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Alex Colangelo

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# Satellite Wars

## Culture vs. Expression

- By Alex Colangelo<sup>1</sup>

On April 26, 2002, the Supreme Court of Canada delivered its anticipated decision, *Bell ExpressVu Limited Partnership v. Rex*.<sup>2</sup> *Bell ExpressVu* considered the role of section 9(1)(c) of Canada's *Radiocommunication Act*<sup>3</sup> to determine whether it prevents Canadians from decrypting satellite programming that originates with American broadcasters.<sup>4</sup> While some lower courts had previously interpreted section 9(1)(c) narrowly by limiting the liability of those engaged in such decryption,<sup>5</sup> the Supreme Court interpreted the section broadly to prevent the piracy of American satellite signals.<sup>6</sup> This interpretation affects the hundreds of thousands of Canadians owning American satellite systems, as well as the businesses that provide them. As a result, *Bell ExpressVu* has wide implications.<sup>7</sup>

This Article first describes satellite technology and the process by which Canadians access American satellite broadcasts. It then examines the competing issues of preservation of Canadian business and culture, versus the freedom of expression as set forth in section 2(b) of the *Canadian Charter of Rights and Freedoms* (hereinafter "*Charter*"). Next, the Article considers case law preceding *Bell ExpressVu*, and presents an examination of the findings of the Supreme Court of Canada in *Bell ExpressVu*. The Article will then argue that the Supreme Court incorrectly found that there existed no ambiguity in the various interpretations of section 9(1)(c), and that its decision derives from the consideration of broad policy factors affecting satellite signal piracy in general. Finally, the Article considers arguments for a constitutional challenge to the Supreme Court's interpretation based on the *Charter*.<sup>8</sup>

### Technology

The use of satellite technology to broadcast television programming has emerged as a viable alternative to broadcasting via over-the-air and cable signals.<sup>9</sup> Historically, broadcasting television signals over long distances has proven difficult.<sup>10</sup> Radio signals, for example, operate at relatively low frequencies and reflect off the Earth's ionosphere, thereby allowing for the transmission of radio broadcasts over long distances.<sup>11</sup> Television signals, on the other hand, require higher frequencies that do not reflect off of the Earth's ionosphere.<sup>12</sup> The use of satellite technology, however, makes possible the timely transmission of

television signals.

Satellite television technology employs geosynchronous satellites orbiting the Earth once every 24 hours at a distance of 22,300 miles.<sup>13</sup> Positioned above the equator, the satellites do not change position relative to the Earth and, as a result, ground transmitters and receivers do not require repositioning once aimed at the satellite.<sup>14</sup> More importantly, the use of satellites enables the transmission of live broadcasts over great distances, delayed only by the time the signal takes to travel at the speed of light.<sup>15</sup>

The transmission of satellite communication begins with the "uplink"—the transmission of information from an originating ground station to the satellite.<sup>16</sup> The satellite then retransmits the information back to a receiver on the ground—the "downlink."<sup>17</sup> The satellite's orientation towards the ground establishes a physical area capable of receiving the satellite's signal—the satellite's "footprint."<sup>18</sup> Viewers residing within the footprint can then capture the signal and view satellite programming.<sup>19</sup> Capturing a satellite signal, however, requires that a satellite customer possess three components—a receiving dish, a receiver, and a "smart card."<sup>20</sup> First, a receiving dish captures the signal redirected by the satellite,<sup>21</sup> at which point the second component, a receiver, "receives" the digitized signal.<sup>22</sup> The third necessary component, a "smart card," contains a computer chip able to decrypt the encrypted signal, allowing the customer to view the programming for which he or she has paid.<sup>23</sup> Satellite broadcasters control a customer's ability to decrypt satellite signals by retaining the ability to activate the smart card remotely upon payment of a monthly fee.<sup>24</sup>

*Bell ExpressVu* and *StarChoice*, the two satellite broadcasters currently licensed to provide programming in Canada<sup>25</sup> through the Canadian Radio-television and Telecommunications Commission (hereinafter "*CRTC*"), are subject to the relevant rules regarding Canadian programming requirements.

### American Dishes in Canada

The reception of broadcasts from American satellites by circumventing program-content regulations continues to pose a major problem to the current licensing

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regime in Canada. Despite encrypted broadcast signals, Canadian purchasers of satellite equipment remain capable of deciphering American broadcasting signals in order to enjoy American programming in the comfort of their homes in Canada. That is, Canadians can access American satellite broadcasting in either of two ways: by use of a false mailing address or by circumventing the encryption technology.

### False Mailing Address

A Canadian purchaser of American satellite equipment can acquire an American mailing address and submit payments using that address.<sup>26</sup> Under this method, American satellite broadcasters treat the Canadian receiver of signals as a legal American purchaser, and remotely activate the customer's smart card—allowing for decryption of the satellite broadcast.<sup>27</sup> In such cases, the Canadian resident pays the identical amount for the programming package as does an American resident. Thus, the satellite broadcaster treats the Canadian resident as if he or she were a regular American customer.

### Encryption Circumvention

Employing encryption circumvention technology provides an additional method for accessing American satellite programming from Canada. Under this method, viewers download decryption software available on the Internet and transfer the software code directly onto the smart card. In other words, programmers "hack" the satellite smart card rather than paying an American satellite provider for authorization to unscramble the satellite signals.<sup>28</sup> These "pirate" cards can be purchased in Canada from satellite dealers and reprogrammed periodically to stay ahead of broadcaster changes to the encryption codes.<sup>29</sup> When a satellite broadcaster changes the encryption code and renders a programmed smart card useless, consumers can simply hire a programmer to reprogram their smart cards for a minimal fee.

### The Issues

The advent of technology allowing for Canadians to access international satellite broadcasts has, in turn, created ideological tensions between those individuals wishing to protect Canadian business and culture, and those advocating freedom of expression.

### Canadian Business and Culture

The advent of satellite broadcasting technology has created serious cultural and political implications in Canada. The *Broadcasting Act*<sup>30</sup> recognizes that a Canadian broad-

casting regime remains "essential to the maintenance and enhancement of national identity and cultural sovereignty"<sup>31</sup> and that it serves to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."<sup>32</sup> The cultural sector represents an important part of the Canadian economy, contributing \$24 billion towards the Gross Domestic Product (GDP) in 1996-97.<sup>33</sup> The Canadian cultural sector, moreover, employs 710,000 individuals.<sup>34</sup> Given these statistics, the government recognizes that protecting the Canadian broadcast industry not only preserves the national identity of the Canadian people, but it also ensures continued growth of the Canadian economy.

The *Broadcasting Act* attempts to protect Canadian culture by prescribing minimum limits of Canadian content that broadcasters must televise. The *Broadcasting Act* gives the CRTC the power to enact regulations regarding both the definition of "Canadian" programming as well as the proportion of time that broadcasters must devote to Canadian programming.<sup>35</sup> Under the relevant regulations, public and private broadcasters must devote no less than sixty percent of their total broadcast time to Canadian programming in a given year.<sup>36</sup> Furthermore, public broadcasters must ensure that sixty percent of their evening broadcast

**THE** reception of broadcasts from American satellites by circumventing program-content regulations continues to pose a major problem to the current licensing regime in Canada.

period is devoted to Canadian programming; private broadcasters must maintain a fifty percent quota of Canadian programming during evening broadcasts.<sup>37</sup> To qualify as Canadian content, the program in question must meet strict requirements that include using a Canadian producer,<sup>38</sup> achieving at least six points on the CRTC scale for determining key creative functions,<sup>39</sup> and requiring payment of seventy-five percent of the service costs to Canadians.<sup>40</sup> Such requirements demonstrate the importance placed by the Canadian government on the protection of Canadian identity. Canadian content rules further encourage the Canadian broadcasting sector to produce domestic programming because of the technical impediments to broadcasting over long distances.

While Canadians living near the American border have historically received programming spilling over from the United States, those living farther from the border had no choice but to view Canadian stations, which offered solely programming subject to Canadian content rules.<sup>41</sup>

With cable television services currently available to the majority of Canadian viewers,<sup>42</sup> orders drafted by the CRTC now require both that certain Canadian channels receive priority in, and that certain competing American broadcasts be excluded from, cable television programming packages.<sup>43</sup> The advent of direct to home satellite technology further prompted the CRTC to seek control of Canadian content by limiting the number of satellite broadcast providers in Canada as well as by regulating content available to consumers.<sup>44</sup> Canadians dissatisfied with the choices offered by Canadian cable and satellite retailers, however, can take advantage of Canada's proximity to the United States and receive American satellite broadcasts. By purchasing a satellite dish intended for use in the United States and taking advantage of the large footprint American satellites leave on Canadian territory, Canadian consumers can bypass Canadian content regulations by simply orienting their backyard dishes toward American satellites and decrypting the signals received. This allows Canadians to enjoy American broadcasts unaffected by Canadian content regulations.

### Freedom of Expression

The regulatory regime imposed by Canadian legislation and the CRTC contradicts the *Charter*-protected fundamental freedom of expression.<sup>45</sup> Canada recognized the importance of the freedom of expression even before the adoption of the *Charter*. In *Boucher v. The King*,<sup>46</sup> Justice Rand found that "[f]reedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life."<sup>47</sup> Justice Rand also spoke strongly about expression in *Switzman v. Elbling*,<sup>48</sup> finding that "public opinion . . . demands the condition of a virtually unobstructed access to and diffusion of ideas."<sup>49</sup> Courts continued their strong protection of expression rights after the adoption of the *Charter*, finding that its protection exceeded political or commercial expression. As stated by Chief Justice McLachlin and Justice Lebel, "It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society."<sup>50</sup>

In considering the freedom of expression, the Supreme Court of Canada has recognized three broad underlying rationales.<sup>51</sup> The Court found that: "(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."<sup>52</sup> The Court also recognized that section 2(b) of the *Charter* protects choice of language: "language is so intimately related to the form and content of expression that

there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression."<sup>53</sup> Many Canadians, however, do not enjoy the freedom to receive broadcasting in the language of their choice.

Currently, subscribers to Canadian satellite services have no access to many cultural and religious programs available through American satellite providers. While DirecTV offers various packages that include such programming,<sup>54</sup> Canada's small market<sup>55</sup> for religious and third-language—i.e., non-English and non-French—programming deprives cultural minorities in Canada access to programming relevant to their lives. For example, while Canadian satellite services do not broadcast any Spanish language channels, American satellite services feature many Spanish channels catering to the United States' Hispanic population.<sup>56</sup> Thus, Latino Canadians currently enjoy only minimal access to programming in their native tongue. Moreover, Canadian satellite programming affords few options for non-Christian Canadians, whereas American broadcasters offer many more channels for the benefit non-Christian Americans.<sup>57</sup> As a result, minority segments of the population argue that freedom of expression protects their right to access cultural and religious programming specific to their heritage. These advocates of American satellite broadcasting also argue that prohibiting American satellite broadcasts undermines the broad principles that underlie the freedom of expression.<sup>58</sup> Furthermore, Canada has never banned the reception of foreign signals receivable on short-wave radio, via rooftop antennae for televisions, or from Internet websites located abroad.<sup>59</sup> The prohibition on foreign satellite signal reception has even been compared to the prohibition of Western radio and television signals in cold-war Russia.<sup>60</sup> With the Canadian regulatory regime currently standing at odds with those advocating the free flow of information, an amicable resolution balancing the interests of both sides must be achieved.

### The Law

Section 9(1)(c) of the *Radiocommunication Act* provides that "no person shall decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed."<sup>61</sup> While a practical difference in the two methods of acquiring and decrypting signals from American satellite broadcasters exists (establishing a U.S. address as opposed to hacking the smart card), section 9(1)(c) does not differentiate between the two methods, but instead treats both identically.<sup>62</sup> Section 18(1)(c), meanwhile, allows anyone "[holding] a licence to carry on a broadcasting undertaking issued by the [CRTC] under the Broadcasting Act" to sue

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a person involved in conduct prohibited by section 9(1)(c) for damages.<sup>63</sup> Ultimately, the various interpretations of section 9(1)(c) by Canadian courts have created the most controversy.

### The Cases Prior to the Supreme Court Decision

#### Absolute Prohibition

The first line of cases interpreting section 9(1)(c) of the *Radiocommunication Act* held that, absent consent of a licensed broadcaster, section 9(1)(c) absolutely prohibits the decoding of encrypted broadcast signals—regardless of whether the signals originated with a licensed Canadian broadcaster or an unlicensed American broadcaster.<sup>64</sup> In terms of the effect achieved by this interpretation, the first line of cases established a broad interpretation of section 9(1)(c). Since Canadians viewing American broadcasts do not have the consent of a *licensed* broadcaster, and since the CRTC does not license American broadcasters to broadcast in Canada, the reception and decoding of American programming must be prohibited.

In *R. v. Knibb*,<sup>65</sup> the Alberta Provincial Court considered the *Broadcasting Act's* policy implication in relation to the *Radiocommunication Act*:

It is clear from the stated policy of the Broadcasting Act that there is only one broadcast system in Canada that is to be regulated by a single entity. Programs that are not a part of the Canadian Broadcasting system, e.g., encrypted satellite signals from outside Canada that are not distributed by a lawful distributor in Canada are not capable of regulation in the normal sense, that is by regulation of the distributor. This of course means that there can be no regulation in the context of the policy set out in s. 3 of the Broadcasting Act. It is impossible to prevent the transmission of satellite signals emanating from outside Canada because it is impossible to block such signals once transmitted. The regulation of encrypted signals that are not or do not become part of the Canadian Broadcasting system can only occur by regulation of the recipient. That is, to prohibit such reception except in circumstances where the signal is subject to the regulated control of the Canadian Broadcasting system, i.e. through a lawful distributor.<sup>66</sup>

The Court found the argument that prohibiting the decryption of signals applying only to Canadian providers “does not consider the fact that such an approach would allow unregulated broadcasting that would surely harm the economic interests of the lawful distributors in Canada. The fact that the harm in this sense is more subtle than the direct harm referred to by Defence counsel does not make

it any less harmful.”<sup>67</sup> On appeal,<sup>68</sup> however, the Alberta Court of Queen's Bench acknowledged evidence indicating that lawful Canadian distributors did exist for some of the programming available from American broadcasters.<sup>69</sup> Based on this evidence, the appellate Court found that section 9(1)(c) incorporated an absolute prohibition against the decoding of encrypted subscription program signals *unless* they emanated from a lawful Canadian distributor in Canada that authorized their decoding.<sup>70</sup>

Following the Alberta Provincial Court's line of reasoning, the Manitoba Provincial Court found that section 9(1)(c) absolutely prohibited the decryption of programming signals originating in the United States in *R. v. Open Sky*.<sup>71</sup> The Court reasoned that allowing unauthorized decryption would harm lawful distributors of similar programming in Canada.<sup>72</sup> According to the Court, “[e]ven if the programming had not been of the same type, the programming would still not have received the regulatory approval from the CRTC as there was no lawful distributor in Canada.”<sup>73</sup>

In *R. v. Nil Norsat International*,<sup>74</sup> the Federal Court of Appeal affirmed the trial court's recognition of an absolute prohibition on the decryption of broadcast signals originating in the United States. The Court found that “the interpretation [of] paragraph 9(1)(c) of the Act is entirely supported by the text of the provision and provides, as [the Court] believe[s] it was intended, a measure of control in Canada over the unfair competition which comes both from internal and external sources and is inherent in the reception and enjoyment of satellite services.”<sup>75</sup> Thus, the Federal Court of Appeal adopted the prohibition on the decryption of American satellite broadcasts. These particular courts, in attempting to interpret the logical meaning of section 9(1)(c), relied heavily on the policy implications of their decisions—e.g., the protection of Canadian culture and business—and interpreted section 9(1)(c) so as to ensure consistency therewith. Other courts, however, allowed concerns regarding the protection of the freedom of expression to weigh heavier on their decisions. Decisions of these courts are examined below.

#### Legal Broadcaster

The second line of cases interpreting section 9(1)(c) of the *Radiocommunication Act* held that the reception of foreign satellite broadcasts was prohibited *only* if a legal broadcaster existed. In terms of the effect achieved by this interpretation, the second line of cases established a narrow interpretation of section 9(1)(c). In *R. v. Love*,<sup>76</sup> the defendant appealed to the Manitoba Court of Queen's Bench his conviction for modifying satellite decoders, which allowed for the reception of foreign satellite broadcasts.<sup>77</sup> Despite upholding the defendant's conviction on grounds that the defendant decrypted signals available from lawful Canadian distributors, the Court concluded that section 9(1)(c) sought only to protect Canadian distributors.<sup>78</sup> Rejecting

arguments advocating absolute prohibition of *all* signals, the Court found that Parliament had restricted the prohibition to signal decryption.<sup>79</sup> With respect to the impact of the prohibition on lawful distributors, Justice Kennedy explained that “[i]f the prohibition is to protect lawful distributors it would be difficult to speculate how the receipt of signals from other sources not licensed in Canada could impact upon the lawful distributor who themselves have no entitlement to the signals.”<sup>80</sup> Meanwhile, the Court interpreted the relevant provisions of the *Radiocommunication Act* to be quasi-criminal in nature, and held that in such cases, an accused was to be afforded the most favorable interpretation of such provisions.<sup>81</sup> That is, in this second line of cases, the courts displayed a willingness to interpret narrowly the imprecise provision in an attempt to protect the defendants—as opposed to the broad interpretation adopted in the first line of cases. Since Parliament did not explicitly prohibit the interception of signals where lawful distributors in Canada do not exist, “[i]t is therefore open to conclude that where there is no lawful distributor the prohibition does not exist.”<sup>82</sup>

In *R. v. Ereiser*,<sup>83</sup> the Saskatchewan Court of Queen’s Bench

explicitly agreed with the *Love* decision. In its decision, the Court added that, in order to qualify as a protected “subscription programming signal” under the *Radiocommunication Act*, the broadcast signal “must be lawfully intended for reception by the public in Canada and the public must also be entitled to lawfully subscribe for it in Canada.”<sup>84</sup> Following this reasoning, section 9(1)(c) could not prohibit Canadians from decrypting programming signals from American satellites that originated in the United States since they were not lawfully intended for Canadian reception. Moreover, in *R. v. LeBlanc*,<sup>85</sup> the Nova Scotia Supreme Court adopted the *Ereiser* Court’s reasoning concerning section 9(1)(c), reiterating the opinion that the section prohibits the decryption of broadcast signals only when a lawful distributor in Canada existed.

Before *Bell ExpressVu* reached the Supreme Court of Canada, the British Columbia Court of Appeal heard *Bell ExpressVu Limited v. Rex*.<sup>86</sup> The Court of Appeal followed the second line of cases, finding that the *Radiocommunication Act* only protected the decryption of signals that originated with a licensed Canadian distributor.

The Appellant in *Bell ExpressVu* was one of two distributors licensed by the CRTC to provide within Canada

direct-to-home (“DTH”) satellite signals.<sup>87</sup> The Respondent, a satellite equipment vendor, engaged in the sale of equipment that allowed users to decode satellite signals originating in the United States.<sup>88</sup> To execute its scheme, the Respondent provided American mailing addresses to its customers since American satellite distributors would not authorize the reception of their signals by foreign subscribers.<sup>89</sup> The Respondent would then contact the American broadcasters on behalf of a customer and provide a U.S. address and the customer’s billing information. This would satisfy the American satellite broadcaster’s requirement that the customer live in the U.S.<sup>90</sup>

The British Columbia Court of Appeal considered the divergent interpretations of section 9(1)(c) of the *Radiocommunication Act* and found the section ambiguous. Because the legislation bore penal consequences, the Court advocated adoption of the narrow interpretation.<sup>91</sup> Furthermore, the Court was persuaded that even without

divergent case law, the narrow interpretation was correct theoretically.

<sup>92</sup> The British Columbia Court of Appeal explained that:

[S]ection 9(1)(c) enjoins the decoding of encrypted subscription

program signals that are not authorized by the lawful distributor of the signal. “The signal” can only refer to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal. “Lawful distributor” is defined in the *Radiocommunication Act* to mean those who have the lawful right in Canada to transmit the signal and to authorize its decoding. If there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding. Decoding of such an unregulated signal cannot therefore be in breach of the *Radiocommunication Act*.<sup>93</sup>

The British Columbia Court of Appeal, however, followed the decisions of *Love*, *Ereiser*, and *LeBlanc* for more than just policy reasons. The Court of Appeal agreed with the notion of protecting expression, and also found that, in order to be invoked, section 9(1)(c) logically required the existence of a licensed distributor.<sup>94</sup> That is, the Court of Appeal interpreted section 9(1)(c)’s “the lawful distributor of the signal” to mean that, in order to warrant protection, the signal required broadcasting from a lawful distributor.<sup>95</sup> This decision afforded those advocating a narrow interpretation of

**THE** *Broadcasting Act* gives the CRTC the power to enact regulations regarding both the definition of “Canadian” programming as well as the proportion of time that broadcasters must devote to Canadian programming.



section 9(1)(c) their strongest endorsement to date.

### The Supreme Court Intervenes

On December 4, 2001, the Supreme Court of Canada heard *Bell ExpressVu* on appeal from the British Columbia Court of Appeal.<sup>96</sup> Using principles of statutory interpretation, the Court found no ambiguity in section 9(1)(c).<sup>97</sup> Justice Iacobucci, writing for the majority, explained that section 9(1)(c), read in its “grammatical and ordinary sense,” created an absolute prohibition with a limited exception.<sup>98</sup> Again, section 9(1) of the *Radiocommunication Act* provides:

No person shall

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with authorization from the lawful distributor of the signal or feed.<sup>99</sup>

The Supreme Court realized that the British Columbia Court of Appeal had based its interpretation of the section on the use of the word “the” instead of the word “a”.<sup>100</sup> Finding this interpretation incorrect, however, the Supreme Court explained that:

[T]he definite articles are used in the exception portion of s. 9(1)(c) in order to identify from amongst the genus of signals captured by the prohibition (any encrypted subscription programming signal) that species of signals for which the rule is “otherwise”. Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for the (definite) particular signal that is decoded, the person has received authorization from the (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.<sup>101</sup>

**BY** purchasing a satellite dish intended for use in the United States and taking advantage of the large footprint American satellites leave on Canadian territory, Canadian consumers can bypass Canadian content regulations by simply orienting their backyard dishes toward American satellites and decrypting the signals received.

The Court also considered the prohibition on decrypting satellite signals in a broader context, finding that a broader interpretation of section 9(1)(c) remained consistent with both the *Broadcasting Act* and the protection of Canadian culture.<sup>102</sup> It questioned the rationality of a narrower interpretation, asking: “Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come in and sweep all of that aside? What purpose would have been served?”<sup>103</sup> The Supreme Court thus found that the context in which the section exists was a determinative factor in its interpretation.

The Supreme Court ultimately overruled the previous decisions supporting a narrow interpretation of section 9(1)(c) for two reasons. First, the Court sided with a policy rationale that advocated the protection of Canadian culture and business. Second, the Court found that the logical meaning of the section’s wording required an absolute prohibition of American satellite signals. In this decision, the Supreme Court determined how section 9(1)(c) of the *Radiocommunication Act* is to be interpreted and applied across Canada.

### The Supreme Court Should Have Deferred to Parliament

The inconsistent interpretations by Canadian courts reveal, however, that ambiguity does in fact exist within section 9(1)(c) of the *Radiocommunication Act*. While the *Bell ExpressVu* decision concerned a defendant providing U.S. mailing addresses to facilitate access to American satellite programming via paid subscriptions, the true value of the decision to Canadian satellite providers was actually in stopping the hacking of smart cards. This practice of accessing American programming for free would have continued unchecked had the Supreme Court recognized the ambiguity in the section and interpreted the section narrowly.

As discussed previously, many Canadians who access American satellite programming, in order to avoid paying American satellite providers for authorization to decrypt their satellite signals, hack their smart cards using a decryption program. Individuals can purchase these pirate cards in Canada from satellite dealers and have them configured to decode the American signals, thus giving Canadian customers access to American channels and pay-per-view movies for no monthly charge. The typical customer either pays a programmer between ten and twenty

Canadian dollars to configure his card, or instead simply downloads a free hack program from the Internet. The consumers in this market most adversely affect Canadian satellite providers.

On the other hand, Canadian customers providing a U.S. address pay subscription costs of up to U.S. \$82.99,<sup>104</sup> and even more when they subscribe to pay-per-view movies and events. Bell ExpressVu generally priced programming packages competitively between Canadian \$10.95 and \$74.95, but such packages can also cost more.<sup>105</sup> Bell's programming packages, while priced in Canadian dollars, also have the advantages of containing Canadian channels and programming.<sup>106</sup> As a result, when forced to choose between subscribing to American or Canadian satellite services, many Canadians would likely choose Canadian satellite services.

The true issue in the satellite wars remains the use of "pirate" access cards, through which Canadians pay no monthly subscription fee to access all channels available on the American service. If the Supreme Court had followed the British Columbia Court of Appeal's interpretation of section 9(1)(c) of the *Radiocommunication Act*, not only would subscribing to American satellite services have become legal, but so would have the use of pirate cards. As it stands, section 9(1)(c) is an all-or-nothing provision with respect to American satellite signals—if the section did not apply to foreign signals, Canadians would have been able to use technological means to decrypt American signals for free. Requiring Canadian viewers to pay the full price for a subscription to American services would enable Canadian satellite providers to compete. Canadian companies cannot, however, compete with a free service—no matter how low the fees—since decryption creates the possibility of essentially free access to American satellite service. It is this practice of accessing American satellite programming for free that truly threatens Canadian business and culture. The all-or-nothing nature of the *Radiocommunication Act*, coupled with the fact that section 9(1)(c) is not broken down into two distinct sections to recognize the two different ways of accessing foreign signals, forced the Supreme Court to overturn the British Columbia Court of Appeal in order to stop the practice of hacking smart cards.

In so doing, however, the Supreme Court of Canada relieved the Canadian Parliament of its responsibility to clarify this situation. Parliament could not have predicted the technological issues that arose in *Bell ExpressVu* at the time it drafted the *Radiocommunication Act*. Yet it is Parliament that bears the burden of dealing with the issues created by modern technology.<sup>107</sup> The Supreme Court allowed the fact that section 9(1)(c) is an all-or-nothing provision both to overshadow the section's lack of clarity and to outweigh the notion that it should be updated to reflect modern technological reality.

## Constitutional Considerations

### Section 2(b)

The next step for those advocating Canadian access to American satellite broadcasts involves a challenge to the constitutionality of basing restrictions of American broadcasts on section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>108</sup>

In Canada, *Irwin Toy v. Quebec*<sup>109</sup> provides the framework for considering arguments based on the freedom of expression. The first question for analyzing a freedom of expression case asks whether the activity falls within the sphere of conduct protected by the freedom of expression.<sup>110</sup> In *Irwin Toy*,<sup>111</sup> the Supreme Court interpreted the scope of the freedom of expression broadly, finding that "[a]ctivity is expressive if it attempts to convey meaning."<sup>112</sup> The Supreme Court added that "most human activity combines expressive and physical elements," limiting excluded activity to that which is "purely physical and does not convey or attempt to convey meaning."<sup>113</sup> The protections of section 2(b) also feature content neutrality: "The content of a statement cannot deprive it of the protection accorded by section 2(b), no matter how offensive it may be."<sup>114</sup> Therefore, courts will undertake to determine whether the activity in question conveys meaning and, thus, whether it falls within the scope of section 2(b).

Once an activity has been found to fall within the scope of section 2(b) of the *Charter*, courts consider whether the purpose or effect of government action was to restrict the right.<sup>115</sup> If the purpose of the government action is found to infringe upon the right in question, the action is invalid.<sup>116</sup>

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.<sup>117</sup>

If a court finds a valid government purpose in the action, the appellant then bears the burden of demonstrating that the action effectively restricted the appellant's rights.<sup>118</sup> In showing the government's actions restricted the freedom of expression, the appellant must demonstrate that his or her actions promoted an underlying principle of the freedom of expression. As stated above, the Supreme Court made the following findings regarding these principles:



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“(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.”<sup>119</sup> These principals now underlie the consideration of freedom of expression cases.

While courts broadly interpret the *Charter* with regard to protected communications, they also recognize that section 2(b) protects the rights of listeners. The Ontario Court of Appeal found the freedom of expression “[applicable] to all phases of expression from maker or originator through supplier, distributor, retailer, renter or exhibitor to receiver, *whether as a listener or a viewer*.”<sup>120</sup> The Supreme Court has additionally recognized that the protection of expression extends to the listener.<sup>121</sup> Thus, the freedom of expression extends beyond the conveyer of expression and includes the right to access expression.

### Purpose of Prohibition

The Canadian government has argued that protection of encrypted signals from theft constitutes the purpose of section 9(1)(c) of the *Radiocommunication Act*.<sup>122</sup>

The government points out that section 9(1)(c) only prohibits the decryption of an “encrypted subscription programming signal or encrypted network feed.”<sup>123</sup> Thus, if American broadcasters of satellite programming decided to broadcast their programming in an unencrypted format, the *Radiocommunication Act* would not apply, making it perfectly legal for Canadians to access American programming. The Attorney General of Canada made a submission to this effect:

It is also relevant to consider that s. 9(1)(c) is engaged only by a decision on non-governmental actors to transmit their programming in an encrypted form. It is not in any sense an attempt by government itself to restrict access to particular content, or to prevent members of the public from having something they are entitled to. Rather, Parliament has only decided to provide additional legal support for proprietary rights that exist in any event. In the absence of this provision, no one would acquire a right to appropriate the copyrighted content of the encrypted signals by ruse or by theft.<sup>124</sup>

This statement of purpose, however, oversimplifies the nature of section 9(1)(c). Canadian Courts have interpreted this section in a manner consistent with the *Broadcasting Act* and have, in that vein, recognized its purpose as one to protect Canadian culture and business. Were the section merely to protect broadcasters choosing to encrypt their signals, allowing American broadcasters to

enroll Canadian subscribers would pose no problem. But this is not the case, as the protection of Canadian culture and business is the rationale behind Canada's broadcasting regime—rather than the mere protection of encrypted signals.

Similarly, were the purpose of section 9(1)(c) solely to protect broadcasters from signal theft, there would be equally little reason to prohibit Canadians from subscribing and paying fees to American satellite providers. It seems evident, then, that the true purpose of section 9(1)(c) is to limit Canadian access to foreign signals—signals not regulated by the CRTC. Since the purpose of section 9(1)(c) restricts access to a particular type of content (content unregulated by the CRTC), it violates the freedom of expression.

### Effect of Prohibition

The effect of the prohibition on accessing American satellite programming is that section 9(1)(c) limits the freedom of expression. As interpreted by the Supreme Court, section 9(1)(c) prevents Canadians from receiving religious and foreign language broadcasting when the broadcasters do not meet CRTC license requirements.<sup>125</sup> In *R. v. Leblanc*, Justice Haliburton compared such prohibitions to those of communist regimes, stating that:

Russia and the Eastern Block countries of Europe attempted to exclude both radio and television signals from emanating from the West. Canada participated in breaching that electromagnetic wall of silence by specifically broadcasting to those countries and others with Radio Canada International Service of which Canadians are apparently fiercely proud. I understand that Cuba imposes serious penalties on citizens who attempt to receive radio and television signals from international sources. *Such interference is clearly incompatible with freedom of speech and the freedoms which we have always taken for granted in this country.*<sup>126</sup>

The effects of section 9(1)(c) strike at the heart of the principles underlying the freedom of expression. Access to multi-lingual foreign programming unavailable in Canada, for example, is a function of these principles.<sup>127</sup> As mentioned earlier, Canadian broadcasters currently provide no Spanish language channels.<sup>128</sup> American DTH services, however, offer approximately twenty Spanish channels—including channels broadcasting news, sports, and movies from Latin America.<sup>129</sup>

Access to such programming would enable Spanish-Canadians to remain in touch with the culture and events of their homelands. Such access is essential to the freedom of expression's promotion of attainment of truth, participation in social and political decision-making, and allowance for individual self-realization.<sup>130</sup> The unavailability of religious programming over Canadian satellite ser-

vices presents a similar problem.<sup>131</sup> The nature of the religious and third-language material to which Canadians have no access falls within the sphere of principles underlying the freedom of expression.<sup>132</sup> Broad interpretations of section 2(b) of the *Charter* and section 9(1)(c) of the *Radiocommunication Act*, then, stifle the freedom of expression and its underlying values. Courts must recognize that prohibiting the reception of American satellite signals violates the freedom of expression—both when the *Radiocommunication Act* is interpreted to prohibit decryption, and when interpreted to prohibit Canadians from subscribing to the service for a fee.

## Section 1 - Oakes Analysis

The protection of expression under section 2(b) of the *Charter*, however, is not framed in absolute language. Section 1 of the *Charter* allows for a reasonable limitation of rights under certain circumstances.<sup>133</sup> In particular, as a result of the broad interpretation afforded to expression under section 2(b), section 1 allows the government to restrict expression to a certain extent. That is, in contrast to the American First Amendment “freedom of speech,” where the definition of “speech” has been expanded beyond literal “speech,” the Canadian term “expression” in section 2(b) is itself very broad. Section 1 of the *Charter*, then, has allowed the Supreme Court of Canada to encourage such a liberal interpretation of “expression” under section 2(b).<sup>134</sup>

The Supreme Court of Canada elucidated the requirements for the abrogation of rights under section 1 in the case of *R. v. Oakes*.<sup>135</sup> *Oakes* asked whether a reverse onus with respect to a narcotics charge infringed upon the right to a presumption of innocence under section 11(d) of the *Charter*.<sup>136</sup> To determine whether section 1 of the *Charter* saved the infringing clause, the Supreme Court fashioned a test applicable whenever a court considers section 1 of the *Charter*.<sup>137</sup> Once a court determines that legislation infringes upon a *Charter* right, the government shoulders the burden to justify under section 1 the limitation placed on the right.<sup>138</sup>

Under the *Oakes* test, two requirements must be met. First, the objective of the action must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”<sup>139</sup> Embodying a high compliance standard, the objective must relate to concerns “which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.”<sup>140</sup> After recognizing a sufficiently significant objective, the government must show the means chosen “are reasonable and demonstrably justified.”<sup>141</sup>

This second requirement involves a proportionality test containing three components.<sup>142</sup> First, “the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In other words, they must be rationally connected to the government’s objective.”<sup>143</sup> Second, the government action must employ the least drastic means possible in limiting the protected right.<sup>144</sup> Nearly all section 1 cases have turned on this prong.<sup>145</sup> The third component requires “proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of ‘sufficient importance.’”<sup>146</sup> This condition demands that the effects of the limiting measures “must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.”<sup>147</sup> This third component must also take into account the “proportionality between the deleterious and the salutary effects of the measures.”<sup>148</sup> Thus, upon discovery of a sufficiently important objective, the court will consider whether the law is rationally connected to the objective, whether the law impairs the right no more than necessary to complete the

**AS** interpreted by the Supreme Court, section 9(1)(c) prevents Canadians from receiving religious and foreign language broadcasting when the broadcasters do not meet CRTC license requirements.

objective, and whether the law has a disproportionately detrimental effect on those to whom it applies.<sup>149</sup>

As already stated, an *Oakes* analysis focuses on the “least drastic means” criterion.<sup>150</sup> Courts usually defer to the legislature on the issue of whether a given objective is sufficiently important to override section 1.<sup>151</sup> That is, the courts rarely find that the law is not rationally connected to the objective. Moreover, the “inquiry into disproportionate effect is normally, if not always, precluded by the judgment that the law’s objective is sufficiently important to justify the impact on civil liberties.”<sup>152</sup>

## Sufficiently Important Objective

Identifying a sufficiently important objective, then, constitutes the first step in the *Oakes* analysis. With respect to the decryption of American satellite broadcasts, the protection of Canadian culture from erosion by the availability to Canadian consumers of cheaper American programming represents one objective of the Canadian legislation. Pro-

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tection of the economic sector associated with Canadian culture represents another objective.<sup>153</sup> These two objectives are relevant as to whether the prohibition exists on the "pirate" decryption of satellite programming, or whether the prohibition exists on allowing Canadians access to American satellites through subscription agreements.

With respect to individuals who modify satellite access cards without paying subscription fees, there also exists a pressing need to protect Canadian businesses that offer satellite service for a fee. While a policy allowing Canadians to subscribe to American satellite broadcasters would decrease the subscription base of Canadian satellite companies, a law allowing Canadians to decrypt American signals for free would more seriously damage Canadian businesses since Canadian satellite providers would be unable to compete with free American service. Allowing such circumstances to develop would create unfair competition between American and Canadian satellite providers. The need to protect Canadian culture and business—combined with the deference that courts afford legislatures regarding the satisfaction of the first step in the *Oakes* analysis—will ensure that a sufficiently important objective in protecting Canadian culture and businesses exists.

### Proportionality Test - Rational Connection

The second part of the *Oakes* analysis—the proportionality test—consists of three components.<sup>154</sup> The first component requires a rational connection between the law and the objective.<sup>155</sup> "The essence of a 'rational connection' is a causal relationship between the objective of the law and the measures enacted by the law."<sup>156</sup> It is not necessary, however, that this causal relationship be proven by concrete evidence; rather, a "causal connection based on 'reason' or 'logic' would suffice."<sup>157</sup> It is logical to find that the objective to protect from unfair competition

Canadian businesses offering satellite programming would lead Parliament to prohibit Canadians from accessing free satellite programming from the United States. Thus, the

prohibition against Canadian access to encrypted satellite broadcasts for free without authorization from American companies who regularly charge a subscription fee for the service, at the expense of companies obligated to obey Canadian culture laws, is rationally connected to the objective. This connection means, then, that the first part of the *Oakes* proportionality test has been met. Furthermore, the proliferation of American programming not subject to content regulations diverts viewers from Canadian programming, thus decreasing the demand for such programming. As a result, prohibiting Canadians from subscribing to American programming not subject to Canadian content regulations is also rationally connected to the objective of protecting Canadian culture and business.

### Proportionality Test - Least Drastic Means

The second part of the *Oakes* proportionality test seeks to determine whether section 9(1)(c) of the *Radiocommunication Act* infringes on the freedom of expression no more than is necessary to accomplish its objective of protecting Canadian culture and business. It is here that section 9(1)(c) fails justification. As discussed above,<sup>158</sup> section 9(1)(c) infringes upon section 2(b) of the *Charter* because the purpose and effect of the prohibition undermine the policy rationales behind the freedom of expression.<sup>159</sup>

Parliament should amend the *Radiocommunication Act* to create an offense for the act of decrypting American satellite signals without authorization and payment of subscriptions fees, separate from the offense of decrypting

American signals with authorization from an American broadcaster while paying the appropriate fees. A provision in the *Radiocommunication Act* that only prohibits the decryption of American satellite signals by circumventing the encrypted signal would meet the second part of the *Oakes* proportionality test. Such a prohibition

would protect Canadian businesses by eliminating the free ride enjoyed by some Canadians with access to American satellite broadcasts, but would still allow Canadians to

**TO** execute its scheme, the Respondent provided American mailing addresses to its customers since American satellite distributors would not authorize the reception of their signals by foreign subscribers. The Respondent would then contact the American broadcasters on behalf of a customer and provide a U.S. address and the customer's billing information.

access American programming through pay subscriptions. Such an amendment, moreover, should prohibit piracy without depriving Canadians of the freedom to access religious and third-language programming, as well as other programming not available in Canada. A prohibition preventing Canadians from subscribing to American satellite services, however, would not pass the second requirement of the Oakes proportionality test.

Radio and television signals originating in the United States are readily accessible to the Canadian public living in proximity to the American border. Residents of Niagara Falls, Windsor, and Vancouver have access to radio stations and television programs originating, respectively, from Buffalo, Detroit, and Seattle. No law prohibits the reception of these unencrypted broadcasts. While Canadian law currently encourages Canadian business and culture by imposing requirements on those who broadcast radio and television signals in Canada, Canadian law does not prohibit Canadian consumers from receiving foreign radio and non-satellite television signals where technology permits. With respect to satellite broadcasts in particular, Parliament should change Canadian law to achieve a similar compromise.

The prohibitions on receiving American programming, however, only apply to those broadcasts chosen for encryption, enabling the broadcaster to charge a fee to authorize its decryption. If American broadcasters broadcasted their satellite signals unencrypted, Canadians could freely view American programming without fear of contravening section 9(1)(c). Allowing Canadians to access American programming through conventional antennae, while prohibiting access to the same broadcast from encrypted satellite signals, even where a Canadian resident is willing to pay the subscription fee, breaches the freedom of expression more than necessary. There is little reason to protect the encrypted signal if both the United States broadcaster and Canadian receiver agree on consensual reception. Such a provision would not force American satellite companies to provide service within Canada, but rather would allow them to offer service to Canadians. Thus, section 9(1)(c) of the Radiocommunication Act fails the second prong of the Oakes proportionality test because it limits the freedom of expression to an extent greater than is necessary to protect Canadian culture and business.

### **Proportionality Test - Proportionality of Objective and Effects**

The third component of the proportionality test requires proportionality between the effects and objective of the provision. "[T]heir effects [of the limiting provision] must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."<sup>160</sup> The effects of section 9(1)(c) of the *Radiocommunication Act*—

prohibiting Canadians from subscribing to American satellite services—outweigh the section's benefits to Canadians. Prohibiting Canadians from accessing American satellite services limits their ability to access information while offering minimal protection to Canadian culture. Canadians already have access to unencrypted foreign television, radio, and Internet signals. The true threat to Canadian business derives from the unfair competition experienced by Canadian satellite providers that must compete with free access to American programming. While section 9(1)(c), as interpreted by the courts, protects Canadian satellite providers by forbidding Canadians from accessing encrypted American programming, it nevertheless restricts the freedom of expression more than necessary. Such a provision, therefore, fails to strike a harmonious balance between the objective and its effects.

As suggested, however, a provision that prohibits the circumvention of encrypted satellite broadcasts, while allowing Canadians to pay for subscriptions to the service, would be constitutionally acceptable. Such a provision would accommodate both the objective of protecting Canadian business and the objective of charging Canadians a subscription fee for access to American programming. Canadians, thus, would have access to American programming, but would have to pay American broadcasters for subscriptions. The ban on accessing foreign satellite signals for free, meanwhile, would protect domestic satellite providers. The ultimate result would be the ability of Canadian broadcasters to compete with foreign satellite providers for customers on a level playing field.

## **Conclusion**

The ruling of the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*<sup>161</sup> adversely affected hundreds of thousands of Canadians owning American satellite systems, as well as the businesses that provide such systems. The Supreme Court should not, however, have performed the duty of Parliament in attempting to resolve the statutory ambiguity surrounding the reception of encrypted foreign satellite programming. Instead, Parliament should reassess the relevant sections of the *Radiocommunication Act* to ensure that it is able to withstand *Charter* scrutiny. The current provision breaches the freedom of expression under section 2(b) of the *Charter*; moreover, section 1 of the *Charter* fails to save the provision from causing this breach. Parliament should amend the provision to prohibit only the decryption of broadcasts where no subscription fee is paid, regardless of whether the broadcaster has a CRTC license. Such a legislative scheme would be consistent with the status quo Canadians currently enjoy with respect to over-the-air television and radio broadcasts and unencrypted foreign satellite signals. This scheme would also maintain an appropriate balance of rights of those who desire access to foreign programming,

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and domestic businesses concerned with unfair competition of pirated signals. The Canadian Parliament, therefore, should implement the legislative changes suggested here to ensure that the *Radiocommunication Act* does not violate the freedom of expression enshrined in the *Charter*.

### ENDNOTES

<sup>1</sup> Alex Colangelo, Student-at-Law, McCague Peacock Borlack McInnis & Lloyd, LLP. LL.B. 2001 (University of Western Ontario), LL.M. 2002 (Concentration in Law & Technology, University of Ottawa). The author would like to thank Professor Daniel Gervais and Professor Elizabeth Judge of the University of Ottawa, Faculty of Common Law, for their comments on an earlier version of this paper, which was originally submitted in partial fulfillment of the Master of Laws (Concentration in Law & Technology) program at the University of Ottawa. The author would also like to thank his family for their everlasting support. The author can be reached at acolangelo@alumni.uwo.ca.

<sup>2</sup> *Bell ExpressVu Ltd. v. Rex*, [2002] S.C.R. 42, 68 [hereinafter *Bell ExpressVu*].

<sup>3</sup> *Radiocommunication Act*, R.S.C., ch. R-2, § 9(1)(c) (1985) (Can.).

<sup>4</sup> See *Bell ExpressVu*, *supra* note 2.

<sup>5</sup> See *infra* notes 65, 71, 74, 76, 83, and 85.

<sup>6</sup> *Bell ExpressVu*, [2002] S.C.R. at 68.

<sup>7</sup> Bill Brioux, *The Proof is on the Roof*, *TORONTO SUN*, June 23, 2002, at T14.

<sup>8</sup> *Constitution Act*, C.S.C., Ch. 11, § 2(b)(1982)(U.K.).

<sup>9</sup> Bradley M. Yusim, *Satellite: Like a Diamond in the Sky*, 2001 U. ILL. J. L. TECH. & POL'Y 389, 392 (2001).

<sup>10</sup> Regis Leonard, *Communications Satellites*, NASA Lewis Research Center, available at <http://ctd.grc.nasa.gov/rleonard/regs1ii.html> (last viewed Mar. 20, 2003).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See also Cosmiverse, *Ionosphere*, available at <http://www.cosmiverse.com/reflib/Ionosphere.htm> (last visited Mar. 20, 2003). "Energy that is radiated from a transmitter upward toward the ionosphere is in part absorbed by the ionized air and in part refracted, or bent downward again, toward the surface of the earth... The amount of refraction in the ionosphere decreases with an increase in frequency and for very high frequencies is almost nonexistent." This

explains why television signals cannot be transmitted over the same distances as radio signals. *Id.*

<sup>13</sup> Regis Leonard, *Satellites in General*, NASA Lewis Research Center, available at <http://ctd.grc.nasa.gov/rleonard/regs1ii.html> (last visited Mar. 20, 2003). *Dictionary.com* defines "geosynchronous" as "marked by an orbit with a period of 24 hours so that a position in such an orbit is fixed with respect to the earth." See *Dictionary.com*, available at <http://www.dictionary.com> (last viewed Mar. 20, 2003).

<sup>14</sup> See Leonard, *supra* note 10.

<sup>15</sup> *Id.* This is a much better situation than before satellites were employed to broadcast television signals and time-delayed broadcasts were the norm.

<sup>16</sup> Regis Leonard, *Components for Communications Satellites*, NASA Lewis Research Center, available at <http://ctd.grc.nasa.gov/rleonard/regs1iii.html> (last viewed Mar. 20, 2003).

<sup>17</sup> *Id.*

<sup>18</sup> See Yusim, *supra* note 9, at 392.

<sup>19</sup> *Id.*

<sup>20</sup> See *infra* note 74.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *United States v. Lewis*, 296 F.3d 487, 489 (6<sup>th</sup> Cir. 2002).

<sup>24</sup> *Id.*

<sup>25</sup> Canada Radio-television and Telecommunications Commission [hereinafter CRTC], *Consumer Information, Satellite TV*, available at [http://www.crtc.ca/eng/INFO\\_SHT/b315.htm#le](http://www.crtc.ca/eng/INFO_SHT/b315.htm#le) (last viewed Mar. 20, 2003).

<sup>26</sup> *Bell ExpressVu*, [2002] S.C.R. 42, at para. 6.

<sup>27</sup> *Infra* note 74, at para. 4.

<sup>28</sup> *Infra* note 74, at para. 6.

<sup>29</sup> *Id.*

<sup>30</sup> S.C. 1991, c. 11 (Can.).



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<sup>31</sup> *Id.* c. 11, s. 3(1)(b).

<sup>32</sup> *Id.* at s. 3(1)(d)(i).

<sup>33</sup> Canadian Heritage, Canada's Cultural Sector Facts and Figures -- Contribution to the Economy, available at <http://www.pch.gc.ca/progs/ac-ca/progs/rc-tr/progs/ddci-tidd/pubs/Facts&FiguresEN/sld002.htm> (last viewed Mar. 20, 2003).

<sup>34</sup> *Id.*

<sup>35</sup> S.C. 1991, c. 11, s. 10(1).

<sup>36</sup> SOR/87-49 at s. 4(6).

<sup>37</sup> *Id.* at s. 4(7). For the purposes of the regulation, "evening broadcast period" is defined under s. 4(2) as "the total time devoted to broadcasting between six o'clock in the afternoon and midnight during each broadcast year."

<sup>38</sup> CRTC, Public Notice CRTC 2000-42, Mar. 17, 2000, at <http://www.crtc.gc.ca/archive/ENG/Notices/2000/PB2000-42.htm> (last viewed Mar. 20, 2003).

<sup>39</sup> *Id.* The point system allocates points in the following way: Director - 2 points, Screenwriter - 2 points, Lead Performer (or first voice) - 1 point, Second Lead Performer (or second voice) - 1 point, Production Designer - 1 point, Director of Photography - 1 point, Music Composer - 1 point, Picture Editor - 1 point. Notwithstanding the above, at least one of the director or screenwriter positions and at least one of the two lead performers must be Canadian. The CRTC also has requirements of screen-time and remuneration in the determination of lead performers. *Id.*

<sup>40</sup> *Id.* The CRTC defines "service costs" as the total cost of the production, minus the following costs: remuneration for producer(s) and co-producer(s) (except for producer-related positions), remuneration for key creative personnel eligible for points, post-production/lab costs, accounting and legal fees, insurance brokerage and financing costs, indirect expenses, contingency costs, goods purchased, such as film/videotape supplies, and other costs not directly related to production. *Id.*

<sup>41</sup> See A. E. Lehmann, *The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity*, 23 SYRACUSE J. INT'L L. & COM. 187, 192-200 (1997).

<sup>42</sup> By 1985, the percentage of households with cable television was 62.4% (Britannica World Data 1988 at 568), this figure reached 71% in 1989 and 73.3% in 1999. Canada At A Glance, StatsCan, available at <http://www.statcan.ca/english/>

[Pgdb/12-581-XIE01001.pdf](http://www.statcan.ca/english/Pgdb/12-581-XIE01001.pdf) (last viewed Mar. 20, 2003).

<sup>43</sup> See CRTC Public Notice CRTC 2001-90, Aug. 3, 2001, available at <http://www.crtc.gc.ca/archive/ENG/Notices/2001/PB2001-90.htm> (last accessed July 30, 2002). See also CRTC, *supra* note 38, at 194.

<sup>44</sup> See Broadcasting Public Notice CRTC 2002-9, Feb. 18, 2002, available at <http://www.crtc.gc.ca/archive/ENG/Notices/2002/pb2002-9.htm>; Public Notice CRTC 2001-89, Aug. 3, 2001, available at <http://www.crtc.gc.ca/archive/ENG/Notices/2001/PB2001-89.htm> (last viewed Mar. 20, 2003).

<sup>45</sup> CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 2(b).

<sup>46</sup> Boucher v. The King, [1951] S.C.R. 265.

<sup>47</sup> *Id.* at 288.

<sup>48</sup> Switzman v. Elbling, [1957] S.C.R. 285.

<sup>49</sup> *Id.* at 306.

<sup>50</sup> RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 583.

<sup>51</sup> Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 976 [hereinafter *Irwin Toy*].

<sup>52</sup> *Id.*

<sup>53</sup> Ford v. Quebec, [1988] 2 S.C.R. 712, ¶ 40 [hereinafter *Ford*].

<sup>54</sup> See RCA DirecTv Programming Packages and Prices, available at [http://www.rca.com/directv/package\\_list](http://www.rca.com/directv/package_list) (last viewed Mar. 20, 2003).

<sup>55</sup> For example, the number of people in the Canadian 1996 census that listed Spanish as their "mother tongue" was 212,890, while the number that listed Spanish as their "home language" was only 141,640. "Mother tongue" was defined by Statistics Canada as "the first language learned at home in childhood and still understood by the individual at the time of the census" while "home language" was defined as "the language spoken most often at home by the individual at the time of the census." See <http://www.statcan.ca/english/Pgdb/popula.htm#lan> (last viewed Mar. 20, 2003). Compare this to the 35.3 million Hispanic or Latino population of the United States, at <http://www.census.gov/statab/www/poppart.html> (last revised May 9, 2002).

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<sup>56</sup> See *Bell ExpressVu*, [2002] S.C.R. 42. (Factum of the Intervener: Congress Iberoamericain du Canada at para. 62-63).

<sup>57</sup> *Id.* (Factum of the Intervener: Canadian Alliance for Freedom of Information and Ideas, at para. 2-3). Examples provided by the Canadian Alliance for Freedom of Information and Ideas include members of the Immaculate Conception Church in Kelowna, British Columbia, who associate themselves with views expressed by EWTN, a religious service available from American broadcasters, but not Canadian broadcasters.

<sup>58</sup> See generally *id.*

<sup>59</sup> See *Irwin Toy*, [1989] 1 S.C.R. 927, para. 18-19.

<sup>60</sup> *R. v. Love*, [1997] 117 Man. R. (2d) 123, para. 15.

<sup>61</sup> Radiocommunication Act, R.S.C., ch. R-2, s. 9(1)(c), s. 18(1)(c) (1985).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at s. 18(1)(c).

<sup>64</sup> See *R. v. Knibb*, [1997] A.J. No. 513, *aff'd.*, [1998] A.J. No. 628 (Q.B.); *R. v. Open Sky*, [1994] M.J. No. 734; *R. v. NII Norsat International* [1998] 1 F.T.R. 245 (Can. Fed. Ct. Trial Div., *aff'd.*, [1997] F.C.J. No. 1563).

<sup>65</sup> *Knibb*, [1997] A.J. No. 513.

<sup>66</sup> *Id.* at para. 30.

<sup>67</sup> *Id.* at para. 54.

<sup>68</sup> *Knibb Appeal*, [1998] A.J. No. 628 (Q.B.) [hereinafter *Knibb Appeal*].

<sup>69</sup> *Id.* at para. 9.

<sup>70</sup> *Id.* at para. 23.

<sup>71</sup> *Open Sky*, [1994] M.J. No. 734.

<sup>72</sup> *Id.* at para. 36.

<sup>73</sup> *Id.* The judgment was later affirmed, and the leave to appeal was denied by the Manitoba Court of Appeal. The Court of Appeal noted that some of the programming being unscrambled was available to Canadian subscribers and, therefore, had lawful distributors. The Court ultimately found that the defendant's action fell within the parameters of the *Radiocommunication Act* and that there were no sub-

stantive questions for appeal.

<sup>74</sup> [1998] 1 F.T.R. 245 (Can. Fed. Ct. Trial Div.), *aff'd.*, [1997] F.C.J. No. 1563.

<sup>75</sup> [1997] F.C.J. No. 1563, at para. 9.

<sup>76</sup> *R. v. Love*, [1997] 117 Man. R.2d 123 (Q.B.).

<sup>77</sup> *Id.*

<sup>78</sup> See *id.*

<sup>79</sup> *Id.* at para. 67.

<sup>80</sup> *Id.* at para. 64.

<sup>81</sup> *Id.* at para. 67.

<sup>82</sup> *Id.*

<sup>83</sup> [1997] 156 Sask. R. 71 (Q.B.).

<sup>84</sup> *Id.* at para. 20 (emphasis added).

<sup>85</sup> [1997] N.S.J. No. 476 (N.S. Sup. Ct.).

<sup>86</sup> [2000] 79 B.C.L.R. 3d 250 (C.A.).

<sup>87</sup> *Bell ExpressVu*, [2002] S.C.R. 42, at para. 8.

<sup>88</sup> *Id.* at para. 6.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at para. 14.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at para. 15.

<sup>94</sup> *Id.* at para. 19.

<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> *Bell ExpressVu*, [2002] S.C.R. 42.

<sup>97</sup> *Id.* at para. 55.

<sup>98</sup> *Id.* at para. 43.

<sup>99</sup> Radiocommunication Act, R.S.C., ch. R-2, § 9(1)(c) (1985)

(Can.) (emphasis added).

<sup>100</sup> See *Bell ExpressVu*, [2002] S.C.R. 42, at para. 39.

<sup>101</sup> *Id.* at para. 41.

<sup>102</sup> *Id.* at para. 47.

<sup>103</sup> *Id.* at para. 48.

<sup>104</sup> See *DirectTV Programming Packages and Pricing*, RCA, available at [http://www.rca.com/directv/package\\_list](http://www.rca.com/directv/package_list) (last viewed Mar. 17, 2003).

<sup>105</sup> *Programming Packages*, Bell Canada, available at [http://www.bell.ca/shop/application/commercewf?origin=noorigin.jsp&event=link\(goto\)&content=/jsp/content/personal/catalog/satellites/programming\\_packages/release3/default.jsp&REF=L\\_SATTV\\_PKGS](http://www.bell.ca/shop/application/commercewf?origin=noorigin.jsp&event=link(goto)&content=/jsp/content/personal/catalog/satellites/programming_packages/release3/default.jsp&REF=L_SATTV_PKGS) (last viewed Mar. 17, 2003).

<sup>106</sup> The exchange rate for CAN \$1 on November 1, 2002 was U.S. \$0.6747. See Bank of Canada, available at <http://www.bank-banque-canada.ca/en/exchange-convert.htm> (last viewed Mar. 17, 2003).

<sup>107</sup> See *supra* Satellite Technology section.

<sup>108</sup> Canada Act, 1982, c. 11, sched. B (U.K.).

<sup>109</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

<sup>110</sup> *Id.* at 967.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 968.

<sup>113</sup> *Id.* at 969.

<sup>114</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697, 828.

<sup>115</sup> *Irwin Toy*, [1989] 1 S.C.R. 927.

<sup>116</sup> See *R. v. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 334.

<sup>117</sup> *Irwin Toy*, [1989] 1 S.C.R. 927, 974.

<sup>118</sup> *Id.* at 976.

<sup>119</sup> *Id.*

<sup>120</sup> *R. v. Videoflicks Ltd.*, [1984] 15 C.C.C.3d 353, 389 (Ont.), *aff'd. on other grounds*, [1986] 2 S.C.R. 713 (emphasis added).

<sup>121</sup> See *Ford*, [1988] 2 S.C.R. 712. The Supreme Court, considering commercial expression, found “[o]ver and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.”

<sup>122</sup> See *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 (Factum of the Attorney General at para. 80).

<sup>123</sup> Radiocommunication Act, R.S.C., ch. R-2, § 9(1)(c) (1985) (Can.).

<sup>124</sup> See *Bell ExpressVu*, [2002] S.C.J. No. 43 (Factum of the Attorney General at para. 80).

<sup>125</sup> *Id.* at para. 38.

<sup>126</sup> *Love*, [1997] 117 Man.R.2d at para. 15 (emphasis added). While the case was ultimately overruled by the Supreme Court, Justice Haliburton’s analogy to Cuba warrants consideration.

<sup>127</sup> See § 2(b) above.

<sup>128</sup> *Irwin Toy*, [1989] 1 S.C.R. 927, at para. 50.

<sup>129</sup> See *Bell ExpressVu*, [2002] S.C.J. No. 42, at para. 3.

<sup>130</sup> See section on *Freedom of Expression* in text.

<sup>131</sup> *Ford*, [1988] 2 S.C.R. 712, at 781.

<sup>132</sup> See *Bell ExpressVu Limited Partnership v. Rex* [2002] S.C.J. No. 43 (Factum of the Intervener, Canadian Alliance for Freedom of Information and Ideas, at para. 25).

<sup>133</sup> Section 1 of the *Charter* states that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Supreme Court of Canada has fashioned a test to determine whether a restriction is demonstrably justified in a free and democratic society, as explained below.

<sup>134</sup> P.W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 833 (1992).

<sup>135</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

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<sup>136</sup> *Id.* at 112-13, 239.

<sup>137</sup> *Id.* at 105-06.

<sup>138</sup> See *Bell ExpressVu*, [2002] S.C.R. No. 43, 704 (Factum of the Attorney General).

<sup>139</sup> *Oakes*, [1986] 1 S.C.R. 103, 138-39.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 139.

<sup>144</sup> See *Bell ExpressVu*, [2002] S.C.J. No. 43 (Factum of the Attorney General).

<sup>145</sup> P.W. HOGG, *supra* note 134, at 711.

<sup>146</sup> *Oakes*, [1986] 1 S.C.R. 103, 109.

<sup>147</sup> *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, 768.

<sup>148</sup> *Dagenais v. CBC*, [1994] 3 S.C.R. 835, 889.

<sup>149</sup> See P.W. HOGG, *supra* note 134, at 711.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See Canadian Culture section in text above.

<sup>154</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, 138-39.

<sup>155</sup> *Id.*

<sup>156</sup> P.W. HOGG, *supra* note 134, at 723.

<sup>157</sup> *Id.* at 724.

<sup>158</sup> See Purpose of Prohibition and Effect of Prohibition, *supra*.

<sup>159</sup> See § 2(b), *supra*.

<sup>160</sup> *Oakes*, [1986] 1 S.C.R. 103.

<sup>161</sup> *Bell ExpressVu*, [2002] S.C.R. 42.