanc Report*, *supra* note 36 at 264.

IV. Why the Balance Programming Requirement Should be Withdrawn

A. Inadequacies in the Balance Requirement

(i) Balance Should be Sought at a System Level, Not at a Station Level

Neither the language of the 1968 Act nor that of the 1991 Act supports the CRTC's interpretation that matters of public concern must be balanced within the programming of individual stations. The CRTC's policy was based on section 3(1)(i) of the 1968 Act, which said that "the programming provided by the Canadian broadcasting system should . . . be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern".⁸⁰ The CRTC took this to mean the system could only be balanced if each broadcaster's programming was balanced, "both in the points of view expressed . . . and in the types of programming carried".⁸¹ However, section 3(1)(i) of the 1968 Act called for balance in "the programming provided by the Canadian broadcasting system", not by each individual broadcaster. This interpretation is supported by the Ministry of Supply and Service's 1986 *Report of the Task Force on Broadcasting Policy*, which said:

The proliferation of channels makes it possible from now on to allow a degree of specialization without reducing the choice offered by the whole system: the diversity lost to the system because of specialization by one channel is replaced by the gamut of specialized channels. . . . It is therefore important to continue to ensure balance in the types of programming offered by adapting the principle to the new circumstances. It is up to all general and specialty services as a whole to achieve the balance required by the Act.⁸²

80. 1968 *Broadcasting Act*, *supra* note 14, s 3(d).

81. Cook & Ruggles, *supra* note 15 at 43.

82. Gerald L Caplan & Florian Sauvageau, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply & Services Canada, 1986) ch 6 at 161.

New language in the 1991 Act made this point even more clearly. As noted in Part III of this paper, the 1991 Act removed reference to the word “balance” with respect to matters of public concern. Commentary at the time suggested that the balance requirement was now “extended to apply to the broadcasting system as a whole”.⁸³ Although the comments of the task force and the wording of the *Broadcasting Act* since 1991 indicate that balance was meant to be achieved at a system level, the CRTC’s 1993 policy nevertheless maintained its interpretation of balance, based on its reading of the superseded 1968 Act.

The Federal Court in 1998 considered an analogous provision of the 1991 Act that refers to “the Canadian broadcasting system”, and came to a different interpretation than that of the CRTC.⁸⁴ At issue was section 3(1)(a) of the 1991 Act, which reads: “The Canadian broadcasting system shall be effectively owned and controlled by Canadians”.⁸⁵ The court concluded that this provision does not apply to *individual* broadcasting undertakings because the 1991 Act clearly distinguishes between the system as a whole and its individual components, referring to “each broadcasting undertaking” to denote individual stations.⁸⁶ By analogy, had Parliament intended that each individual broadcasting undertaking

83. Philip Savage, Bill Gilsdorf & Robert Hackett, “Guest Editors’ Introduction” (1992) 17:1 Canadian Journal of Communication 7 at 9.

84. *Rogers Communications Inc v Canada (Attorney General)* (1998), 145 FTR 79 at para 16, 78 ACWS (3d) 704 [*Rogers Communications*].

85. 1991 *Broadcasting Act*, *supra* note 44, s 3(1)(a).

86. *Rogers Communications*, *supra* note 84 at para 22. The court stated:

Within the statutory scheme the “Canadian broadcasting system” is distinct from its components. . . . For example, paragraph 3(1)(b) is to the effect that the Canadian broadcasting system comprises “public, private and community elements”. Paragraph 3(1)(e) on the other hand, states that “each element” of the broadcasting system will contribute to “the creation and presentation of Canadian programming”. Paragraph 3(1)(f) ensures that “each broadcasting undertaking” will encourage as much as possible, Canadian creativity with respect to the creation and presentation of programs. I need not give further examples as it is abundantly clear that the *Broadcasting Act* distinguishes between the parts and the whole (*ibid* at paras 21– 22).

would have to achieve balance within its programming schedule, it would have said so.⁸⁷

(ii) A Matter of Public Concern?

The effect of regarding religion, politics and public affairs programming as matters of public concern is to cordon them off as a separate category requiring unique regulatory intervention to protect the integrity of the broadcasting system. Whether or not that is true of politics, it is debatable whether religion should continue to be regarded as a matter of public concern. While strong and often contrasting views about religion continue to be held in our society,⁸⁸ the CRTC's policy deems all religious programming to be controversial without considering its actual content. This approach disregards the fact that there are diverse types of religious programming, many of which are devotional in character and lifestyle-oriented, and unlikely to lead to controversy.

The CRTC has said that its policy on "matters of public concern" is about enabling Canadians to reach informed opinions.⁸⁹ Using regulation to encourage citizens to reach informed opinions can perhaps be justified with respect to public affairs and political programming; in a

87. A proper reading of this statutory objective—that there should be balance in the overall system—shifts the responsibility from individual broadcasters to the CRTC. As one communications scholar observed, "[s]ystemic balance . . . can be approached by providing media users with the broadest possible set of truly distinctive viewpoints, across a variety of program types and formats, and, through the judicious employment of additional channels—new avenues in which they can add their own". See Marc Raboy, "Balance is in the Eye of the Beholder" (1992) 17:1 *Canadian Journal of Communication* 117 at 121. Technological developments over the past 18 years, since the 1993 religious policy was introduced, have made balance on a system-wide level even easier to achieve.

88. According to a recent worldwide Ipsos Reid poll, 48% of respondents agreed that "religion provides the common values and ethical foundations that diverse societies need to thrive in the 21st century", while 52% agreed that "religious beliefs promote intolerance, exacerbate ethnic divisions and impede social progress". See CBC News, "Poll underlines sharp divide on religion", *CBC News* (26 November 2010), online: CBC News <<http://www.cbc.ca/news>>.

89. *Open-Line Programming Policy*, *supra* note 53.

democracy, citizens have a duty to make important decisions that affect society as a whole, and it may be a legitimate public policy objective to expose them to a variety of viewpoints in order to help them carry out that duty responsibly. It is less clear why the state would concern itself with whether citizens reach informed decisions on their own religious views, which have no direct impact on other citizens.

(iii) Differential Treatment of Religious and Political Broadcasters

Although the CRTC considers both religion and politics to be “matters of public concern”, it does not impose a balance requirement on political programming to the same extent as on religious programming. A key theme in the CRTC’s religious broadcasting policy and decisions is the idea that balance is a “principal tenet of the Canadian broadcasting system”.⁹⁰ However, CRTC decisions approving news and public affairs services such as *CTV Newsnet*, *Al Jazeera* (Arabic-language), *Al Jazeera English* and *Sun TV News* contain no such statements on the importance of balance. The thrust of those decisions is that diverse news and public affairs services further rather than threaten the objectives of the Act.

For example, in a 2004 public notice, the CRTC approved *Al Jazeera’s* Arabic-language public affairs service for digital distribution. The decision held that distributing *Al Jazeera* would “provide an opportunity for the public to be exposed to the expression of differing views on matters of public concern”, thereby achieving the objectives of section 3(1)(i)(iv) of the 1991 Act.⁹¹ Another example is provided by *Sun TV News*, a news service that aims to provide a conservative point of view on public affairs. Its licence was approved in 2010, with no balance requirement. The CRTC explained that *Sun TV News* would enhance the “plurality of editorial voices in local and national markets” and

90. *CHNU-TV*, *supra* note 65 at para 17.

91. *Requests to Add Al Jazeera to the Lists of Eligible Satellite Services for Distribution on a Digital Basis* (15 July 2004), 2004-51 at para 54, online: CRTC <<http://www.crtc.gc.ca>>.

would ensure that Canadians “are exposed to an appropriate plurality of those voices”.⁹²

(iv) Effect on Conventional Commercial Broadcasters

The CRTC’s 1993 policy also has a different effect on religious broadcasters than on conventional commercial broadcasters. Let us consider the effects of the policy from the perspective of a commercial private broadcaster which airs religious programming and the perspective of a commercial private broadcaster which owns religious stations.

(a) Providing a Forum for Paid Religious Programming

Prior to the CRTC’s 1983 policy, religious programming could only be made available on Canadian radio and television if religious producers or ministries bought air time from conventional commercial broadcasters. Some religious groups continue this practice today, rather than seeking licences as religious broadcasters.

The current definition of balance—as “including” the presentation of different religious content⁹³—operates to the advantage of conventional broadcasters which sell air time to religious organizations. Unlike a licenced religious broadcaster, a conventional private broadcaster need not provide views about other faiths (although there is still an obligation to balance matters of public concern). In a 2010 broadcasting decision, the CRTC described a local affiliate of Global Television as “a general-interest conventional television station”, and as such not “obligated to air other religious programs from a perspective different from that of

92. *Sun TV News—Competitive Mainstream National News Service* (26 November 2010), 2010-882 at para 7, online: CRTC <<http://www.crtc.gc.ca>>. Similarly, balance programming is not listed as a condition of licence for *CTV Newsnet*. See *CTV Newsnet—Licence Renewal* (Ottawa: 21 January 2004), 2004-8, online: CRTC <<http://www.crtc.gc.ca>>.

93. *Winnipeg Television Station*, *supra* note 59 at para 11.

the program in question in order to satisfy the balance requirements”.⁹⁴ For conventional broadcasters, the decision said, “balance on matters of public concern, including religion, can be achieved through the overall programming broadcast on the service, over a reasonable period of time”.⁹⁵ More specifically, it accepted the argument of Global’s owner, Canwest,⁹⁶ that it provided balance through its newscasts and public affairs programming.⁹⁷

In contrast, the CRTC held in 2007 that a BC religious television station could not rely on its public affairs programming to satisfy the balance requirement, because that programming did not sufficiently offset the station’s overall Christian perspective.⁹⁸ Thus, the balance policy seems to be applied inequitably, based on whether the applicant’s owner is religious or is a conventional commercial organization.

This difference in treatment also indirectly benefits conventional broadcasters, who can earn revenue by airing religious programming, and can use that programming to satisfy their Canadian content requirements. A 2009 report prepared for the CRTC confirmed both practices: it identified selling air time for religious programming as a “sure-fire profitable approach” and one of the methods most depended on by conventional broadcasters to satisfy their daytime Canadian programming requirements.⁹⁹

(b) As Owners of Religious Broadcasting Undertakings

The CRTC has given some indication that it may apply the balance programming requirement more flexibly when a religious station is

94 *Complaint Regarding the Broadcast of Jack Van Impe Presents on CKND-TV Winnipeg* (28 September 2010), 2010-716 at para 28, online: CRTC <<http://www.crtc.gc.ca>> [CKND-TV Winnipeg].

95. *Ibid.*

96 Global Television is now owned by Shaw Media. See Global Television, *About Us*, online: GlobalTV <<http://www.globaltv.com>>.

97. *CKND-TV Winnipeg*, *supra* note 94 at para 14.

98. *CHNU-TV Complaint*, *supra* note 68 at paras 32–33.

99. Peter H Miller, *The Business of Canadian OTA Television* (Ottawa: 31 August 2009) at section 4(a)(ii), online: CRTC <<http://www.crtc.gc.ca>>. See also Zolf & Taylor, *supra* note 2 at 157.

owned by a mainstream commercial entity. CHNU-TV, which was originally under Christian ownership, had been acquired by Rogers Communications. Rogers wanted to bring the station under its overall “OMNI” brand, and perhaps downplay its religious character. The new category of quasi-religious programming, discussed in Part III, enabled Rogers to air more US programming than it would have previously been allowed to. The only explanation offered by the CRTC was that “it is appropriate that religious broadcasters also be permitted to include in their programming schedules programs . . . which reflect broadly accepted religious, spiritual, ethical or moral values”.¹⁰⁰ With regard to allegations that Rogers had not complied with its conditions of licence, the CRTC explained that the rationale for its decision had been to “provide a measure of programming flexibility for CHNU-TV, while ensuring that the service it provides remains a distinct alternative to commercial services in the same market”.¹⁰¹

The CHNU-TV decision enabled programming previously justified as balance programming to qualify as quasi-religious or religious. That a third category of quasi-religious programming was required to ensure CHNU-TV remained “distinct” seems unpersuasive because the effect of the decision was that Rogers was able to air more US programming than it otherwise would have been able to. It is not yet clear whether this decision was a fact-specific accommodation for Rogers or a new approach that may be applied to other broadcasters.

B. Developments that Have Made the Balance Requirement Unnecessary

(i) Technological Change: Less Spectrum Scarcity and More Content Choices

The CRTC’s balance requirement is rooted in spectrum scarcity (the existence of only a limited number of over-the-air radio and television frequencies) and in “a concern that the public airwaves not be exploited by any person or entity to proselytize any particular religious point of

100. *CIIT-TV*, *supra* note 66 at para 57.

101. *CHNU-TV Complaint*, *supra* note 68 at para 21.

view”.¹⁰² However, as noted in an independent 2007 report examining the relevancy of the CRTC’s broadcasting regulations, developments in digital distribution technology (such as satellite television, digital cable and the internet) “have lessened concerns based on spectrum scarcity, and have provided licensing options . . . that will make it possible to allow more single faith religious broadcasting undertakings”.¹⁰³

In Robert Armstrong’s words, the transition from analog to digital formats has provided “the opportunity for improved spectrum management and the possibility of fulfilling the demand for specialized and personalized niche programming that responds to individual needs”.¹⁰⁴ In other words, new methods of distribution have led to a surplus of content choices, resulting in the ability to satisfy the demands of niche audiences like never before. An example of a previously unavailable method of distribution is provided by Category 2 specialty services.

Specialty television refers to channels available by subscription from a distributor; the subscriber chooses and pays for a single service, or more often, for a package of channels. The CRTC defines specialty services as “narrowcast television programming designed to reflect the particular interests and needs of different age, language, cultural, geographic or other groups in Canada”.¹⁰⁵ Category 2 speciality services are an extension of the initial specialty channels (Category 1) and are offered in digital format alone. Category 1 specialty services must be carried on cable and are subject to greater regulation than Category 2 services,¹⁰⁶ which are intended to be governed by market forces.¹⁰⁷ Category 2 services are available on an optional basis, licenced as niche

102. *Dunbar/Leblanc Report*, *supra* note 36 at 264.

103. *Ibid.*

104. Robert Armstrong, *Broadcasting Policy in Canada* (Toronto: University of Toronto Press, 2010) at 163.

105. *Call for Applications for Network Licences to Offer Canadian Specialty Programming Services* (13 August 1986), 1986-199 at section 1, online: CRTC <<http://www.crtc.gc.ca>>.

106. Examples of Category 1 services include: *MuchMusic*, *The Sports Network* (TSN), *History Television*, *W Network*, and *The Comedy Network*.

107. Salter & Odartey-Wellington, *supra* note 6 at 49, 468-69.

formats to cable and satellite carriers—meaning that it is up to the licensee to make its own arrangements with any distributor.¹⁰⁸ In short, there has been what the CRTC has called a “content surge”—that is, the availability of unprecedented content choices for Canadian television viewers.¹⁰⁹

Looking back, technological advances have been the precursors to each modification of the CRTC’s religious broadcasting policy. The first multi-faith religious broadcaster was made possible in part by satellite-to-cable technology, which enabled broadcasting to be distributed without travelling over or using up scarce over-the-air frequencies.¹¹⁰ Single-faith religious broadcasting was justified by an “evolution of digital technology” which permitted an expansion of niche and “à la carte” programming.¹¹¹

These technological changes should lead to another change in the CRTC’s policy—the end of the balance requirement. One of the CRTC’s objectives, according to the 1991 Act, is to regulate and supervise the Canadian broadcasting system “in a flexible manner that . . . is readily adaptable to scientific and technological change”.¹¹²

108. *Introductory Statement—Licensing of New Digital Pay and Specialty Services* (14 December 2000), 2000-171, online: CRTC <<http://www.crtc.gc.ca>>. Category 2 services include such networks as *Animal Planet*, *BBC Canada*, *Discovery Science*, *Movieola*, and *National Geographic*, as well as ethnic services such as *Abu Dhabi TV*, *Mediaset Italia*, *Persian Television*, *PTC Punjabi*, and the *Israeli Network*. There are currently three religious Category 2 services. See *Grace TV: The Christian Channel—Acquisition of Assets* (4 May 2009), 2009-247, online: CRTC <<http://www.crtc.gc.ca>>; *Salt and Light Television Salt and Light Catholic Media Foundation—Licence Amendment* (25 October 2006), 2006-608, online: CRTC <<http://www.crtc.gc.ca>>; *LoveWorldCan—Category 2 Specialty Service* (10 January 2011), 2011-15, online: CRTC <<http://www.crtc.gc.ca>>.

109. Canadian Radio-television and Telecommunications Commission, *A Competitive Balance for the Communications Industry: Submission of the CRTC to the Competition Policy Review Panel* (Ottawa: January 2008), online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/cprp.pdf>>.

110. 1983 *Religious Broadcasting Policy*, *supra* note 11; Zolf & Taylor, *supra* note 2 at 161.

111. 1993 *Religious Broadcasting Policy*, *supra* note 11 at s III(A)(3).

112. 1991 *Broadcasting Act*, *supra* note 44, s 5(2).

(ii) Transformation of Media Consumption Practices

Canadians now consume media differently than they did in the past; the model viewer and model listener whom “balance programming” was designed to serve no longer exist. As the CRTC acknowledged in 2010, the “transformative shift in Canadian viewing habits” from conventional to new digital services—specialty, pay, pay-per-view and on-demand—has brought “wholesale change” to the broadcasting landscape.¹¹³ The following are some aspects of that change:

- Individuals consume and interact with a greater variety of media. Content used to be delivered on dedicated channels (such as conventional TV stations), but is now delivered through an array of media technologies.¹¹⁴
- Viewers and listeners access media content on their own schedules, not those of the media outlets.¹¹⁵
- Audiences expect greater choice and easier accessibility, and viewers gravitate to outlets that provide it.¹¹⁶

To reiterate, the 1993 policy described the balance programming requirement as seeking “to ensure that a reasonably consistent viewer or listener will be exposed to a spectrum of differing views on issues of public concern within a reasonable period of time”.¹¹⁷ However, an audience that is “reasonably consistent” in the sense that it tunes into one station for a substantial time is swiftly becoming culturally extinct.

113. Canadian Radio-television and Telecommunications Commission, *Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications* (Ottawa: February 2010) at 4, online: CRTC <<http://www.crtc.gc.ca>>.

114. Hamilton, *supra* note 42 at 6.

115. *Ibid.*

116. *Ibid* at 6–7.

117. 1993 *Religious Broadcasting Policy*, *supra* note 11 at s III(A)(2).

(iii) The Extent to which Balance Programming is Watched or Listened To

The CRTC has recognized that balance programming is undermined when few people consume it.¹¹⁸ Such programming tends to be poorly consumed, and is not particularly appreciated by viewers and listeners who are specifically in the market for religious programs.¹¹⁹ Like other niche broadcasters, single-faith broadcasters likely attract audiences who seek their particular type of programming. Some audiences of single-faith broadcasters may feel confused by the presence of material on other religions.¹²⁰ In the words of an independent report commissioned by the CRTC, “when Christians tune to their preferred religious broadcasting station, they expect to receive programming that predominantly reflects Christian values and teachings”.¹²¹ The report also pointed out that “[i]t is not consistent with common sense to expect that Christian, or Hindu, or Muslim licencees of an [over-the-air] religious television or radio broadcasting station will provide listeners/viewers with a meaningful exposure to a ‘spectrum of differing issues of public concern’”.¹²²

118. *Introductory Statement to Decisions CRTC 96-773 and 96-774—Denial of Applications for Broadcasting Licences to Carry on New, Religious Television Programming Undertakings at Toronto and Hamilton/Burlington, Ontario* (4 December 1996), 1996-152, online: CRTC <<http://www.crtc.gc.ca>>; See *CHNU-TV*, *supra* note 65 at para 18.

119. A study conducted by Trinity Television that evaluated the effectiveness of religious broadcasting internationally, indicated that Christian programming does not typically attract large non-Christian audiences. See Meg Johnstone, “Christian on-air media expanding, unifying”, *Canadian Christianity*, online: Canadian Christianity <<http://canadianchristianity.com/cgi-bin/na.cgi?nationalupdates/020925media>>.

120. “Christian radio station forced to give time to other faiths”, *The Ottawa Citizen* (28 July 2007), online: Postmedia Network <<http://www.canada.com>>.

121. *Dunbar/Leblanc Report*, *supra* note 36 at 265.

122. *Ibid.*

Conclusion

Religious broadcasting in Canada has come a fair distance. Previously considered to be troublesome amateurs on the margins of the broadcasting industry, religious broadcasters have grown in number and have a niche programming presence in the Canadian broadcasting landscape.

From the beginning, the development of a national policy for broadcasting in Canada and the job of regulating it was an inherently political activity. A Canadian scholar once wrote:

Obviously, Canadian broadcasting could not for ever proceed as if no national policy were required. Technical limitations on the number of available frequencies necessitated intervention by the state. The question of who would be given the advantage of a scarce resource, a frequency—this would be the result of a political decision.¹²³

The CRTC decided, rightly or wrongly, that it was in the public interest to place strict limits on religious broadcasting. However, consumer demand, technological advances and the enactment of the *Charter* led the CRTC, in 1983 and 1993, to relax its policy on religious programming. While religious broadcasting was no longer prohibited outright, the balance requirement was a compromise designed to permit some of it while keeping religious broadcasters accountable and protecting Canadians from the perceived dangers of one-sided religious programming.

Nearly two decades have passed since the CRTC last revised its religious broadcasting policy in 1993. From the evolution of that policy, including the changes in the meaning given to the words “balance” and “religious”, it is clear that the balance programming requirement has become increasingly vacuous and confused. This paper has argued that this requirement should be withdrawn. First, it is based on a problematic interpretation of the *Broadcasting Act*, and it has been applied less favourably to religious broadcasters than to other types of broadcasters. Furthermore, its rationale is no longer relevant due to technological advances, an increase in content choices, the advent of

123. Peers, *supra* note 2 at 12–13.

niche programming, and changes in the consumption habits of audiences.

The CRTC ought to initiate a public notice proceeding and invite interested parties to comment on the religious broadcasting policy. If one of the goals of that policy is to permit a wide enough space for legitimate religious expression within the broadcasting system while protecting against the potential excesses of religious fundamentalism, there needs to be a discussion on whether the current balance programming rules are the most effective way to realize that goal.

