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Restricting Abusive Representation: A Case Study in Public Consultation Under the Charter

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On May 15, 1991, the Canadian Radio-television and Telecommunications Commission (CRTC) announced that it would seek public comment on whether to prohibit "broadcast programming that is abusive on the basis of sexual orientation" (CRTC, 1991a). The Commission noted that, while its proposal to prohibit abusive representation had been prompted by a number of complaints about abusive representations of homosexuals, it had to consider the right of freedom of expression alongside new interpretations of the *Charter of Rights and Freedoms* that included protection on the basis of sexual orientation. During the seven weeks after the Public Notice was issued, the CRTC received 7,391 submissions related to the proposed amendment, many of which came from Christian individuals or organizations. This number of submissions represented a record-breaking outpouring of public sentiment on a regulatory issue (A. Cohen, Head of General Legal Counsel, CRTC, personal communication, October 11, 1991). My paper addresses two major issues surrounding this Public Notice and the response it received. First, the nature of the public opposition to the proposal is analyzed, on the basis of a content analysis of a sample of the letters. Second, the policy problems associated with the public notice process are highlighted, especially in an age when the *Charter* and its interpreters are becoming increasingly important as the most significant "public" or "audience." These two discussions come together under the general finding that, while the majority of the letters were opposed to the proposed prohibition (and even employed secular and judicial arguments for their cause) the CRTC largely overlooked them, being constrained by another kind of "public"--namely, the growing jurisprudence emanating from *Charter* decisions.

The Letters

A selection of the 7,391 letters to the CRTC was chosen for analysis and coding. Every twenty-fifth letter was selected, resulting in a sample size of 296. Fully 88.2% of the sample were opposed to the CRTC amendment. (About 25% of all letters in the sample could be coded as form letters.)

The most common reason given for opposing the amendment was that it would infringe on individual rights to freedom of expression. Almost 70% of letters made reference to this concern. Some writers claimed that the guarantee of protection of rights and freedoms (in section 1 of the *Charter*) would override any equality rights outlined in section 15 (the section which the CRTC had cited as an influence for its proposed prohibition). Thus, the protection of freedom of expression

(and religion) was seen by letter writers as a greater good than the protection of any particular group of people.

The second most common reason for opposing the amendment involved a rejection of homosexuality. In 54% of the letters in the sample, this ranged from mild disapproval to strident condemnation. Evidently many writers were not only concerned about losing some freedom of expression but were also upset about the particular group of people who might be protected. In addition, just over 5% of the letters commented on the link between homosexuality and AIDS, and feared that the proposal might contribute to the further spread of AIDS. (Programs claiming AIDS to be divine punishment were among those forming the basis for the original complaints to the CRTC.)

The third most common reason given for opposing the amendment was the claim that there was no legal reason for the change. In fact, 54.4% of the opposition letters included this statement, stating that there were no requirements for the CRTC to protect homosexuals. This related to one of the CRTC's justifications for proposing the amendment--that there was a growing jurisprudence in favour of *Charter* protection of homosexuals. The use of this argument might challenge the assumption that individuals care little for the legal intricacies of the *Charter* and the Constitution.

The most active mobilization of opposition (at least in terms of the number of letters generated) came from several conservative Christian organizations. Such mobilization influenced the argumentation used in the letters. On the national level, two organizations--Focus on the Family and Christian Broadcasting Associates (CBA)--used their broadcast programs to promote opposition to the proposed change. These groups argued that, due to their situation as broadcasters of Christian programming, they felt directly threatened by the Public Notice.

Both organizations considered the CRTC proposal to be evidence of the destruction of the "normal" family and the increasing legitimation of the gay/lesbian community. Both groups were also surprised by the number of their members who responded to the campaigns. According to the Executive Vice-President of the CBA, the CBA had never in its history received such an aggressive response to an issue (Alex Parachin, personal communication, October 3, 1991).

It is significant to note that a third major Canadian Christian broadcaster, Crossroads Communications (producers of *100 Huntley Street)*, neither mentioned the CRTC proposal on their program nor asked their viewers to respond in any way (Douglas Burke, Crossroads Communications, personal communication, October 17, 1991). Rather, the organization appeared to be concerned with the representation of Christians and not that of homosexuals.

Given the nature of the opposition to the proposal, it is significant to note the extent to which the arguments were generally based on the same language and concerns as the Public Notice itself. Despite the fact that those who mobilized opposition were ostensibly religious organizations, they recognized the need to use legal and secular arguments rather than solely moral or theological ones (although the latter were clearly in evidence as well). This illustrates an increased sophistication in the public comment of such groups.

The Decision-Making Process

The CRTC cited two justifications for issuing the public notice: "a growing public perception that discrimination on the basis of sexual orientation is not acceptable" and "a growing jurisprudence that supports the proposition that discrimination on the basis of sexual orientation, although not specifically enumerated in s. 15 of the *Charter*, is prohibited by that section" (CRTC, 1991a). The

first reason is difficult to evaluate, as the nature of the evidence for a "growing public perception" was not specified (and the balance of the letters disputed this claim).

In terms of the second justification, the CRTC cited five legal precedents, including *Andrews v. Law Society of British Columbia* (1989, 1 S.C.R. 143, Supreme Court of Canada), which affirmed that the *Charter* also protected other grounds that were analogous to those named in the original document.

On November 21, 1991, the CRTC issued a press release affirming that sexual orientation would be included as a criterion for protection against abusive comment. In order to partially reassure its critics, the CRTC release noted:

> Today's announcement notes that when considering complaints related to alleged abusive comment, the CRTC takes into account the other rights guaranteed by the Charter of Rights and Freedoms, in particular freedom of expression. Where there is any doubt, the Commission will continue to follow its established practice of ruling in favour of freedom of expression. (CRTC, 1991b)

Public Policy Implications

Asking for comment on a policy when a body of law exists to inform the final decision raises a number of relevant questions regarding public policy. First, there is the curious practice of asking for opinion when significant constraints already exist on the decision-making process, that is, relevant *Charter* clauses. By opening the debate to public participation, the CRTC also opened itself to the complex variety of deeply felt emotions regarding freedom of expression and even the nature of sexuality. To expand the policy development process to include the public makes it an apparently more democratic procedure. However, once people are given the impression that they are being consulted, they yearn to see the effects of their opinions in the final decision. The fact that this decision seemed to be made even before the responses were tallied is an ominous sign for the future of public consultation.

Second, there is the issue of how to determine what is in the interests of the "audience." Communication scholars have moved from viewing the audience as a unitary and sometimes malleable mass to seeing it as a mosaic of small collective interests and identities (e.g., Angus, Jhally, Lewis, & Schwichtenberg, 1989; Bird, 1992; Erni, 1989; Fiske, 1987; Gray, 1987). There is no longer any workable theory of an average Canadian viewer, listener or reader. One might inquire, therefore, as to whether regulatory agencies are informing themselves of this theoretical trajectory.

If indeed today's audience is fragmented, how does one operationalize a principle of "public interest"? If the audience does not have a common set of interests, then how can one regulate in the public interest? Further, if the public consists of many competing audiences (or publics), then how do some become privileged over others? And, in certain situations, how is it that the values of some audiences even become the embodiments of the "public interest"?

The regulatory conundrum brought about by the notion of a plural audience might be resolved by opting for a common denominator in an effort to find some evidence of the interests of the public. One such denominator is the *Charter*, and since its explicit purpose is to serve the interests of all Canadians, then adherence to its principles (and those of the legal opinions surrounding it and giving it meaning in the everyday world) would mark an action in the "public interest."

So in the end, a cynic might argue, the only audience that matters is the Supreme Court. And "public interest" is now considered to be represented not by any audience groupings, but by the *Charter*, as a binding legal document as well as a statement of political philosophy.

The story of Public Notice 1991-53 appears to concur with this conclusion. In the case of that decision, I would argue that the CRTC's notion of the "public" was neither that of a particular group nor that of a proverbial "average Canadian viewer." Rather, it was most accurately represented as a "growing body" of court judgments and legal interpretations.

Conclusions

We come to two somewhat contradictory tensions in communications policy: (1) there is still a need to regulate public resources; but (2) there is an uncertainty about exactly how to determine who or what represents the public's interests. These tensions may be accommodated by making reference to larger political philosophies as sources of regulatory authority.

For example, if it is recognized that the airwaves are still a public resource, then broadcasters must act in a publicly responsible manner. And if the airwaves ought to be opened up to more narrowcasting made possible by technological developments, then it may be necessary to change the focus of the regulatory framework--from demanding balanced treatment of issues on the part of every licence-holder to demanding adherence to broad non-discrimination codes.

For participants in any public consultation, this implies a new model for debate. Consultations may be invited, and observed politely, but in the end the decision may already have been taken or, at least, constrained by other forces such as interpretation of the *Charter.* With respect to the substance of the CRTC decision on Public Notice 1991-53, I believe the final ruling to be progressive and even, in light of other court judgments, almost prophetic. My point is not to argue about the validity of this particular public notice but to raise the issue of how it illustrates a trend in the decline of the power (if not the status) of public consultation and a concomitant rise in the use of the *Charter* to mediate social relations.

My point is not to argue the validity of this shift. Within many "publics," there is far more faith in the *Charter* than in the traditional influence-peddling of commercial interests. But the end results of this process of using the *Charter* while soliciting public opinion are not yet clear.

To conclude, in both the realm of theory and in the concrete world, we are now seeing the decline of a mass, undifferentiated audience and the rise of many publics--divergent groups making their own claims on legitimacy and dedicated to controlling their own representations. This will undoubtedly continue. The losers in this story, the religious groups, have also begun to construct their own positions in light of the *Charter* and are claiming that popular representations of fundamentalist Christianity are offensive, oppressive, and unfair. In short, they believe that they are subject to abusive commentary in broadcast representations. Harold Lasswell's old communication dictum, "who says what to whom in what channel with what effect" has been modified to "who is authorized to represent what about whose identity in what channel without challenge?"

Just as technology has changed the regulatory climate, social trends have altered broadcast regulation. The organizing of certain audience groups continues, and there will be increasing demands for more (and more accurate) representations. Increasingly, the regulators will need to allow such groups to have broadcasting spaces, possibly limited only by the *Charter* and human

rights acts. This is not the same as deregulation; it is, rather, simply a different source for regulatory authority.

Notes

1 The author would like to acknowledge the constructive assistance of two anonymous *CJC* reviewers in the preparation of this research report. In addition, research support was received from the Social Sciences and Humanities Research Council of Canada, under a Standard Research Grant.

2 Anyone wishing more complete information on the content of the letters (or the lines of argumentation used) may contact the author for an expanded version of this paper.

3 The organization Focus on the Family checked 5,751 of the letters and found that 88.3% were opposed to the proposal (Jim Sclater, National Director, Public Policy, Focus on the Family, personal communication, October 10, 1991).

4 While one might not want to make too much of this comparison, it is significant to note that Crossroads is a Canadian operation, whereas Focus on the Family and Christian Broadcasting Associates are both branch-plants of U.S.-based evangelical multinationals.

5 The "non-Christian" media in general did not consider the CRTC Public Notice to be newsworthy, except in the case of certain columnists who used the notice as an example of the attack on morals being led by "radicalized homosexual politicians" or the "powerful pro-gay lobby" (for example, Stockland, 1991; Hoy, 1991; Calamai, 1991). Photocopies of these articles were also included in several submissions, and some letter writers quoted the above columnists.

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