

## Regulation of Newspaper/Broadcasting, Media Cross-Ownership in Canada

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*Last summer, the CRTC was provided with a policy directive on one aspect of media cross-ownership, newspapers/broadcasting combinations. This article, by examining the transcripts, interventions and decisions of the six hearings held pursuant to the directives at the point of writing, seeks to more fully report these cases and reveal how various provisions of the directives have been interpreted.*

*L'été dernier, on a soumis à la C.R.T.C. une directive de principes portant sur un aspect du droit diversifié de propriété des media—la comlienaison journal-radiodiffusion. Cette étude cherchera à exposer l'état de cette affaire à l'aide d'un examen des copies de discours, des interventions, et des décisions obtenues durant les six audiences tenues suite à la mise en oeuvre de la directive. De plus, l'étude fera connaître les diverses interprétations qu'ont reçues les dispositions de cette directive.*

### INTRODUCTION

On July 29, 1983, by Order-in-Council, the Canadian Radio-television Telecommunications Commission was provided with a policy directive to address the problem of media cross-ownership. The explanatory note which accompanied *Direction to the C.R.T.C. on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors* encapsulated the directive's principal objective in this manner:

The Direction is to ensure that, with certain exceptions, enterprises engaged in the publication of daily newspapers shall be prohibited from owning or controlling broadcasting undertakings operating in the same market area.<sup>1</sup>

The patterns of ownership of the Canadian broadcasting industry are renowned for their high degree of corporate concentration and cross-ownership with other types of media outlets. Since its inception, on an *ad hoc* basis, the CRTC has been applying policies of its own creation to address this trend, often with questionable and often questioned results. The cabinet's directive attempts to provide more solid ground for the Commission's efforts and it narrows the focus of those efforts to newspaper/broadcasting cross-ownership situations where a daily paper and a broadcasting outlet do or will serve the same market area.

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<sup>1</sup>P.C. 1982-2290, S.O.R./82-746. This direction was issued pursuant to subparagraph 22(1)(a)(iii) and Section 27 of the *Broadcasting Act*, on the recommendation of the Minister of Communications. Section 22(1)(a)(iii) of the *Broadcasting Act* R.S.C. 1970, c. B-11 gives the Governor in Council the power to proscribe classes of applicants to whom broadcasting licenses may not be issued or to whom amendments or renewals may not be granted.

The motivation of the Governor-in-Council for creating this directive was also included in the legislation's explanatory note. It was created:

... for the general purpose of fostering independent, competitive and diverse sources of news and viewpoints within Canada.<sup>2</sup>

This paper will examine the issue of ownership diversity, review the CRTC's early attempts to regulate media cross-ownership and canvass the first batch of decisions rendered by the Commission under the cabinet directive.

### THE DIVERSITY PRINCIPLE AND BROADCASTING OWNERSHIP PATTERNS IN CANADA

The diversity principle enunciated in the explanatory note quoted above is considered by many to be a fundamental right of every citizen. The public is said to have a right to a free flow of information and opinion from "diverse and antagonistic sources".<sup>3</sup> This doctrine is premised on the assumption that natural market competition between diversely held media outlets will produce the widest possible dissemination of information and the greatest variety of opinion.<sup>4</sup>

The patterns of ownership of Canadian media outlets exhibit a very apparent lack of diversity. Recent ownership studies conducted by the Davey Committee<sup>5</sup>, C.R.T.C.<sup>6</sup> and the Kent Commission<sup>7</sup> reveal that media

<sup>2</sup>*Ibid.*, This note was published along with the directive itself but is not intended to be part of the legislation. For further statements of the policy objectives of the new legislation, see the public statements made by the Hon. Jim Fleming, then Minister of State (Multiculturalism), on May 25, 1982.

<sup>3</sup>The concept of diverse and antagonistic sources of information was developed in the United States as a sub-part of the First Amendment guarantee to freedom of the press in the U.S. Constitution. The diversity principle was first applied to communications ownership in the case of *Associated Press et al. v. United States* (1945), 326 U.S. 1. (See especially at p. 12). Prior to the enactment of the *Canadian Charter of Rights and Freedoms, Constitution Act 1981*, and section 2(b) therein, freedom of the press in Canada was protected by the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, s. 1(f) and arguably through the preamble to *The British North America Act* giving Canada a constitution similar in principle to that of the United Kingdom. The extension of U.K. press freedoms are referred to in *Reference Re: Alberta Statutes*, [1938] S.C.R. 100 (S.C.C.). (See especially pp. 133-35 and pp. 145-46).

<sup>4</sup>The diversity principle and its assumptions about natural market forces have no definite legislative or media case law foundation in Canada. No section of the *Broadcasting Act* provides expressly for diversity of ownership and the case of *R. v. K.C. Irving* (1977), 72 D.L.R. (3d) 82 (S.C.C.) suggests that the assumptions relating to natural market forces and diverse ownership are not necessarily accepted by Canadian courts. (See *Irving* case at pp. 88 and 93 per Laskin C.J.C.)

<sup>5</sup>*Report of the Special Senate Committee on Mass Media* (Ottawa: Queens Printer, 1970) Volume II of the report entitled "Words, Music and Dollars: A Study of the Economics of Publishing and Broadcasting in Canada" contains an extensive section on ownership patterns and on the holdings by province and corporate group. (See especially pp. 41-115 in Vol. II).

<sup>6</sup>"Ownership of Private Broadcasting: An Economic Analysis of Structure, Performance and Behaviour", *Report of the Ownership Study Group to the CRTC* (Ottawa: C.R.T.C., 1978). (The CRTC Ownership Study). This study was mainly concerned with how concentrated the ownership of media outlets had become between the years 1968 and 1975. The issue of cross-ownership was addressed as an aside to the issue of group ownership.

<sup>7</sup>*Royal Commission on Newspapers* (Hull: Supply and Services, 1981). While the Kent Commission concentrated on the ownership patterns of newspaper publishing, it did address the problem of cross-ownership of newspapers and broadcasting outlets. (See pp. 239-40).

outlets in Canada are characterized by a high degree of group ownership<sup>8</sup> and cross-ownership. The statistics collected for the CRTC ownership study reveal that for the first eight years of the existence of the CRTC, group-ownership, as opposed to single company holding for broadcasting outlets, increased at an alarming rate. For example, between 1968 and 1975 group-ownership of television undertakings increased from 35 to 50 percent of the industry, radio station ownership by groups rose from 64 to 81 percent of the industry, and by 1975 cable television ownership was so concentrated that, not only were 53 percent of the outlets group-owned, but 10 percent of the largest cable groups accounted for about 80 percent of that industry's revenue.<sup>9</sup>

Cross-ownership of media undertakings refers to a combination of different broadcasting media, such as radio/television, television/cable or cable/radio controlled by the same individual, firm or institution, or it can consist of one or more types of broadcasting outlets combined with an individual, firm or institution owning or controlling newspaper interests. Some of the first statistics demonstrating the extent of the cross-ownership problem can be seen in this statement of the Davey Committee which used statistics from the 1960's:

There are 31 communities where groups have common interests in both radio and TV stations, and another 14 communities where "independents" enjoy the same multiple interest . . . There are also 11 communities where groups or independents have a common interest in the local newspaper and one or more of the broadcasting stations. In eight of these places, the people who own a newspaper also have a financial interest in a TV station. In four of these communities, the newspaper owners have an interest not only in the TV station, but in one or more of the local radio stations as well.<sup>10</sup>

While the Kent Commission report did not address the problem of newspaper/broadcasting cross-ownership in any detail, it did contain a recommendation directed at this problem. The Commission stated that while much concentration of newspaper ownership had to be tolerated due to the economic realities of the industry, it regarded cross-ownership where the newspaper and broadcasting undertakings served the same community as an unjustifiable reduction in the diversity of sources of information. The report recommended that such co-locally operated combinations be forced to divest one of their holdings over a five year period unless the cross-ownership could be justified in the public interest.<sup>11</sup>

<sup>8</sup>Group ownership was defined in the study as "one of two or more broadcasting undertakings of the same type (television or radio stations, or cable systems) controlled by the same individual, firm or institution". From "Ownership of Private Broadcasting: The Contemporary Status of Ownership and the Level of Concentration in the Canadian Broadcasting Industry", Background Study II to the *CRTC Ownership Study* (at p.3.)

<sup>9</sup>From Background Study II, *ibid.* at p. 3.

<sup>10</sup>See: "The Uncertain Minor", Volume I of the Davey Committee Report, *supra*, footnote 5 at pp. 16-17. These observations were recorded by community, presumably they refer to where cross-owned undertakings service the same market area.

<sup>11</sup>*Supra*, footnote 7, at pp. 239-240.

It should be noted that none of the studies cited were able to produce any empirical evidence that cross-ownership of either sort, broadcasting/broadcasting or newspaper/broadcasting, were contrary to public interest. The principle ground for objection was the loss of diversity of information and opinion likely to result from such combinations. Not only did the CRTC ownership study find no proof of detriment in cross-ownership, they offered a potential benefit.

... the Study Group found no economic or financial basis for any general ban on cross-ownership. For example, the analysis showed no measurable cross-ownership effects on advertising rates. Respecting television and cable, an inference could be drawn that given the financial conservatism of television and the financial aggressiveness of cable, appropriate mergers could result in better balanced groups from a purely financial point of view.<sup>12</sup>

In another more recent study, contradictory statistics suggest that while cross-ownership of television and radio interests established a trend toward an increase in advertising rates, cross-ownership of newspaper and television interests actually tended to decrease advertising rates.<sup>13</sup>

Before leaving the diversity issue as it relates to concentration and cross-ownership patterns, it should be noted that a lack of diversity of sources of information and opinion has an additional cause. As noted in the Kent Commission, almost all media outlets in Canada—newspapers, television and radio—rely heavily on the Canadian Press, the newspaper chain dominated news agency, as their principle source of news.<sup>14</sup> Such behaviour may or may not be related to the patterns of ownership discussed above.

### **PREDIRECTIVE REGULATION OF NEWSPAPER/BROADCASTING OWNERSHIP BY THE C.R.T.C.**

The CRTC has been attempting to separate and keep separate newspaper/broadcasting combinations (whether or not the same market was involved) since the early years of its existence.<sup>15</sup> Its policy, while very vague and not always consistently applied, has remained unchanged since first developed in the early 1970's:

<sup>12</sup>*Supra*, footnote 6, at p. 41. Other symbiotic benefits can be obtained from a *Globe and Mail* article quoting Mr. J.R. Peters on Western Broadcasting Company Limited of Vancouver. Speaking specifically about television/cable cross-ownership he stated that it permitted better use of employee skills, fuller employee co-operation and cross-fertilization of ideas. From: "New Thinking, Rethinking Viewed as Need to Improve Broadcasting Service to the Public," *Globe and Mail*, October 6, 1977.

<sup>13</sup>*Canadian Broadcasting: Market Structure and Economic Performance*, (Montreal: The Institute of Research on Public Policy, 1980). The only empirical evidence of adverse effects from cross-ownership in Canada can be found in this study. Not only do radio/newspaper combinations tend to charge significantly higher advertising rates, their rate of return on investment is also significantly higher than single-ownership stations. (See pp. 111-118).

<sup>14</sup>*Supra*, footnote 7, at p. 13.

<sup>15</sup>There is evidence of such regulation which pre-dates the CRTC. In 1965, Southam Inc. acquired a substantial interest in Selkirk Communications Limited. The parties had agreed that Southam would nominate 4 of the 10 directors of Selkirk's board. It was a condition of approval of the share transfer by the Board of Broadcast Governors (BBG) that this stipulation be changed to 3 nominees. This information was obtained from the written intervention filed by Selkirk Communications Limited on June 14, 1983 re: Public Notice CRTC 1983-99. (See section 2 at p. 2).

The Commission considers that the ownership and control of broadcasting undertakings should be separate from the ownership and control of newspapers except in special circumstances . . . The Commission has been particularly concerned where there is joint ownership of broadcasting and newspapers in the same market but has indicated that it will deal with applications involving cross-ownership on a case-by-case basis, taking into account the particular circumstances of each individual case.<sup>16</sup>

The 'special or particular circumstances' provision in this policy has allowed the Commission to permit cross-ownership if it appears to be necessary or desirable. Such circumstances were deemed to exist when a Montreal cable undertaking needed to attract a large amount of domestic capital investment during difficult times.<sup>17</sup> In another case, a promise to substantially improve local service if a transfer of shares was approved, convinced the CRTC that the circumstances were special.<sup>18</sup>

The CRTC has been controlling and influencing the patterns of ownership of newspaper/broadcasting undertakings through its power to approve the transfer of shares of broadcasting outlets, through its licensing powers and by employing informal policy statements designed to shape ownership patterns. For example, in Decisions CRTC 74-87<sup>19</sup> and 75-490<sup>20</sup> the Commission denied applications to transfer shares to Thompson-group and Southam-group companies respectively because of the resultant undesirable cross-ownership. In other share transfer cases, the Commission has denied the transfer but has couched its reasons in terms of a concern for the resultant concentration of ownership or control rather than citing the consequential cross-ownership problem.<sup>21</sup>

The licencing power of the CRTC has been used to try and force divestiture of newspaper/broadcasting cross-ownership which the Commission felt could not be justified through the existence of special circumstances. For instance, in 1970 a licence was granted to a cable undertaking with a condition attached that it would not be renewed unless, by the time the licence had expired, a daily newspaper publisher had divested its 17 per cent interest in the applicant.<sup>22</sup>

<sup>16</sup>This encapsulation of the CRTC's cross-ownership policy was contained in Public Notice CRTC 1982-46. Early statements of a similar nature are: Decisions CRTC 70-156, 70-169, 70-284, 72-370, 73-152, 73-354, 73-452, 74-87 and 75-490.

<sup>17</sup>In Decision CRTC 70-284, the Commission permitted Starlaw Investments Limited to acquire all of the issued shares of Cable TV Limited when a cabinet directive on foreign ownership of broadcast undertaking forced certain divestitures before licences could be renewed.

<sup>18</sup>In Decision CRTC 70-104 CKNX Limited was sold to the London Free Press despite the fact that the owner of a daily newspaper would then own a total of 5 radio and TV stations in London and Wingham, Ontario.

<sup>19</sup>An application by Bay Ridges Cable TV Ltd. to transfer 48 percent of its issued shares to a company which was 50 percent owned by Kenthom Holdings, a Thompson-group company, was denied because it would produce an unacceptable balance of ownership in the communications media.

<sup>20</sup>In this instance an application by CKOY Ltd. to transfer a number of shares to Selkirk Holdings Limited, a company of which 30 percent of the voting shares and 38 percent of the equity shares were held by Southam Press Limited, was denied. Southam owned almost 38 percent of CKOY at the time.

<sup>21</sup>See for example: Decision CRTC 70-41, 71-300 and 72-24 involving Maclean-Hunter and Southam.

<sup>22</sup>This condition, first imposed on F.P. Publication's interest in Community Antenna Television Ltd. by Decision CRTC 70-169, was extended until the middle of 1976 by Decision CRTC 73-152. When this condition was imposed, one of the FP's daily newspapers and the licensee both served Calgary.



In addition to the two means discussed, the CRTC has also attempted to shape the pattern of newspaper/broadcasting cross-ownership through informal policy statements. For example, the following statement was made and then reiterated in three separate decisions involving broadcasting interests owned by Thompson group corporations:

"These applications lead to the separation of a group of broadcasting stations from a significant newspaper group. The Commission thinks this separation is desirable."<sup>23</sup>

In none of the early newspaper/broadcasting cross-ownership cases cited did the CRTC tie what it was doing to an enabling provision of the *Broadcasting Act* or any other legislation. An examination of the *Broadcasting Act* reveals no provision authorizing the Commission to regulate to achieve diversity of ownership of any type, by any means either formal or informal. The only provision dealing with regulatory authority over such diversity is section 3(d) of the *Act*. It provides as follows:

"the *programming* provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the *programming* approved by each broadcaster should be of high standard using predominantly Canadian creative and other sources." (emphasis added).

One can only assume that the Commission considers that its jurisdiction to ensure diversity of views through a diversity of programming can be stretched to ensure a diversity of programming by requiring a diversity of ownership patterns. Considering the nature of vested interests involved in this area of regulation, one should be able to see a much stronger statutory anchor to a policy which intervenes so directly in the affairs of the market place.<sup>24</sup>

The cases surrounding another diversity of ownership policy of the CRTC reveal that the Commission is relying on the *Broadcasting Act* for the font of its authority to influence and control patterns of ownership. Since the early years of the CRTC, there has been a policy of not permitting a company to own more than one CTV affiliated station unless special compensating circumstances existed.<sup>25</sup> In Decision CRTC 72-316, the Com-

<sup>23</sup>The policy, first stated in Decision CRTC 70-156 and repeated in Decision 72-370, was an expression of Commission approval of attempts by Thompson-group interests to divest their broadcasting outlets. In CRTC Decision 74-87, the Commission denied a transfer of shares in a cable undertaking to a Thompson-group holding company, reiterated the statement cited in the text, and added, "the Commission continues to consider that such separation is a desirable objective." The CRTC engaged in similar posturing in Decision 73-452. After approving a transfer of shares in CKOY Ltd. to a numbered Ontario company, the Commission noted as an aside that Southam Press Limited, which owned a chain of newspaper dailies, participated in the ownership of CKOY through Selkirk Holdings. The Commission took the opportunity to repeat its concerns about such concentration and control of the mass media.

<sup>24</sup>This comment has nothing to do with how desirable the objectives of the Commission may have been. As a statutory body, its actions and policies must still be *intra vires* its express or implied jurisdiction.

<sup>25</sup>The policy actually predates the CRTC but the BBG applied it as a rule without special exemptions.

mission reviewed recent share purchases by a corporation which effectively put it in breach of the affiliate separation policy. The Commission insisted that it needed to:

... maintain supervision of the ownership and control of licences of broadcasting undertakings which are owned or controlled, directly or indirectly, by companies whose shares are traded on the public market.

The Commission stated that it had a right to exercise such supervision to ensure a diversity of ownership "to enable the objectives of the *Broadcasting Act*, particularly those of Section 3(d), to be achieved."

In a more recent case<sup>26</sup>, Baton Broadcasting Ltd., the owner of the CTV affiliate in Toronto, attempted to purchase a majority of the common shares of CFCF-TV, the Montreal affiliate of the same network. The Commission, in a split decision, denied the application as it could not find sufficient compensating benefits in the proposal. Both the majority and the minority commissioners appear to have regarded the Commission's regulatory jurisdiction, as delineated in section 3 of the *Broadcasting Act*, as statutory authority to supervise all aspects of the broadcasting system which would affect, either directly or indirectly, the policy contained in that section. Therefore, the Commission regarded itself as being seized of the statutory authority to prevent a particular concentration of ownership likely to reduce the diversity of programming.

In light of these two decisions it is difficult to see how section 3 of the *Act* could have been used to support newspaper/broadcasting cross-ownership regulation. While affiliate independence may lead to programme diversity,<sup>27</sup> a separation of newspaper and broadcasting interests need have no relation at all to programming. The only alternative argument is that the entire fabric of the *Broadcasting Act* both envisions and authorizes such regulation.<sup>28</sup>

<sup>26</sup>Decision CRTC 78-669. John B. Bassett, the owner of Baton Broadcasting which owned CFTO-TV in Toronto, was attempting to purchase 54 percent of CFCF-TV owned by Multiple Access Ltd. and 45 percent of CITY-TV in Toronto. "Multiple" also owned an AM and FM station in Montreal.

<sup>27</sup>In an article written about the Bassett decision great doubt is cast upon the relevance of affiliate independence to programme diversity. See: Wilkie, J.S., "The CRTC and Concentration of Ownership in Canadian Broadcasting: The "Bassett Decision," An Uncertain Response" (1979), 37 *U.T. Fac. L. Rev.* 157. (See: especially at pp. 166-67 and p. 174).

Two recent cases, *CKOY Limited v. The Queen*, [1979] 1 S.C.R. 2 (S.C.C.) and *Canadian Broadcasting League v. CRTC*, [1983] 1 F.C. 182 (F.C.A.), have both endorsed a very wide view of the powers of the Commission conferred as a necessary incident to the objectives set out in section 3 of the *Broadcasting Act* (See respectively pp. 11-14 and pp. 191-93).

<sup>28</sup>In the Bassett decision the CRTC supported the validity of its affiliate separation policy on this very foundation:

"The Commission considers that Parliament in the *Broadcasting Act* as enacted, made clear its intention that the broadcasting system should strengthen and enhance the open, democratic political system and culture of Canada, characterized by freedom of expression, diversity of taste, and the availability of the public of the widest possible opinions. This intention permeates the entire fabric of the *Act*" (From *supra*, footnote 26 at p. 5).

## A NEW DIRECTION

Direction PC-2294 came into effect on July 29, 1982. From this time until the point of writing, six newspaper/broadcasting cross-ownership cases have been heard and decisions have been rendered by the Commission.<sup>29</sup> Five of the cases involve a different publisher of a daily newspaper and each decision seems to explore a different aspect of the direction.

The directive itself is quite lengthy,<sup>30</sup> but the Commission divided it into a five-part inquiry. The following interrogatories were incorporated into the "Notice of Public Hearing" for each case:

<sup>29</sup>Decisions CRTC 83-567, 83-656, 83-675, 83-676, 83-677 and 83-773. Presumably these are but the first of a series of cases to be considered under the directive. This quotation from the Senior Vice-President of London Free Press Holdings Limited at one of the cross-ownership hearings discussed, *infra*, provides some indication of the number of cases yet to come.

This is the first of what conceivably could be a series, even a continuing saga, of licence renewals forcing us to justify our continued involvement in broadcasting under the cloud of the directive (From Public Hearing CRTC Transcript of Proceeding, Vol. 2, Hull, Quebec, March 1, 1983 (at p. 79.)

It should be noted that while the initial cases before the CRTC have been decided, at the time of writing, the legal status of the directive itself is on appeal to the Federal Court of Canada. Applications to the trial and appeal division of the Federal Court were filed on February 14, 1983 and August 18, 1983 respectively by the New Brunswick Broadcasting Co. Limited.

<sup>30</sup>1. This Direction may be cited as the *Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors*.

### Definitions

2. For the purposes of this Direction,

"daily newspaper" means a newspaper that is generally published and circulated five or more days per week; and "proprietor of a daily newspaper" means a person who, in the opinion of the Commission, alone or jointly or in concert with one or more other persons, effectively owns or controls or is in a position to effectively own or control directly or indirectly an enterprise engaged in the publication of a daily newspaper and includes, where the enterprise is a corporation having share capital, a person who, in the opinion of the Commission, alone or jointly or in concert with one or more other persons, effectively owns or controls or is in a position to effectively own or control the corporation, whether directly through the ownership of shares of the corporation or indirectly through a trust, a contract, the ownership of shares of any other corporation, the holding of a significant portion of the outstanding debt of the corporation or by any other manner whatever.

### Direction

3. The Canadian Radio-television and Telecommunications Commission is hereby directed that, on and after July 29, 1982, broadcasting licences may not be issued and renewals of broadcasting licences may not be granted to an applicant who is a member of the class described in section 4.

4. The class of applicants referred to in section 3 consists of

(a) the proprietors of daily newspapers, and

(b) the applicants who, in the opinion of the Commission, are effectively owned or controlled, or are in a position to be effectively owned or controlled directly or indirectly, by the proprietor of a daily newspaper where the major circulation area of the daily newspaper substantially encompasses the major market area served or to be served by the broadcasting undertaking.

5. Where the Commission is satisfied that a refusal to grant a broadcasting licence or renewal applied for by an application of the class described in section 4 would be contrary to overriding public interest considerations taking into consideration all relevant factors including consequences that would adversely affect service to the public or create exceptional or unreasonable hardship to the applicant and the level of existing competition in the area served or to be served under the broadcasting licence, the Commission may, notwithstanding section 3, grant a licence or a renewal thereof.



- 1) whether the broadcasting undertaking is effectively owned or controlled by a daily newspaper proprietor;
- 2) the major circulation area of the daily newspaper;
- 3) the major market area served by the broadcasting undertaking;
- 4) whether the major circulation area of the daily newspaper substantially encompasses the major market area served by the broadcasting undertaking;
- 5) whether failure to renew would be contrary to overriding public interest considerations taking into consideration all relevant factors including:
  - a) consequences that would adversely affect service to the public;
  - b) consequences that would create exceptional or unreasonable hardship to the applicant; and
  - c) the level of existing competition in the area served under the broadcasting licence.

For the sake of convenience, and to accord with the issues raised in the cases already decided, this inquiry has been shortened into three main issues; effective ownership or control, market overlap and public interest exemptions.

**(a) Effective Ownership or Control**

Section 3 of the direction prohibits the CRTC from issuing or renewing the licences of applicants who are members of the proscribed class set out in section 4. Section 4 describes this prohibited class of applicants as:

- a) the proprietors of daily newspapers; and
- b) the applicants who, in the opinion of the Commission, are effectively owned or controlled, or are in a position to be effectively owned or controlled, or are in a position to be effectively owned or controlled directly or indirectly, by the proprietor of a daily newspaper . . .<sup>31</sup>

There have been three cases dealing specifically with section 4(b) of the directive.<sup>32</sup> They are Decisions CRTC 83-567, 83-675 and 83-773. In all three cases the direction was held by the Commission to be inapplicable to the particular applicant as it was not "effectively owned or controlled by the proprietor of a daily newspaper". An examination of these decisions will reveal how section 4(b) has been interpreted and how the particular licensee escaped its application.

In the *Southam/Selkirk*<sup>33</sup> case, the first of the six to be considered under the direction, the four applicants, all wholly-owned by Selkirk Communi-

<sup>31</sup>Section 2 of the direction provides definitions for the terms "daily newspaper" and "proprietor of a daily newspaper". Neither of these terms have been the subject of significant analysis to date—in the hearings or in the decisions rendered. There have been no applications considered by proprietors of daily newspapers under s. 4(a).

<sup>32</sup>I have named these cases after the newspaper/broadcasting cross-ownership at issue. They are the *Southam/Selkirk*, *Thompson/Cablevue* and *Maclean-Hunter/CFCN* cases respectively.

<sup>33</sup>Decision CRTC 83-567. One cannot say that the direction was 'applied' in this case as the applicants were seeking approval for a transfer of shares rather than issuance or renewal of a license. The direction was considered because the licences involved were about to expire and the transfer of shares was requested in an attempt to avoid its application.

cations Limited (Selkirk), were requesting CRTC approval for two sets of share transfers. Two hundred voting shares of Selkirk held by Southam Inc. (Southam) and 1,400 voting shares of Selkirk held by seven separate shareholders were to be transferred to the Canada Trust Company. The eight beneficiaries of this trust would each be beneficially entitled to 200 shares but all 1600 shares were subject to a voting trust agreement. This transfer would leave Southam with 20 percent of the voting shares of Selkirk and 38 percent of the non-voting shares.<sup>34</sup> As Southam publishes a chain of daily newspapers which, as the company acknowledged in its intervention, substantially encompassed the market area of many of the twenty-one radio and television stations involved,<sup>35</sup> the CRTC had to determine the status of the applicants *vis à vis* the direction following such a transfer.

In order to determine whether Selkirk, as 100 percent owner of the licensees, was itself "effectively owned or controlled . . . by the proprietor of a daily newspaper", the Commission canvassed common law cases on corporate control and devised and applied a two-part examination of legal and *de facto* control. According to the Commission, the primary test of legal control is:

the legal ability to elect a majority of the Board of Directors of a company, either by the holding of sufficient voting securities for that purpose or by some other legally enforceable means such as a voting trust agreement or other contractual arrangement.<sup>36</sup>

The Commission's test for *de facto* control is to be applied in circumstances where legal control does not exist. It involves examining factors which allow for:

direct influence over the running of a company's affairs, such as the holding of significant debt or a commercial relationship through which a dominant influence can be asserted over a company. Finally, the courts have further recognized *de facto* control to exist in the hands of the shareholder group having the plurality of votes in widely-held companies where geographical or numerical dispersion of other shareholders makes it virtually impossible for those other shareholders to aggregate their voting interest so as to assert legal control over the company.<sup>37</sup>

The Commission went on to add further flexibility to the *de facto* control test:

In the Commission's view, the grounds set out herein for determining effective or *de facto* control are not meant to be exhaustive and, in any event, each case will have to be decided on the basis of its own particular facts.<sup>38</sup>

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<sup>34</sup>*Ibid.*, at p. 1.

<sup>35</sup>There was no public hearing for this case. This information was obtained from the Intervention filed by Southam Inc. on June 10, 1983 re: Public Notice 1983-99 (at p. 3-3). Also contained in the intervention is the fact that, at the time, Southam Inc. published 15 daily newspapers in Canada (at p. 2-3).

<sup>36</sup>*Supra*, footnote 33, at p. 3.

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*, at p. 4.

The legal control test used by the CRTC is a very common one.<sup>39</sup> It is premised on the fact that most business association legislation and corporate by-laws vest the power to manage the affairs and business of a corporation in the Board of Directors. In the absence of cumulative voting, the directors of a corporation are elected by a majority of the voting shareholders. Therefore, whoever owns or controls the votes of the majority of a corporation's voting shares is in a position to elect the Board of Directors. The key is that these votes are being directed through legally enforceable means such as owning a majority of the voting shares or securing a contractual or trust arrangement which gives control over voting for directors.<sup>40</sup>

The Commission's test for effective control also contains no novelty.<sup>41</sup> Without the legal ability to do so, the holder of less than 50 percent of a corporation's voting shares, is determined to be in a position to effectively control the business and affairs of a corporation because circumstances are neutralizing a sufficient number of the votes of the remaining shareholders. Those neutralizing circumstances may be present naturally, such as when voting is not uniformly difficult for all. These circumstances may also exist through the politics of corporate influence, such as when the Board of Directors feels obliged to follow the dictates of their major client or the holder of a large corporate debt.

The application to transfer shares into a trust in the *Southam/Selkirk*<sup>42</sup> case represents a successful attempt, certainly in the CRTC's view, to render groundless allegations that Southam was in a position to effectively control Selkirk Communications Limited.<sup>43</sup> The 1600 voting shares in the trust were made subject to a voting trust agreement, the effect of which was as follows:

All class B voting shareholders except Southam have entered into a voting trust agreement dated April 20, 1983 and deposited (subject to CRTC approval) their shares with a trust company to consolidate their voting rights into one block of 80 percent of the voting shares. All shares in this block will be voted together by the trustee at the direction of the participating shareholders beneficially owning a majority of the deposited voting shares.<sup>44</sup>

<sup>39</sup>See: *M.N.R. v. Aaron's Ladies Apparel Ltd. et al.* (1967), 60 D.L.R. (2d) 448 (S.C.C.). (See especially at p. 450). In this case the Supreme Court of Canada held that the ownership of 50 percent of a corporation's shares and serving as corporate president did not amount to legal control of the company.

<sup>40</sup>An example of contractual control over a broadcasting outlet can be found in Decision CRTC 81-750. In this case a lending institution which purchased 30 percent of the voting shares of a cable company was given the legal right to elect three of the company's five directors. The Commission considered that control over the licensee had passed to the purchaser of the shares.

<sup>41</sup>It is not even novel to the CRTC. In the background paper to the *CRTC Ownership Study* a test identical to this was used. (*supra*, footnote 8 at pp. 1-2). For an example of a CRTC decision where the issue of effective control was considered prior to the directive see: Decision CRTC 72-316. This case involved an unrecorded purchase of shares.

<sup>42</sup>*Supra*, footnote 33.

<sup>43</sup>There were more than just allegations of effective control. The Kent Commission actually threatened Southam. See the Kent Commission *supra*, footnote 7 (at pp. 439-40) where the commission noted that Southam owned 30 percent of the voting stock of Selkirk and went on to state:

The fact nonetheless is that Southam is the largest shareholder and could, if it chose to exercise the power, impose its will on the operation of Selkirk. The proposed legislation's definition of control would make it plain that Southam is required to sell its interest in Selkirk.

<sup>44</sup>From: Southam's intervention, *supra*, footnote 35, at pp. 1-1 to 1-2.

In other words, the effect of CRTC approval of this transfer of shares, with the proposed voting trust agreement attached, would be to reduce Southam's voting interest in Selkirk, from 30 percent to 20 percent of the voting shares, and to unify into a single block all remaining votes.<sup>45</sup>

As the Commission could find no other arrangements, contractual or otherwise,<sup>46</sup> which would increase, or put Southam in a position to increase at a future time,<sup>47</sup> its control over Selkirk, the federal regulator decided that the direction: "would not apply in respect of the broadcasting undertakings operated by companies controlled by Selkirk."<sup>48</sup>

The *Thompson/Cablevue*<sup>49</sup> decision also involved a determination premised on the CRTC's interpretation of the "effective ownership or control" provision contained in section 4(b) of the direction. In this case, Cablevue (Quinte) Limited (Cablevue), a cable company serving Belleville and Trenton, Ontario, was seeking a five year licence renewal. The cabinet direction was involved because:

Cablevue is owned 50 percent by Morville Holdings Limited (Morville), a holding company owned and controlled by area residents. The remaining 50 percent of cableview is owned by Kenthom Holdings Limited (Kenthom) which, in turn, is wholly owned by the Peter John Thompson Trust (1965), a trust established by Kenneth R. Thompson for the benefit of his minor son, Peter John Thompson. Kenneth R. Thompson, indirectly, controls the Canadian Newspapers Company Limited which is the proprietor of the "Intelligencer", a daily newspaper published in Belleville.<sup>50</sup>

As the quotation above makes apparent, Cablevue is ultimately connected to the publisher of the Intelligencer, Thompson Newspapers Lim-

<sup>45</sup>According to the voting trust agreement the shares, subject thereto, could only be voted in accordance with the express directions of a majority of the trust's eight beneficiaries. As Southam was to maintain its right to nominate only two of ten directors to the Board of Directors, the voting trust agreement would clearly put Southam into a minority position. In addition to this the corporate by-laws of Selkirk-Communications Limited required that fundamental changes to the corporation required a majority of 66 2/3 percent of the voting shares cast. Therefore, Southam could not veto any fundamental changes. See: Southam's intervention, *supra*, footnote 35, at pp. 5-2 to 5-4.

<sup>46</sup>It was stated by Southam and accepted by the CRTC that:

No arrangements of any sort, including shareholder agreements, share options, loan agreements, business relations, directorships, veto powers and quorum requirements . . . provide to Southam any means whereby it could or can effectively control, or is in a position to effectively control, Selkirk regardless of what realistic test or definition may be applied. (*Ibid.*, at p. 1-1).

<sup>47</sup>The phrase "in a position to" is part of the effective ownership and control inquiry the CRTC must perform in accord with section 4(b) of the directive. While it has not been the subject of analysis in the directive cases to date, presumably it is applicable in the situation where the putative owner or controller of a licensee, by a mechanism such as an option to purchase shares, has the means to acquire legal or *de facto* ownership or control. See for example, the early cross-ownership case of Decision CRTC 74-87 where an agreement to transfer shares contained an option to acquire additional shares. The Commission disallowed the transfer as it was concerned that the option to purchase additional shares put the purchaser "in a position to" exercise legal control over the broadcasting outlet.

<sup>48</sup>*Supra*, footnote 33, at p. 3.

<sup>49</sup>Decision CRTC 83-675.

<sup>50</sup>*Ibid.*, at p. 1.

ited. Therefore, to determine the licensee's status in relation to section 4(b) of the direction, one would have to trace each of the linkages between Cablevue and Thompson Newspapers to determine if the publishing company owns or controls or effectively owns or controls the cable company. In fact, the CRTC determined that the directive had no application to the present licensee without proceeding beyond an examination of the share structure, shareholder agreement and course of business management between Morville and Kenthom.<sup>51</sup> These three aspects of the relationship between the joint owners of Cablevue were subjected to the legal and *de facto* control test developed in the *Southam/Selkirk* case.<sup>52</sup>

While considering the legal control of Cablevue, the Commission noted that the share ownership of the cable company had been equally divided between Morville and Kenthom since its original licence was granted in 1965. Also, the original shareholder agreement between the two holding companies gave each the authority to appoint three of the six board members and two of the four corporate officers. Additionally, the Commission noted that the shareholder agreement contained a consensual arbitration clause to be used to settle unresolved differences involving corporate decisions.

The CRTC studied the *de facto* control of Cablevue and found that there were no other arrangements affecting voting rights between the joint owners, there was no evidence that Kenneth R. Thompson exercised a dominant influence, either directly or indirectly, over the licensee's affairs, and that the daily business of Cablevue was, for the most part, conducted by Morville.

After reviewing all of the foregoing, the decision of the federal regulator stated:

... the Commission is satisfied that effective ownership and control of the licensee does not reside in Kenthom. The Commission concludes, therefore, that Cablevue does not fall under the proscribed class of applicants described in section 4 of the Direction, and that it is not necessary for the Commission to determine whether the Peter John Thompson Trust (1965) is effectively owned or controlled by Kenneth R. Thompson.<sup>53</sup>

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<sup>51</sup>Merely as a point of interest the other linkages should be briefly reviewed. Kenthom is wholly owned by the Peter John Thompson Trust (1965). The sole beneficiary of the trust is the 17 year old son of Kenneth R. Thompson. The Trust is independently administered by two trustees appointed by its settlor, K. R. Thompson. Peter John Thompson will become entitled to the income of the trust when he reaches his 21st birthday and the capital will vest in him at age 30. The trust, which is irrevocable, owns only 10 percent of the issued shares of Thompson Newspapers and no other shares in any other companies which publish daily newspapers. Thompson Newspapers is a public company, the shares of which are traded publicly. Voting control of Thompson Newspapers is in Woodbridge Company Limited (Woodbridge). The ultimate control of Woodbridge is in Kenneth R. Thompson. This information was disclosed by those who appeared at the public hearing on behalf of Kenthom Holdings Ltd. See: Public Hearing CRTC, Transcript of Proceedings Vol. 2, Hull, Quebec, March 2, 1983 (at pp. 206-216 and 224-225).

<sup>52</sup>*Supra*, footnote 49. The Commission quoted the test in its entirety. (at pp. 2-3)

<sup>53</sup>*Ibid.*, at pp. 5-6.



The Commission went on to give Cablevue the maximum period of licence renewal.

The third case involving section 4(b) of the directive closely paralleled the preceding facts, analysis and decision in a number of respects. In the *Maclean-Hunter/CFCN* case,<sup>54</sup> the CRTC applied the same legal and *de facto* control test to similar share structure and shareholder agreement arrangements between Maclean-Hunter Limited (Maclean-Hunter) and the Toronto Sun Publishing Corporation (Toronto Sun) and decided once again that the directive did not apply.

In the present case, CFCN Communications Limited (CFCN) applied to the Commission for licence renewals for two AM radio stations in Calgary and for a Calgary television station with eleven rebroadcasting outlets located throughout southern Alberta and British Columbia. The cabinet directive was involved because CFCN was wholly-owned by Maclean-Hunter which owned 49.7 percent of Toronto Sun. Toronto Sun published three daily newspapers, one of which was the "Calgary Sun". The Commission enumerated the issue raised by these circumstances in this manner:

A central question arising from the Direction is whether, by virtue of this 49.7 percent shareholding or by any other means, [Maclean-Hunter] can be said either to have, or be in a position to have, effective ownership or control directly or indirectly of [Toronto Sun].<sup>55</sup>

Therefore, in order to determine whether CFCN was effectively owned or controlled by the proprietor of a daily newspaper, which served substantially the same market area, the Commission had to determine whether, as a result of the ownership and other arrangements between Maclean-Hunter and Toronto Sun, Maclean-Hunter was the proprietor of the daily newspaper, "Calgary Sun."<sup>56</sup>

The CRTC began its inquiry by examining for legal control. It noted that Maclean-Hunter owned less than 50 percent of the voting shares of Toronto Sun and that the recently amended shareholder agreement between the two companies<sup>57</sup> provided that Maclean-Hunter nominate only two members to Toronto Sun's twelve member board of directors and that

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<sup>54</sup>Decision CRTC 83-773.

<sup>55</sup>*Ibid.*, at p. 2.

<sup>56</sup>While it did not appear to be treated as such, at the hearing or in the Commission's approach to the case, this is, presumably, a slightly different issue than the one raised in the previous two 'effective ownership or control' cases. By examining the ownership and control linkage between Maclean-Hunter and Toronto Sun the Commission was trying to determine if, under the directive, Maclean-Hunter was the proprietor of a daily newspaper. The direction supplied its own definition for the phrase 'proprietor of a daily newspaper' but, from all indications, it was, for the most part, ignored.

<sup>57</sup>The agreement was amended between the close of the hearing and the announcement of the CRTC's decision. New sections were added and the arrangement was extended for a further five years. (*Supra*, footnote 54 at p. 4).

Maclean-Hunter was required to approve the state of remaining nominees put forward by the board for election.<sup>58</sup>

*De facto* control of Toronto Sun was explored by the Commission by reviewing the shareholder agreement as amended<sup>59</sup> and by examining commitments made by Maclean-Hunter which would keep the two companies at arms length. The Commission concluded that the result of the amended agreement was that Maclean-Hunter was effectively prevented from combining by any means, legal or informal, with other shareholders to vote in additional Maclean-Hunter appointees to Toronto Sun's board of directors and control its daily operations. The five assurances made by Maclean-Hunter to keep itself and CFCN at arms length from Toronto Sun<sup>60</sup> were incorporated into all of the licences as a condition of their renewal.

The CRTC concluded:

In view of all of the above factors, [legal and *de facto*] the Commission is satisfied that [Maclean-Hunter] does not effectively own or control, nor is it in a position to effectively own or control, the Toronto Sun Publishing Corporation. The Commission concludes, therefore, that Maclean-Hunter Limited is not the proprietor of the "Calgary Sun", and that CFCN does not fall under the proscribed class of applicants described in section 4 of the Direction.<sup>61</sup>

### (b) Market Overlap

Section 4 of *Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors* qualifies the Commission's application of the direction to those newspaper/broadcasting cross-ownership situations:

where the major circulation area of the daily newspaper substantially encompasses the major market area served or to be served by the broadcasting undertaking.<sup>62</sup>

<sup>58</sup>The quorum for a meeting of Toronto Sun's Board of Directors was six and this remained when the parties entered into the shareholder agreement. The agreement, referred to as the Standstill Agreement, was entered into on March 10, 1982—very shortly after Maclean-Hunter purchased 49.7 percent of the voting shares of Toronto Sun. The five year agreement raised the Sun's Board of Directors to twelve, restricted Maclean-Hunter's nominees to two and provided that the daily business of the newspaper publisher would be supervised by its own board of directors. The agreement was discussed at length at the hearing. See: Public Hearing CRTC, Transcript of Proceedings Vol 1, Calgary, Alberta, May 24, 1983 (especially at pp. 20-23 and pp. 64-68).

<sup>59</sup>The amendment to the Standstill Agreement maintained the two nominee restriction to Toronto Sun's board of directors and it added that:

... in any event, the Board of Directors of the Toronto Sun shall not include more than two persons who are directors, officers or employees of Maclean-Hunter or any of its subsidiaries. (*Supra*, footnote 54 at p. 4).

<sup>60</sup>At the hearing, Maclean-Hunter made nine separate assurances and the Commission reduced or combined these into a licence condition that Maclean-Hunter remain restricted to two nominees to Toronto Sun's board; Toronto Sun will not restrain the financing of CFCN's broadcasting operations; CFCN will not operate out of the same location as the "Calgary Sun"; the "Calgary Sun" and CFCN will continue to remain editorially independent; and that CFCN and "Calgary Sun" will not share any management personnel. (*Ibid* at p. 5).

<sup>61</sup>*Ibid*.

<sup>62</sup>*Supra*, footnote 1.

As previously stated, the direction has been considered on six occasions before the CRTC. In three of those cases, substantial overlap of the market area, of the daily newspaper and the broadcasting outlet involved, was acknowledged to exist<sup>63</sup> or the existence of such overlap was specifically unchallenged<sup>64</sup> by those who intervened on behalf of the publisher of the daily involved. In the remaining cases the overlap issue was challenged and in only one instance was that challenge accepted by the CRTC as a ground for exempting the licensee from application of the directive. Only the successful challenge will be discussed as in the other two cases the CRTC did not specifically discuss the market overlap issue in its decisions.<sup>65</sup>

*The London Free Press/CKNX*<sup>66</sup> case arose because the AM radio station in Wingham, Ontario, CKNX Broadcasting Limited, was wholly-owned by Wingham Investments Limited which was a wholly-owned subsidiary of London Free Press Holdings Limited. This second holding company was the proprietor of the London Free Press Printing Company Limited, which published the daily newspaper, the "London Free Press". This daily was published about 100 km. away from Wingham in London, Ontario. Because the radio station was located so far away from where the "London Free Press" was published, and due to the fact that CKNX claimed that its listeners were situated in pockets of high concentration which surrounded Wingham in a donut-like fashion, the CRTC was forced to grapple with the terms, "major circulation area", "major market area" and "substantially encompasses". The Commission's resolution of this case offers no definition for the terms listed above. After examining the evidence submitted by the applicant the CRTC held that:

while there may be some degree of overlap between the major circulation area of the "London Free Press" and the major market area served by radio station CKNX, the Commission is satisfied that the major circulation area of the London Free Press does not substantially encompass the major market area served by CKNX.<sup>67</sup>

<sup>63</sup>In the *Thompson/Cablevue* case and the *London Free Press/CFPL* case, (to be discussed *infra*) market overlap was admitted during the hearing. See respectively: Transcript, *supra*, footnote 51 (at p. 227) and Public Hearing CRTC Transcript of Proceedings, Vol 1, Hull, Quebec, March 1, 1983 (at p. 115).

<sup>64</sup>In the *Southam/Selkirk* case, Southam Inc. in its intervention specifically stated that it was not challenging this aspect of the directive. See: Intervention *supra*, footnote 35 (at p. 3-3).

<sup>65</sup>As previously discussed, in the *Maclean-Hunter/CFCN* case, application of the directive was ruled out as Maclean-Hunter was held, by the Commission, not to be the proprietor of a daily newspaper. At the hearing, Maclean-Hunter had argued that the circulation area of the "Calgary Sun" did not substantially encompass the major market area of CFCN-AM and CFCN-TV as the daily was a "city" paper and the broadcasting undertakings served the area in a regional fashion. See: Transcript, *supra*, footnote 58 (at pp. 24-29). In the *Irving/N.B. Broadcasting* case (the facts of which to be discussed *infra*.) the president of New Brunswick Broadcasting Company Ltd. challenged the vagueness of this provision and refused to admit the existence of major market overlap between the Saint John newspaper, the "Evening Times-Globe" and CHSJ-TV in Saint John or substantial duplication of market between the provincial daily, the "Telegraph-Journal" and CHSJ-TV and its seven rebroadcasting stations. In its decision, the CRTC simply stated that it found as a fact that the major circulation of the two newspapers substantially encompassed the major market area of the broadcasting undertakings at the regional and at the provincial level. See: Decision CRTC 83-656 (at p. 9).

<sup>66</sup>Decision CRTC 83-677.

<sup>67</sup>*Ibid.* (at p. 2) (emphasis in original).

One can only glean the definitions accorded to these phrases by examining a lengthy exchange which took place between counsel for the CRTC and representatives supporting the licensee, during the public hearing for this case.<sup>68</sup> From this exchange it would appear that the Commission regarded the "major circulation area" of a daily newspaper to be "the areas where the greatest proportion of newspapers are read by inhabitants of those areas."<sup>69</sup> To discern the distinction between a paper's circulation area and major circulation area, the Commission was apparently ready to examine and compare the circulation figures available, through the ABC Fact Book<sup>70</sup>, of all newspapers available in an area under review. These figures were used to allocate market shares, per newspaper, for each subsection of the area reviewed. By examining the relative sales for each subsection of the total circulation area, the Commission could determine a daily's major circulation area.<sup>71</sup> Also considered relevant were the figures available from a newspaper as to which areas generated its greatest volume of advertising.<sup>72</sup>

The term "major market area" for a broadcasting undertaking seems to be derived by superimposing a broadcaster's major advertising market and audience data, from BBM figures<sup>73</sup>, on a station's technical contour, or signal reach.<sup>74</sup> It also appeared that a station's stated mandate, or who it directed its news, opinions and entertainment at, was relevant to determining its major market area.<sup>75</sup>

The term "substantially encompasses", for the determination as to whether the major circulation area of the newspaper substantially encompasses the major market area of the broadcasting undertaking, appears to have been accorded a rather plain meaning. The Commission is to determine whether one area substantially overlaps the other.<sup>76</sup>

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<sup>68</sup>See: Public Hearing CRTC Transcript of Proceeding, Vol I Hull, Quebec, March 1, 1983 (at pp. 91-117A).

<sup>69</sup>*Ibid.*, at p. 98.

<sup>70</sup>As disclosed at the hearing, the Audit Bureau of Circulation does an audit of every newspaper's records and produces a publication referred to as the "Fact Book" (*Ibid.*, at p. 94).

<sup>71</sup>Counsel for the Commission made her inquiry in these words:

Could the point of reference to determine major be the dominance of the penetration of the newspaper in a given country or city or area, that is the circulation of the newspaper relative to the total number of dailies read in that county independently of the percentage of the total circulation of the newspaper that it represents?

(*Ibid.*, at pp. 99-100).

<sup>72</sup>*Ibid.*, at pp. 101-102. Also used to examine advertising markets was the Canadian advertising rates and data publication.

<sup>73</sup>These figures are prepared and published by the Bureau of Broadcast Measurement. For example, data on who listens at what times.

<sup>74</sup>*Ibid.*, esp. at pp. 114-115.

<sup>75</sup>*Ibid.*, at p. 106.

<sup>76</sup>*Ibid.*, at p. 116-117.

In the *London Free Press/CKNX* decision, once the CRTC determined that the newspaper's major circulation area did not substantially encompass the radio station's major market area, it held that the directive was inapplicable to CKNX Broadcasting Limited. The Commission, based on the licensee's record of performance, renewed its broadcasting licence for another five years.<sup>77</sup>

**(c) Public Interest Exemptions**

Section 5 of the directive gives the CRTC the discretion to grant or renew an applicant's licence request, notwithstanding the existence of newspaper/broadcasting cross-ownership if the Commission is satisfied that:

... refusal to grant a broadcasting licence or renewal ... would be contrary to overriding public interest considerations taking into consideration all relevant factors including consequences that would adversely affect service to the public or create exceptional or unreasonable hardship to the applicant and the level of existing competition in the area served or to be served under the broadcasting licence ...<sup>78</sup>

As their principal or alternative argument, in each of the six cases where the directive was under consideration, every applicant, and those intervening on their behalf, advanced extensive argument which they hoped would convince the Commission that non-renewal of the licence under consideration would be to the detriment of the public interest.<sup>79</sup> In the following two cases, the Commission held that the applicant was a member of the proscribed class enumerated in section 4 of the directive; it then addressed the potential extension of its discretion to exempt the applicant under section 5.

The CRTC has extended its discretion under section 5 of the direction to grant a full renewal of a licence, notwithstanding the existence of the cross-ownership proscribed in section 4, on only one occasion. In the *London Free Press/CFPL*<sup>80</sup> case, an AM radio station in London, Ontario, petitioned for a licence renewal. The applicant, CFPL Broadcasting Limited (CFPL), was examined under the directive because it was wholly-owned by London Free Press Holdings Limited—the same holding company which was directly linked to the London daily newspaper "London Free Press" in the *London Free Press/CKNX* case.<sup>81</sup> As CFPL could not deny that it was owned

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<sup>77</sup>*Supra*, footnote 66, at p. 3.

<sup>78</sup>*Supra*, footnote 1.

<sup>79</sup>Most applicants and intervenors tendered lengthy argument premised on the three components of section 5 of the direction *viz.*, that their service would ultimately be replaced with something markedly inferior, they and their employees would suffer unreasonable hardship from a forced divestiture and the level of existing competition was so high that a diversity of sources of information and viewpoints was assured.

<sup>80</sup>Decision CRTC 83-676.

<sup>81</sup>The connection between this holding company and the daily was discussed below footnote 66. While these licences were not under review at this time, it should be noted that CFPL also owned CFPL-FM and CFPL-TV, both operating in London, Ontario.



by the proprietor of a daily newspaper, and as the broadcaster admitted that the major market area of the radio station substantially encompassed the major circulation area of the daily, the applicant and those appearing on its behalf addressed most of their attention to the public interest consideration issue.

In its decision, the CRTC reviewed the public interest arguments made by CFPL and its appearing and non-appearing intervenors. They may be briefly stated as follows:

... the absence of any evidence that failure to renew the broadcasting licence issued to CFPL would lead to any significant increase in independent, competitive and diverse sources of news and viewpoints in London ... the area now "enjoys a very wide choice of independent, competitive, successful and diverse media" ... each of the broadcasting undertakings for which it is licenced provides a distinct and useful service to the community, operating in complete and absolute independence of the "London Free Press" ... The licensee stressed the high quality of its AM radio service in London ... the amount of news programming it produces ... its close ties with the London community [and] that non-renewal of the London AM station would bring about a drastic cut in company revenues and a coincident drop in the level of service provided by CFPL-FM ... [and] for CFPL-TV as well as for the AM, FM and TV undertakings in Wingham ...<sup>82</sup>

Of the public interest considerations cited by the Commission it appeared to be most moved by the applicant's high quality of locally-oriented news and current affairs service,<sup>83</sup> the strong relationship between the station and its community<sup>84</sup> and the "multiplicity and diversity of media voices currently available to residents in the London area, and the resultant high degree of competition."<sup>85</sup>

After taking into account all of the factors mentioned as well as the applicant's overall performance, the CRTC renewed CFPL's broadcasting licence until 1988.<sup>86</sup>

An exemption to the directive based on public interest considerations was also considered in the *Irving/N.B. Broadcasting* case.<sup>87</sup> N.B. Broadcasting Co. Limited (N. B. Broadcasting), an affiliate of the English language CBC

<sup>82</sup>These were obtained from the decision itself. *Ibid.*, at pp. 3-6.

<sup>83</sup>Not only were CFPL's expenditures for news coverage higher than the national average, the station produced twice as much news as its local competitors. (*Ibid.*, at p. 5).

<sup>84</sup>The Commission was impressed by the high number of positive—and the total lack of negative—interventions. According to one newspaper account, there were 45 written interventions endorsing the renewal. See: Halwig David, "Free Press is Allowed to Retain Radio Holding", *Globe and Mail*, August 18, 1983 (at p. B-7).

<sup>85</sup>The Commission acknowledged that there were 13 different broadcasting and rebroadcasting transmitters, owned by seven separate licencees, in London. Also noted was the number of other signals made available to local residents by cable. (*Ibid.*, at p. 4). In its intervention London Free Press Holdings Limited stated that there were 12 daily newspapers available within the market area of CFPL. (See: Transcript *supra*, footnote 63, at p. 76).

<sup>86</sup>*Supra*, footnote 80, at 7.

<sup>87</sup>Decision CRTC 83-656.

television network, sought renewal of its broadcasting licences for CHSJ-TV of Saint John and the station's seven rebroadcasting outlets. The eight stations gave the Saint John licensee province-wide coverage.

The broadcaster ran afoul of the cabinet directive because N. B. Broadcasting was wholly-owned by the New Brunswick Publishing Company Limited (N. B. Publishing), which was ultimately controlled by three members of the Irving family of Saint John, New Brunswick.<sup>88</sup> N. B. Publishing was the proprietor of two daily newspapers, one of which, the "Evening Times-Globe" served the City of Saint John, and the other, the "Telegraph-Journal" was circulated provincially. As cited earlier in this text, the CRTC held that the major market areas of both the city and the provincial broadcasting operations substantially encompassed the respective major circulation areas of the city and provincial newspapers.<sup>89</sup>

In its decision, the federal regulator canvassed the arguments raised by the applicant during the hearing which it felt justified a licence renewal despite the existence of the type of cross-ownership prohibited by the directive. The licensee claimed, *inter alia*:

... that it would deprive the people of New Brunswick, at least initially, of access to CBC English-language television programming, as well as to its own long established local and regional service, and would spell the termination of employment for a substantial number of the company's employees. It also argued that non-renewal would constitute exceptional and unreasonable hardship to the applicant by forcing N. B. Broadcasting, which established its service in 1952, to sell its assets at prices significantly less than their value and on a piecemeal basis; further, that removal of CHSJ-TV from the marketplace would severely restrict the level of media competition in New Brunswick.<sup>90</sup>

After recognizing the contribution of the intervenors who had appeared in support of and in opposition to the application, the Commission discounted all of the public interest considerations offered by the licensee save the adversity suffered by the public by a sudden cessation of CBC English-language programming if N. B. Broadcasting were immediately forced to divest its interests in CHSJ-TV and its rebroads. For that reason alone, the Commission renewed:

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<sup>88</sup>N. B. Publishing was owned by James K. Irving (40%), Arthur L. Irving (40%) and K. C. Irving Limited (20%). The Commission noted, but reserved comment on the fact that:

... another son of K. C. Irving, John E. Irving, controls the Moncton Publishing Company Limited which publishes the "Times-Transcript", a daily newspaper in Moncton, and the University Press New Brunswick Limited which publishes the "Gleaner", a daily newspaper in Fredericton. (*Ibid.*, at p. 8). In its written brief to the CRTC regarding this case, the Consumers Association of Canada made this comment about the relationship of these media holdings to other Irving interests:

These companies are in turn woven into the Irving Group of some 170 companies which can be found in the CALURA Tiered listing program of Statistics Canada. The founder of the group, K. C. Irving, is a resident of Bermuda. (From the CAC's written intervention filed on January 25, 1983 re: Public Hearing 1982-94, at p. 11).

<sup>89</sup>*Supra*, footnote 65.

<sup>90</sup>*Supra*, footnote 87, at pp. 9-10.

... the licences for CHSJ-TV Saint John and its rebroadcasters in New Brunswick for a term expiring 1 January 1986. This term will provide sufficient time for N. B. Broadcasting to rearrange its affairs or for other arrangements to be made which will ensure that the people of New Brunswick are not deprived of the CBC network service.<sup>91</sup>

Thus, N. B. Broadcasting was given a 27-month renewal to "rearrange its affairs or for other arrangements to be made . . . [for] CBC network service." Presumably, permitting the licensee over two years to rearrange its affairs would permit the broadcaster to sell its assets or change its corporate structure or operations such that it would no longer offend section 4(b) of the directive.<sup>92</sup>

Reconciling the result in the *London Free Press/CFPL* case with the *Irving/N. B. Broadcasting* case is not difficult. The factors which most impressed the CRTC in the former fact situation were clearly not apparent in the latter. Not only was the licence renewal in the New Brunswick case strongly contested by a number of intervenors, the Commission had determined, before it addressed the issue of the directive, that based on the applicant's record of performance, it did not warrant a full licence renewal.<sup>93</sup> The level of existing media competition in New Brunswick was a fraction of that in London, Ontario. Another factor which affected the outcome of the *Irving/N. B. Broadcasting* case was the long standing desire of the CRTC, the Department of Communications and the Premier of New Brunswick that the CBC finally obtain its own English-language service in New Brunswick.<sup>94</sup>

## CONCLUSIONS

This report canvassed the initial decisions rendered by the CRTC pursuant to the cabinet *Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors* and examined the application of the directive's provisions. The six decisions were examined in terms of the three components of the directive—effective ownership or control, market overlap, and public interest exemptions.

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<sup>91</sup>*Ibid.*, at p. 11.

<sup>92</sup>A newspaper report published after the decision was released explained the controversy caused by the phrase "restructure its affairs." Apparently, consumer and media spokesmen were claiming that it meant that N. B. Broadcasting had to sell its interests privately or to the CBC. The president of the broadcasting company refuted this interpretation. The reporter covering the story criticized the decision as being vague and ambiguous. See: Wood, Chris, "Cross-Ownership Issue Still Far From Cleared Up" *The Financial Post*, August 20, 1983 (at p. 6). The directive itself contains no power to order a divestiture of any assets. The Commission may only renew or not renew a licence in a case such as this.

<sup>93</sup>*Supra*, footnote 87, at p. 7. The previous licence renewal for CHSJ-TV had been for less than a full licensing period for the same reason.

<sup>94</sup>See for example, Decision CRTC 74-349 where the Commission expressed this very wish. In his personal intervention before the Commission in this case, the Premier of New Brunswick claimed that he had been complaining about the lack of CBC personnel and facilities in the province since before the CRTC was created. See: "Premier Blasts CRTC Policies", *The Daily Gleaner*, February 16, 1983 (at p. 1).

While analysis of the impact of the directive on newspaper/broadcasting cross-ownership situations may be premature, I feel that a few words must be said about the relationship of the stated objective of the directive to the use of an effective ownership or control test to determine undesirable affiliations between broadcasting and publishing outlets. The directive stated that it was designed to foster "independent, competitive and diverse sources of news and viewpoints in Canada." Yet, the contents of the directive sent the CRTC looking for the most overt forms of corporate control and influence. If one accepts diverse and competitive sources of news and views as a truly worthwhile objective, then one must go beyond examining for actual or potential control over a broadcaster's daily operations or dictation of editorial content or policy. There are many more subtle forms of corporate influence.<sup>95</sup> The mediocrity and inaccuracy which frequently results from affiliated sources of news and viewpoints may be more dangerous than editorial dictation because it is so insidious.<sup>96</sup>

By replacing the Commission's *ad hoc* approach with a policy containing an effective ownership or control test we may have succeeded in legitimizing ownership patterns which could have been eliminated or reduced over time.

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<sup>95</sup>For example, in the *Thompson/Cablevue* case, the Commission seemed very unconcerned about the fact that K. R. Thompson himself was President of Kenthom Holdings Limited, Vice-President of Cablevue (Quinte) Limited and ultimate controller of Thompson Newspapers Limited through another holding company. It also seemed disturbing that one of the two trustees of the Peter John Thompson Trust (1965) was also Vice-President, Treasurer and Secretary of Kenthom Holdings. (Supra, footnote 51, at pp. 242-43).

<sup>96</sup>I suggest that all newspaper/broadcasting cross-ownership situations where there is substantial overlap of the respective market areas should have been prohibited unless public interest considerations similar to those in section 5 of the direction justified a licence renewal.