

The Constitutional Obligation to Finance the CBC in a Way Consistent with Editorial Freedom

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This article reviews the compatibility with editorial freedom of the provisions concerning the financing of the Canadian Broadcasting Corporation ("CBC") by the allocation of annual parliamentary credits. The inevitable presence of the government in the establishment and financing of public broadcasting requires that the situs of editorial freedom be clearly specified. Broadcasters, even those financed by the State, are answerable only to the CRTC and common law tribunals for their editorial decisions, not to the government. Under present Canadian law, the CBC has a degree of editorial freedom analogous to that of other broadcasting undertakings. Editorial freedom thus presumes that the public broadcaster enjoys general decision-making independence exempt from interference by government authorities. This brings to mind the constitutional principles that define the governmental power to decide the level and form of financing to be allocated to the CBC. The measures meant to ensure control over public resources must be seen in a special way with respect to public organizations with editorial functions, such as the CBC, because of the preeminence of constitutional guarantees of freedom of expression. Consequently, the government cannot simply finance the CBC as it sees fit, but must frame its decisions into a public evaluation mechanism to decide the adequacy of resources granted to the public broadcaster to meet the broadcaster's inherent needs for the effective accomplishment of its mandate. The authors conclude that some provisions in the Broadcasting Act concerning the government financing of the CBC are not compatible with the necessity to promote and increase respect for the freedom of expression, as well as journalistic, creative and programming independence, which the CBC enjoys under sections 35(2) and 52 of the Broadcasting Act.

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and with the freedom of expression provided for in section 2(b) of the Canadian Charter of Rights and Freedoms.

Cet article examine la compatibilité des dispositions concernant le financement de la Société Radio-Canada, par l'octroi de crédits parlementaires annuels, avec la liberté éditoriale. La présence inévitable du gouvernement dans la mise sur pied et le financement de la radiodiffusion publique nécessite d'abord de situer avec précision le siège de la liberté éditoriale. Les radiodiffuseurs même ceux financés par l'État, ne répondent de leurs décisions éditoriales que devant le CRTC et devant les tribunaux de droit commun, non devant le gouvernement. Actuellement, la Société Radio-Canada jouit d'un degré de liberté analogue à celui qui prévaut à l'égard des autres radiodiffuseurs; ceci suppose donc une indépendance décisionnelle générale, exempte de possibilités d'ingérence de la part des autorités gouvernementales. On y rappelle ensuite les principes constitutionnels balisant le pouvoir gouvernemental de décider du niveau et de la forme de financement qui sera dévolu à la Société Radio-Canada. Les mesures destinées à assurer le contrôle des deniers publics doivent être conçues de façon particulière à l'égard des organismes publics exerçant des fonctions éditoriales comme Radio-Canada en raison de la primauté des garanties constitutionnelles de la liberté d'expression. Par conséquent, le gouvernement n'a pas le loisir de fixer à sa guise le financement de la Société Radio-Canada en marge d'un mécanisme public d'évaluation de l'adéquation entre les ressources accordées au diffuseur public et les exigences inhérentes à son mandat. Les auteurs concluent donc que certaines dispositions concernant le financement gouvernemental de la Société Radio-Canada ne sont pas compatibles avec la nécessité de promouvoir et de valoriser la liberté d'expression, ainsi que l'indépendance en matière de journalisme, de création et de programmation dont jouit la Société Radio-Canada en vertu des articles 35(2) et 52 de la Loi sur la radiodiffusion et avec la liberté d'expression prévue à l'alinéa 2b) de la Charte canadienne des droits et libertés.

INTRODUCTION

This article addresses the question of whether the provisions concerning government financing of the Canadian Broadcasting Corporation ("CBC") by the allocation of annual parliamentary credits, as is presently provided by the *Broadcasting Act*, are compatible with

1. the need to promote and increase respect for the freedom of expression, as well as journalistic, creative and programming independence of the Corporation, provided for in sections 35(2) and 52 of the *Broadcasting Act*; and
2. the freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication, provided for in section 2(b) of the *Canadian Charter of Rights and Freedoms*.

This question calls for an analysis of the status of public broadcasting with respect to the fundamental, and now constitutional, principles of freedom of expression, the press and other means of communication. Regarding public media, the principle of editorial freedom takes a form which fairly distinguishes it from that which is accepted regarding other broadcasters. The inevitable presence of the government in the establishment and financing of public broadcasting requires that the situs of editorial freedom be specified more clearly.

While for private broadcasters editorial freedom is attributed to those (most often the majority shareholders) with effective control of the enterprise, this principle is tempered in the case of public broadcasters. The ability of the government (and of Parliament) to perform certain actions affecting the functioning of public broadcasting is, however, limited by the *Canadian Charter of Rights and Freedoms*.

In order to study this question, it is necessary initially to determine the nature and scope of the freedom of the press and other means of communication provided for in section 2(b) of the *Charter*. This must be done first for all information media, then for broadcasters in general, and finally for the CBC. Next we must examine the provisions relative to the financing of the Corporation in light of the principles and requirements following from editorial freedom. This will allow us to determine the extent of governmental prerogatives in the framework of the financing of the Corporation, since such prerogatives are limited by the principle of editorial freedom.

1. THE NATURE AND SCOPE OF THE EDITORIAL FREEDOM OF THE CBC

The principle of editorial freedom is well established in Canada in regard to written media and, with certain modifications, is a fundamental given for the regulation of the activities of broadcasters.

Editorial freedom stems directly from the freedom of expression and the constitutional guarantees of freedom of expression, the press and other media of communication, as stated in section 2(b) of the *Canadian Charter of Rights and Freedoms*.¹ Thus editorial

1 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

freedom possesses constitutional value in Canada: this fact makes it impossible to set it aside except by legislation and to the extent that such action would be reasonable and justifiable in a free and democratic society. Thus, the provisions of the *Broadcasting Act* are not the source of the broadcasting undertakings' right to freedom of expression, freedom of the press, and journalistic, creative and programming independence. These freedoms are only noted: they pre-exist in the undertakings' favour and the Act simply states that it must be interpreted and applied in consequence.

In four places, the *Broadcasting Act* points out the principle of editorial freedom and the independence of broadcasting undertakings regarding journalism, creation and programming.

Section 2(3) of the *Broadcasting Act* orders its interpretation to be done in accordance with the freedom and editorial independence of all broadcasters. It reads as follows:

This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

Three other provisions mention the freedom of expression and journalistic, creative and programming independence of broadcasting undertakings with respect to the CBC.² These freedoms, which are components of editorial freedom, do not have their source in the Act, but are inherent in press and communications undertakings which have freedom of expression. Abrogating such provisions would not eliminate these prerogatives, which follow directly from freedom of expression, the press and other means of communication, as guaranteed by the Constitution. This is the spirit in which we must now examine all sides of editorial freedom.

(a) Editorial Freedom in General

Editorial freedom is, in a way, the form freedom of expression takes when it is applied to the media as an entity.³ It has long been recognized that governmental authorities do not have the right to in-

2 Sections 35, 46 and 52.

3 S.D. Charkes, "Editorial Discretion of State Public Broadcasting Licensees" (1982) 82 Columbia L. Rev. 1161 at 1172.

terfere in the operation of information media. It will be recalled that *Reference re Alberta Legislation*⁴ recognized the editor's right to decide upon the contents of his publication, without the intervention of state authorities. The measures invalidated in the *Saumur*⁵ case, a municipal regulation on the distribution of tracts, have been analyzed as allowing governmental authorities to forbid the distribution of information by basing themselves on the contents of the documents intended to be distributed and not on criteria foreign to the contents of those documents: for this reason they were judged invalid. In *Gay Alliance Toward Equality v. Vancouver Sun*,⁶ Justice Martland, expressing reasons for the majority of the Justices of the Supreme Court, based his reasoning on *Miami Herald Publishing Co. v. Tornillo*,⁷ which he considered to be "of assistance in considering one of the essential ingredients of freedom of the press." He concluded that "the law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes."⁸ In consequence, he set aside an interpretation of an Act the consequence of which, in his opinion, would have been the determination of what a newspaper must publish.

Editorial freedom presumes an autonomy of principle in decisions regarding choice, treatment and distribution of information. In exchange, it carries responsibility: those with editorial discretion, and no one else, are responsible to others for the information distributed.

(b) The Editorial Freedom of Broadcasters

The principle of editorial freedom reserves for the broadcaster, with the exclusion of all authorities, the right to decide on the content which will be broadcast. Due to this, and in contrast to other bodies with large concessions from the State, public and private broadcasters are given a wide margin of journalistic discretion. Canadian courts recognized the editorial freedom of broadcasters long before the declaration of the *Charter*.

4 [1938] S.C.R. 100, aff'd (1938), [1939] A.C. 117 (P.C.).

5 *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299.

6 [1979] 2 S.C.R. 435.

7 418 U.S. 241 (1974).

8 Above, note 6 at 455.

*National Indian Brotherhood v. Juneau (No. 3)*⁹ confirmed, in effect, the point of view developed in case law regarding printed media. Justice Walsh of the Federal Court stated his view as follows:

Reading the [*Broadcasting Act*] as a whole and in particular the sections to which I have referred, I find it difficult to conclude that Parliament intended to or did give the Commission the authority to act as a censor of programmes to be broadcast or televised. If this had been intended, surely provision would have been made somewhere in the Act giving the Commission authority to order an individual station or a network, as the case may be, to make changes in a programme deemed by the Commission, after an inquiry, to be offensive or to refrain from broadcasting same. Instead of that, it appears that its only control over the nature of programmes is by use of its power to revoke, suspend or fail to renew the licence of the offending station.¹⁰

The reasoning followed in the *Juneau* case resulted from a restrictive interpretation of the powers granted to the CRTC under the *Broadcasting Act*¹¹ of 1968. This interpretation, made when the *Broadcasting Act* made no direct mention of editorial freedom, is proof of the inherent nature of this freedom in Canadian law. For Justice Walsh, the power to intervene in the programming of each broadcaster is so great, undoubtedly because it seems to come into conflict with a fundamental freedom, that the legislator must make express mention of it.

In the United States, in *Columbia Broadcasting System Inc. v. Democratic National Committee*,¹² Justice Douglas of the U.S. Supreme Court indicated the limits to the scope of state measures circumscribing the editorial freedom of broadcasters. Such measures cannot be extended to allow state supervision of publishing or broadcasting decisions.

Editorial freedom, recognized in section 2(3) of the *Broadcasting Act*,¹³ can be limited by regulations or by explicit or general licensing conditions. There is no authoritative court decision which recognizes the right of government authorities to interfere in program-

9 [1971] F.C. 498.

10 Ibid. at 513.

11 S.C. 1967-68, c. 25, replaced by R.S.C. 1970, c. B-11; R.S.C. 1985, c. B-9, as am. R.S.C. 1985 (4th Supp.), c. 1, s. 3; S.C. 1988, c. 65, ss. 50-51; S.C. 1989, c. 17.

12 412 U.S. 94 (1973).

13 S.C. 1991, c. 11.

ming decisions. While public authorities may be free to regulate¹⁴ frequency use, they cannot take the place of licence holders when it comes time to decide what will be transmitted. As a result, state authorities cannot impose on broadcasters generalized obligations to broadcast messages which, hypothetically, could be in conflict with their editorial policies.

It might seem that the fact that broadcasters are conceded the right to use a public resource, the spectrum of frequencies, contributes to endowing them with a status which would forbid them from claiming constitutional protection of editorial freedom.¹⁵ This argument would be even stronger in the case of public broadcasters: they would be nothing more than a State component and their status would be confused with the State, which would render them subject to the decisions of the executive in the same way as other bodies owned by the State. The tribunals have, however, viewed this issue in a radically different way, both in Canada and the United States.

In the United States, *Red Lion Broadcasting Co. v. Federal Communications Commission*,¹⁶ which recognized the scarcity of radio frequencies, was thought to create an opening for the activities of broadcasters to be described as state action. This opinion was based on the recognition of a sort of subsidiary responsibility attributed to the broadcaster, a responsibility founded on a certain pre-

14 See, among the abundant literature on this subject, P. Trudel & F. Abran, *Droit de la radio et de la télévision* (Montreal: Éditions Thémis, 1991) at 153ff; A.C. Evans, "An Examination of the Theories Justifying Content Regulation of the Electronic Media" (1979) 30 Syracuse L. Rev. 871 at 883-884; F. Jongen, "La liberté d'expression dans l'audiovisuel: liberté limitée, organisée et surveillée" (1993) Rev. trim. dr. h. 95; M. Dejeant-Pons, "La jurisprudence en matière de liberté d'expression audiovisuelle dans le cadre de la Convention européenne des droits de l'homme" in C. Desbasch & C. Gueydan, *La régulation de la liberté de la communication audiovisuelle* (Paris: Économica, Presses universitaires d'Aix-Marseille, 1991) 285; A. Namurois, "Aspects du droit de la radio et de la télévision dans le monde, en rapport avec la liberté d'expression" (May 1980) 27 Études de radio-télévision I; M. Fallon, "La radio et la télévision face au juge européen" (1987) 47 Annales de droit de Louvain 153; S.W. Head, *World Broadcasting Systems - A Comparative Analysis* (Belmont, Cal.: Wadsworth, 1985) at 377ff; D.R. Browne, *Comparing Broadcast Systems* (Ames: Iowa State University Press, 1989).

15 See P. Trudel & F. Abran, "Le caractère public des fréquences comme limite à la liberté d'expression" (1994) 4 M.C.L.R. 219.

16 395 U.S. 367 (1967).

eminence of public rights over those of broadcasters. However, in *Columbia Broadcasting System Inc. v. Democratic National Committee*,¹⁷ the Supreme Court had the opportunity to discuss at greater length the constitutional status of broadcasters. This case followed the broadcasters' refusal to broadcast the editorial messages of the applicant organizations. The Federal Communications Commission rejected the complaints lodged following these refusals. The Court of Appeal of the District of Columbia, in *Business Executives' Move for Vietnam Peace v. Federal Communications Commission*,¹⁸ reversed the Commission's decision, judging the general prohibition to broadcast any editorial commercials as against the First Amendment. The Court even went so far as to declare that the broadcasters' actions were State actions.

By reversing this decision, the Supreme Court agreed with the FCC and recognized that neither the law nor the Constitution obliged broadcasters to sell air time for the broadcasting of controversial views. Four Justices rejected the application of the doctrine of state action to the activities of broadcasters. Justice Brennan, dissenting, considered that there were four reasons broadcasters could be seen to engage in government action: the public nature of the frequencies, the special status of broadcasters created by the State, the important content regulation by federal authorities and the explicit acknowledgment by the FCC of the policy of the television network, which was attacked in this case. Chief Justice Burger, rendering the majority decision, based his analysis on the notions of independence and journalistic freedom. What sets broadcasters apart from other bodies with large concessions from the State is the fact that they are given a great degree of journalistic freedom. This freedom is incompatible with a conception of these enterprises which assimilates them to state action.

Clearly it is the notion of editorial responsibility which makes the application of the state action doctrine so difficult in the case of broadcasters. Regarding this, Ruth Walden writes that

Unable to reconcile the journalistic role and rights of broadcasters with a theory that would subject journalistic decisions to constitutional scrutiny and restraints, the judiciary has rejected applicability of the state action theory. . . .

17 Above, note 12.

18 450 F.2d 642 (1971).

To accomplish this, Chief Justice Burger and others have used what might be termed a negative approach to symbiosis analysis. In essence, that approach says that state action is not present because it should not be present.¹⁹

The same reasoning prevails in Great Britain. In *British Broadcasting Corp. v. Johns (Inspector of Taxes)*²⁰ the Court of Appeal asserted that broadcasting is not "a province of government" and that in this case the BBC could not claim, as an independent organization, Crown immunities.

As in the United States and Great Britain, tribunals in Canada have refused to consider broadcasters to be performing government activities. The Supreme Court of Canada was first lead to identify criteria for governmental functions when the activities of bodies with functions of an editorial nature, such as universities, were analyzed.

Thus in *McKinney v. University of Guelph*²¹ Justice La Forest concluded that universities have a large degree of autonomy from governmental authorities, which prevents the conclusion that such bodies exercise state functions. After reviewing the status of Ontario universities, he concluded that

The government thus has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources.²²

The comparison with broadcasters, including public broadcasters, implies that the latter have editorial autonomy comparable to university institutions. Broadcasters, even those financed by the state, are answerable only to the CRTC and common law tribunals for their editorial decisions, and not to the government. In light of the criteria identified in *McKinney*, it is difficult to consider them as bodies dependent on the will of the government. Justice La Forest's other reason for concluding that university institutions do not participate in

19 "The Applicability of State Action Doctrine to Private Broadcasters" (1985) 7 COMM/ENT L.J. 265 at 300 and 301.

20 [1965] Ch. 32, [1964] All E.R. 923 (C.A.).

21 [1990] 3 S.C.R. 229, 13 C.H.R.R. D/171; see also *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, 13 C.H.R.R. D/317; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 13 C.H.R.R. D/337; A. Lajoie & M. Gamache, *Droit de l'enseignement supérieur* (Montreal: Éditions Thémis, 1990) at 246ff.

22 *McKinney v. University of Guelph*, *ibid.* at 273.

government action is even more pertinent to the situation of broadcasters in Canada. He explained that

The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom.²³

Regarding broadcasters, Justice Campbell of the Ontario High Court drew a conclusion consistent with such an independent status in *Trieger v. Canadian Broadcasting Corp.*²⁴ He wrote that

The *Canadian Charter of Rights and Freedoms* applies to government action. It represents a curb on the power of government, not a fetter on the rights of organizations or individuals independent of government which do not exercise the functions of government.

It is not a function of government or indeed of the courts to dictate to the news media what they should report. The broadcasters are exercising a function that is very central to the democratic process. But it is a function that they perform quite independently of government.

... By leaving broadcasters a wide individual discretion and responsibility to ensure the fair treatment of issues, candidates and parties during elections, the C.R.T.C. is emphasizing the editorial freedom of broadcasters rather than delegating to them any power of regulation.²⁵

The *Trieger* reasoning has been applied in other decisions concerning issues brought before the courts in order to challenge programming decisions of broadcasters.²⁶ The *Broadcasting Act* thus establishes general regulations applicable to everyone authorized to operate broadcasting undertakings in Canada. These general regulations apply to the CBC and to other public broadcasters, in accordance, of course, with those provisions specifically targeting them in the *Broadcasting Act*.²⁷

23 Ibid.

24 (1988), 54 D.L.R. (4th) 143.

25 Ibid. at 147.

26 See *Natural Law Party of Canada v. Canadian Broadcasting Corp.* (1993), [1994] 1 F.C. 580 (T.D.).

27 On the main differences between the CBC and the other broadcasting companies, see J. Frémont & P. Trudel, *Étude des relations entre le CRTC, la Société Radio-Canada et le gouvernement l'occasion de la détermination des conditions de licence relatives au service national de radiodiffusion* (Study produced for the Department of Communications of Canada) (Montreal: Centre de recherche en droit public, 1986) at 7ff.

(c) The Editorial Freedom of the CBC

Under present Canadian law, the CBC has a degree of editorial freedom analogous to that of other broadcasting undertakings. However, additional distinctions must be made, especially to better define the domain in which editorial freedom may be exercised in the case of a public broadcaster like the CBC and the consequences of this principle regarding financing.

(i) *The existence of the editorial freedom of the CBC*

The *Broadcasting Act* states that it is as a "national public broadcaster" that the CBC offers its services.²⁸ This definition is important. The Corporation is not a simple division of the government: it is mandated to provide a service which, by its very nature, presupposes editorial independence. By stating that the CBC offers a national public broadcasting service, the Act manifests an intention to grant it a degree of freedom analogous to that which is in principle accorded to other broadcasting undertakings. This reflects Canadian traditions in this domain.

In *R. v. Canadian Broadcasting Corp.* Justice Estey noted

the desire by Parliament to establish a national broadcasting service free from influences of the political world, including perhaps both the executive and legislative branches of the government, to the extent that such influences might impinge upon the proper functioning of such a national broadcasting service on a non-political basis.²⁹

Regarding the CBC, the principle of freedom of expression and journalistic, creative and programming independence is asserted in three places in the *Broadcasting Act*.

Section 46(5) asserts that

The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.

Section 35(2) sets out that

This Part [Part III of the Act] shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

28 Above, note 13, s. 3(1).

29 [1983] 1 S.C.R. 339 at 344.

This provision states a principle of interpretation and a legislative directive regarding how to apply the provisions of Part III of the *Broadcasting Act* regarding the status and functioning of the CBC.

A more precise provision concerns the provisions regarding the financing of the CBC. Section 52 states that

(1) Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

(2) Without limiting the generality of subsection (1), and notwithstanding sections 53 to 70 or any regulation made under any of those sections, the Corporation is not required to

(a) submit to the Treasury Board or to the Minister or the Minister of Finance any information the provision of which could reasonably be expected to compromise or constrain the journalistic, creative or programming independence of the Corporation.

Commenting on the CBC in the *Trieger* decision, Justice Campbell came to the conclusion that it is in the same situation as other broadcasters regarding editorial decisions. Taking into account the study of the CBC's activities in light of the criteria stated in *McKinney* and the 1983 *R. v. Canadian Broadcasting Corp.* decision, he concluded that

the C.B.C., in discharging its parliamentary mandate as a broadcaster, is in exactly the same position as any private broadcaster. Whatever the application of the Charter may be to other aspects of the C.B.C., its independence from government in respect of its editorial decisions in its broadcast operations suggests to me that it should perhaps not, in respect of those editorial broadcasting decisions, be treated as if it were a governmental organization subject to government control and subject to the Charter through the instrumentality of s. 34 thereof.³⁰

Section 35(2) of the 1991 *Broadcasting Act* provides even more reinforcement for this approach since the principle is expressly repeated in Part III of the Act, which states the Corporation's status. In *National Party of Canada v. Canadian Broadcasting Corp.*,³¹ Judge Berger of the Court of the Queen's Bench pointed out that even after *Trieger*, which confirmed the extent of the margin of editorial freedom of the CBC under the 1968 *Broadcasting Act*, Parliament

30 Above, note 24 at 148. See also, *Elliott v. Canadian Broadcasting Corp.* (1993), 108 D.L.R. (4th) 385 (Ont. Gen. Div.), aff'd (1995), 125 D.L.R. (4th) 534 (Ont. C.A.).

31 (1993), 106 D.L.R. (4th) 568 (Alta. Q.B.), aff'd (1993), 106 D.L.R. (4th) 575 (Alta. C.A.).

mentioned in two different places in the 1991 *Broadcasting Act* that the latter must be interpreted in a way compatible with the editorial freedom of the CBC.³² He wrote:

Parliament in its wisdom enacted in 1991 specific provisions aimed at protecting the journalistic, creative and programming independence of the C.B.C. Parliament recognized that the broadcast media must be free from government interference – a touchstone of a democratic society.³³

It was clearly the notion of providing the public with information of a high standard of quality, including objectivity, that Parliament had at heart when it stated the principles in the *Broadcasting Act*. Justice Estey, in *R. v. Canadian Broadcasting Corp.*, declared of the 1968 *Broadcasting Act* that

It is clear from s. 39 and s. 3 of the *Broadcasting Act* that the appellant was established by Parliament to provide a national broadcasting service, including the origination and distribution by broadcast of programs, and to do so as part of the “Canadian broadcasting system” and consistent with the terms of the licences granted to the appellant in connection with this undertaking. It is equally clear that the *Broadcasting Act* is a statute of general application to an industry throughout Canada and for the regulation in every particular of that industry and all its components and affiliated organizations. Regulation 5, *supra*, recognizes indeed that there may be activities by the appellant and other broadcasters which are beyond their licence and beyond the statutory authorization. In this respect the appellant was in the same position – no better, no worse – than broadcasters who are not established as Crown corporations under the *Broadcasting Act*.³⁴

Justice Estey added that

It is inconceivable that Parliament, by adopting the *Broadcasting Act* and by authorizing the Regulations thereunder . . . , would have intended to establish a regime whereby one class of broadcasters is made subject to the general laws of the land including the criminal laws, whereas the other class of broadcasters is not.³⁵

In consequence, unless a specific mention can be found in which a provision restricts the editorial freedom of the CBC, the principle which must be applied is that the Corporation has the same degree of freedom as other broadcasters.

32 As well as s. 35(2) of the 1991 *Broadcasting Act*, s. 52(1) states that the financial provisions set out in ss. 53 to 70 do not have the effect of attacking the freedom of expression or journalistic, creative or programming independence of the CBC in the fulfilment of its mandate or the exercise of its powers.

33 Above, note 31 at 573.

34 Above, note 29 at 352-353.

35 *Ibid.* at 353.

(ii) *The situs of the editorial freedom of the CBC*

One might conclude that if the CBC enjoys the guarantees of editorial freedom, it follows that the authorities who make the final decisions regarding it are, because they do so, those who control the editorial freedom of the Corporation. Occasionally the government is spoken of as the CBC's shareholder, and the State therefore as having control over editorial decisions.³⁶ The constitutional principle of editorial freedom makes such a view impossible.

Most discussions questioning fundamental rights and freedoms occur around conflicts between the State and private parties, be they individuals or corporations. Models developed in such contexts tell us little about situations in which freedom of expression is claimed by a public organization which is part of the State. Regarding broadcasting, the major role of the CBC requires the development of a concept of freedom of expression which gives an account of the status of public organizations working in the field of expression and public information.

With respect to freedom of expression, the State's traditional role has been to act as a censor, in particular when it adopts measures injurious to the freedom of expression of persons. Many discussions of freedom of expression are attempts to develop arguments to determine the limits of State intervention when a government adopts measures prohibiting a given type of speech.

By force of circumstances, the State also produces messages. For many reasons, government authorities must address citizens for the proper administration of government legislation and policies. In a great number of cases, the communicative action of governmental authorities is even required by law³⁷ or follows from efforts to achieve effectiveness. Moreover, legitimately elected leaders are permitted to make reasonable use of public resources to inform the population of measures they intend to implement in order to better administer public affairs. The boundary between publicly funded, legitimate expression by elected leaders and partisan propaganda is certainly

36 The CBC, however, has no stock, and thus cannot have shareholders.

37 Much legislation requires the publication of notices or makes it a departmental duty to promote certain behaviours.

tenuous, but public opinion generally draws a line which politicians cannot cross without risk.

In Canada, public organizations have a third type of expressive function: that of editor, the role of which is to select the information to be communicated to the public, to choose the way in which it will be presented, and to decide when it will be presented. The CBC certainly plays this role.

Regarding public media, the issue of the situs of editorial freedom presents itself differently than with the other broadcasters. The inevitable presence of the government in the establishment and financing of public broadcasting requires, in effect, that the situs of editorial freedom be identified even more precisely. While for private broadcasters, this freedom is attributed to those who have effective control over the enterprise (most often, the majority shareholders), the location in which this freedom is held is different in the case of public broadcasters.

The ability of governments and parliaments to perform certain actions concerning expressive activities is limited by the *Charter*. Parliament, and thus the government, cannot act contrary to the freedom of expression recognized in *Charter* section 2(b). By claiming to act as if it were the only or majority shareholder of a public body with editorial functions, the government or Parliament would be attempting to appropriate for itself the constitutional guarantee of freedom of expression.

Constitutional guarantees are limits on the abilities of state authorities, and not sources of rights for such authorities, even though this latter possibility is not inconceivable. Examining this issue in the American context, Yudof emphasizes that, regarding freedom of expression, it would be unthinkable for the government to attempt to claim rights based on the First Amendment which would be contrary to the interest of society as a whole.³⁸

38 More precisely, Yudof writes of this freedom that it is "inconceivable that governments should assert First Amendment rights antagonistic to the interest of the larger community": M.G. Yudof, "When Governments Speak: Toward a Theory of Government Expression and the First Amendment" (1979) 57 *Texas L. Rev.* 863 at 868; id., *When Governments Speak: Politics, Law and Government Expression in America* (1983).

According to such an approach, speech by the government is not in itself prohibited, no more so than are measures meant to ensure the efficiency of the allocation of public funds. Nonetheless, limits on such measures must be defined. They cannot go beyond what is necessary to the accomplishment of governmental functions. Thomas Emerson writes that "government right of expression does not extend to any sphere that is outside the governmental function."³⁹

If we accept this view, the measures meant to ensure control over public resources must thus be seen in a special way with respect to public organizations with editorial functions because of the preeminence of constitutional guarantees of freedom of expression. When an editorial function is devolved to a public organization, the government cannot act toward this organization only as if it were simply the ultimate holder of the right to decide what will be broadcast. It is incumbent on the government to respect the conditions necessary to preserving the independent exercise of the editorial functions accorded to the public organization.

One of the major principles of the *Broadcasting Act* is that of broadcasters' responsibility and freedom of expression. Thus, the CBC must offer the national broadcasting service provided for in section 3(1)(l) and (m), while being in principle governed according to the status of other broadcasters. The status of broadcasters is defined through the notion of editorial freedom: they enjoy freedom of expression and assume responsibility for what they broadcast.

The furnishing of a broadcasting service fulfilling the standards stated in the *Broadcasting Act* is difficult to liken to a government function. In the *Broadcasting Act* there is an obligation to inform and criticize in a balanced, diversified manner, which is not necessarily compatible with the nature of the government under our democratic system. By nature, the government must make decisions and assume responsibility for them, both before Parliament and before the public. Certainly the government has the duty to inform the population of the measures it takes, yet we cannot expect that it will assume the task of providing information meeting standards of jour-

39 T. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 699.

nalistic objectivity, or that it will undertake credible criticism of the measures it has taken.

We cannot, therefore, liken public organizations with editorial functions to simple products of the State. It is undoubtedly permissible for public authorities to establish organizations dedicated to the distribution of government thought. However, when the State sets up organizations to which are devolved the ability to select the information which will be broadcast to the public, the measures taken by the government with respect to such bodies must respect editorial freedom and be examined in light of the standards of section 1 of the *Charter*.

Parliament, and thus the government, cannot act contrary to the freedom of the press recognized in *Charter* section 2(b). This is why it is impossible, regarding public broadcasting, to act as if the government, as the sole shareholder of a public broadcasting company, had complete power to determine broadcast content.

In consequence, the situs of the editorial freedom of the CBC is located not at the level of governmental authority, but rather at that of the decision-makers enabled by the Act to assume the direction of the affairs of the Corporation in accordance with the standards established in the *Broadcasting Act*.

Government power is to be found on another level: that of the determination of the mandate and the provision of the means to accomplish that mandate.

2. FINANCING MECHANISMS REGARDING THE REQUIREMENTS OF EDITORIAL FREEDOM

Evaluation of the adequacy of financing mechanisms with respect to the requirements of editorial freedom necessitates the determination of the limits which must be respected by the legislation, regulations and policies which inevitably supervise the activities of the CBC. Since what is at issue is a freedom, the prerogatives which editorial freedom guarantees to those who have it are generally negatively defined. We will see whether limiting measures are reasonable or not in a democratic society.

Constitutional provisions state principles to which the rules on financing the CBC must conform, particularly regarding editorial freedom and guarantees relating to public services. Sections 1 and 2(b) of the *Charter* state:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Moreover, section 36 of the *Constitution Act, 1982* states that

(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

The commitment of Parliament stated in this constitutional provision must be seen as having supra-legal value. Combined with the guarantee of freedom of the press and other communications media in *Charter* section 2(b), it allows one to suppose that when a public information service is set up and given a mandate to inform the public, it has the benefit of this commitment subscribed to in the constitutional document.

In consequence, it follows from the combined effect of sections 2 and 36 of the *Constitution Act, 1982* and the interpretations made by Canadian courts of these provisions that

- public broadcasting has a guaranteed right to editorial freedom;
- public broadcasting is a condition inherent to communications freedoms;
- decisions affecting public broadcasting in its most essential aspects, such as financing, must be compatible with respect for its conditions of existence as an activity which is effectively independent from government authority.

The analysis of the provisions regarding the financing of the CBC must take into account the fact that the law on these matters must be reconciled with two extremely important imperatives: preservation of editorial freedom and the need to account for the way in which public funds are spent. Depending on the relative importance one places on these imperatives, the conclusions drawn will diverge. Thus, before performing this delicate balancing act, it is useful to fortify our thought with criteria defined in other democratic states.

In order to do this, we can use the reflections and arguments developed in other democratic countries which have been confronted with the problem of settling the limits of editorial freedom with respect to control measures for the activities of public broadcasters.

(a) The United States

In the United States there is no tradition of a public broadcasting service, at least in the sense in which it is usually understood in Canada. Radio and television are essentially seen as commercial activities and the State is not permitted to intervene except concerning what is recognized as justifiable: the need to ensure proper management of the frequency spectrum. This has not prevented the establishment of a network of public radio and television (the PBS network) which receives public financing. The modalities of government financing of public broadcasters remains a controversial subject in the United States. Howard A. White summarizes the debate as follows:

When the Carnegie Commission on Educational Television considered possible sources of federal funding for public television, it proposed a manufacturer's excise tax on television sets, with revenues made available through a trust fund for the proposed Corporation for Public Television. This financing mechanism was designed to distance the activity from political control and to "permit the funds to be disbursed outside the usual budgeting and appropriation procedures." Instead, Congress chose to use general tax revenues and traditional authorization and appropriation procedures. A variety of federal funding source proposals have been advanced, most of which seek to insulate the sources from programming judgments. In addition to, or in place of, appropriations from general tax revenues, proposed revenue sources include taxes on profitable commercial communications entities and taxes on assignments and transfers of broadcast licenses. Granting tax credits to donors might be a fruitful means of increasing audience and underwriter support.⁴⁰

40 H.A. White, "Fine Tuning the Federal Government's Role in Public Broadcasting" (1994) 46:3 Federal Communications L.J.; <http://www.law.indiana.edu/fclj/v46/no3/white.html>.

In spite of the controversies over the best approach to financing, it has been recognized that financing rules must not hinder editorial freedom.

In this respect, the U.S. Supreme Court has developed a doctrine called "unconstitutional conditions" to determine the extent of the regulatory power the government may exercise when it allocates funds to public broadcasters.⁴¹ In *Federal Communications Commission v. League of Women Voters of California*, the U.S. Supreme Court expressed itself as follows:

Although the government's interest in ensuring balanced coverage of public issues is plainly both important and substantial, we have, at the same time, made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area. Unlike common carriers, broadcasters are "entitled under the First Amendment to exercise the 'widest journalistic freedom consistent with their public duties.'" . . .

Indeed, if the public's interest in receiving balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust.⁴²

In determining the extent of the protection enjoyed by public broadcasters under the First Amendment, the Court based its reasoning on the role attributed to such broadcasters regarding the duty to inform the public.

The government cannot tie the financing it accords public broadcasters to conditions contradicting the rights guaranteed them by the Constitution. In order to determine whether one is dealing with unconstitutional conditions, one must determine the nature of the governmental resources in question and the constitutional rights involved. A mechanism which would force a body to modify its mode of functioning and its behaviour in such a way as to limit its guaranteed rights and freedoms could be an unconstitutional condition.⁴³

41 Sullivan, "Unconstitutional Conditions" (1989) 102 Harvard L. Rev. 1413 (1989)

42 468 U.S. 364, 52 L.W. 5008 at 5012.

43 See R. de Lourdes Cordoba, "To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting" (1991) 42 Hastings L.J. 635 at 672-673.

Thus, in *Federal Communications Commission v. League of Women Voters of California*, it was judged that a measure forbidding bodies receiving government funding to present editorials contradicted the First Amendment and must thus be declared inoperative.

Consequently, in American law, measures provided for by legislation or by other mechanisms which affect the editorial freedom of public broadcasters are judged to be contrary to the Constitution. The power to finance a broadcasting organization does not bestow the ability to tie this financing to conditions which would amount to the negation of the broadcasters' constitutional rights.

(b) Germany

With respect to the meaning to be given to constitutional guarantees of freedom of expression in the domain of public broadcasting, the decisions of the German Constitutional Court are of very great interest. Like the Canadian Constitution, which guarantees freedom of expression, the press and other means of communication, Article 5 of the Basic Law of the Federal Republic of Germany provides that

(1) Everyone shall have the right freely to express and disseminate his opinion in speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour.

(3) Art and science, research and teaching shall be free. Freedom of teaching shall not release anybody from his allegiance to the constitution.⁴⁴

The Constitutional Court's interpretations of this provision shed light on the meaning of these freedoms for public broadcasting. Thus, as Eric Barendt points out:

In the context of broadcasting, the Court does not regard the freedoms protected in article 5 as mere liberties against the state, but prefers to see them as fundamental values which must be reflected in state legislation. Secondly,

⁴⁴ *Basic Law of the Federal Republic of Germany*, Promulgated by the Parliamentary Council on 23 May 1949; in W. Hoffman-Riem, *The Fortieth Anniversary of the West German Constitution, Lectures in India* (Verlag, Hans-Bredow-Institut, 1989).

in view of the shortage of frequencies and the high costs of setting up broadcasting channels, a public broadcasting monopoly could be upheld under the Constitution.⁴⁵

After reviewing the Constitutional Court's principal decisions on broadcasting, Barendt explains that in these decisions the Court

emphasised the role of the media in providing information for the citizens and so in contributing to the working of democracy. These fundamental responsibilities . . . were to be discharged by the public broadcasting authorities, which were required to show a comprehensive range of balanced and impartial programmes, as well as to provide a full and accurate news service. Public broadcasting must be adequately financed to enable it to do this satisfactorily. Provided these conditions were met, private broadcasters could be allowed to operate under less onerous obligations.⁴⁶

This is the line of thought followed by the 1994 decision in which the Constitutional Court made a direct link between constitutional guarantees of freedom of expression and the State's obligation to grant adequate financing to public broadcasting organizations, given their mandate. In its February 22, 1994, decision, the German Constitutional Court stated that funds must be granted in accordance with a procedure which distances any possibility of political influence over the programming of public broadcasters. In this way, the Court exposes the link between freedom of expression, the rights of the public, and the consequences which follow from these rights regarding the funding conditions of public broadcasting:

A free formation of opinions will therefore depend on the extent to which the broadcasters themselves are free to provide full and factual information. Attainment of the normative objectives of the Art. 5(1) of the Constitution therefore depends, given the conditions of modern mass communication, to a large extent on the constitutional protection afforded to the communication function of broadcasting. Broadcasting performs this communication function through its programs, and not merely in its political and informational segments. Freedom of broadcasting, therefore, means freedom of programming. . . . It guarantees that program selection, content and design are controlled by the broadcaster and can be based on journalistic criteria. The broadcasters themselves have the power to decide, based on their professional standards, what is required under their statutory mandate in journalistic terms. The use of the broadcasting system for nonjournalistic ends is incompatible with this. . . . This not only applies to direct influence on programming by third parties

45 E. Barendt, "The Influence of the German and Italian Constitutional Courts on Their National Broadcasting Systems" [1991] Pub. L. 93 at 100.

46 *Ibid.* at 102-103.

but also to influence that may affect programming freedom in indirect ways.⁴⁷

The level of protection of editorial freedom must extend beyond the obvious manifestations of the danger of interference. In effect, the Court explains that

This protection not only applies to manifest dangers of direct control of broadcasting or to the imposition of discipline. It also includes the more subtle means of indirect actions which can be used by government agencies to influence programming or exert pressure on the staff of broadcasting networks.⁴⁸

These principles, resting on a global conception of independent decision-making which must be guaranteed to public broadcasters in the name of freedom of expression, are obviously to be applied in the domain of financing. Financing mechanisms must not contain provisions which could open the way to political intervention in the editorial decisions which are the province of the public broadcaster alone.

The notion of editorial decision is not limited to only those decisions directly related to the content broadcast. Editorial freedom cannot be reduced to a list of subjects determined once and for all, and which would constitute the substance of this freedom. Depending on the circumstances, any issue can acquire relevance with respect to the exercise of editorial freedom.

The protection of editorial freedom is thus above all a process issue: it must be ensured that there is a decision process through which the level of resources will be determined without risk of hindering the decisions of the public body, which could be related to the information produced or broadcast and the very organization of this production and broadcasting.

While noting that the constitutional provisions do not impose specific mechanisms regarding the decision process for financing, the Court asserted that

47 *In the Matter of determining the constitutionality of the approval by the provincial Landtag of the Free State of Bavaria on 14 June 1983, of the inter-provincial agreement concerning the amount of the radio and television licence fee* (Federal Constitutional Court, 1 BvL 30/88, 22 February 1994). English translation by the Canadian Broadcasting Corporation (26 October 1994) at 35. Quoted as the Eighth Broadcasting Decision of the German Constitutional Court.

48 *Ibid.* at 36.

a funding method is needed which enables the public broadcasting networks to carry out their proper function in the dual system and at the same time effectively protects them from a situation where funding decisions are used to exert political influence on programming.⁴⁹

The principle of the obligation to finance public broadcasters in accordance with the requirements of the functions they are called upon to assume is at the heart of the German Constitutional Court's analysis. It is acknowledged that if the Constitution guarantees freedom of expression, then this principle is interpreted as carrying an obligation on the State to ensure the maintenance of pluralism through the establishment of public broadcasters. It is logical to conclude that there is an obligation to ensure the financing of these bodies in a manner compatible with their mandate. A contrary interpretation would lead to saying that it is possible to assign a broad mandate to public broadcasters but, in practice, deprive them of the means to accomplish it simply through budgetary decisions which escape the obligation to be in conformity with the requirements of the legislation on broadcasting.

Moreover, protection of editorial freedom is not viewed as a protection limited to a certain number of sensitive questions which should be excluded from discussions of the resources necessary for a public body to accomplish its mandate. Rather, it calls for the establishment of processes appropriate to removing real or feared dangers of interference, even if they are distant or indirect, from decisions which, given changing circumstances, could be related to content decisions.

3. THE COMPATIBILITY OF EDITORIAL FREEDOM WITH PROVISIONS REGARDING THE FINANCING OF THE CBC

The analysis of the scope of the editorial freedom recognized to belong to public broadcasters must thus take into account simultaneously the requirements of freedom of expression, of equitable functioning of public broadcasting, of the interest of the listening public in having available a reliable service worthy of confidence, and

49 Ibid. at 38.

finally, of the protection of those people responsible for making editorial decisions.⁵⁰

The provisions governing the funding of public broadcasters must be compatible with the principle of editorial freedom. Thus the necessity of a procedural fund-allocation mechanism compatible with editorial freedom.

In its 1994 decision, the German Constitutional Court set out the problem as follows:

Funding, like the issue of broadcast licenses and the assignment of transmission power . . . belongs to the fundamental prerequisites for the enjoyment of freedom of broadcasting. Particularly because programming, which is assigned to the broadcasters under the Constitution, is dependent on government-provided funding, such funding decisions, specifically the setting of the radio and television fee as the principal source of revenue of the broadcasting networks, represent a particularly effective means of indirect influence over the fulfilment of the broadcasting mandate and the competitiveness of the public broadcasters. From the perspective of the broadcasting networks, even the threat of employing this means can lead to accommodation to assumed or stated expectations of those involved in deciding the fee and could thereby undermine journalistic freedom.⁵¹

The Court then put forth certain criteria permitting it to be ensured that the power to determine the level of resources made available to public broadcasting cannot interfere with editorial freedom.

The criterion of a close link between financing and mandate acquires a great deal of importance in the framework of determining appropriate financing mechanisms for public broadcasting. The German Constitutional Court explained, in effect, that

This threat to freedom of broadcasting can be controlled only if government funding of broadcasting is strictly tied to the intended purpose, which is to put public broadcasters in a position to produce the programs required to fulfil their mandate and in this way to ensure a basic service of broadcast programs to the public.⁵²

This does not mean that government authorities are prevented from making decisions about general policies concerning broadcasters

50 This approach is inspired by that developed by L.L. Berger, "Government-Owned Media: The Government as Speaker and Censor" (1985) Case Western Reserve L. Rev. 707 at 736ff. See also W.C. Canby Jr., "The First Amendment and the State as Editor: Implications for Public Broadcasting" (1974) 52 Texas L. Rev. 1123.

51 Eighth Broadcasting Decision of the German Constitutional Court, above, note 47 at 42.

52 Ibid. at 42.

fulfilling mandates of public information services. However, these policies must be expressed in the framework of the legislation and regulations relating to radio and television. Thus they must be subject to direct public scrutiny, not stated through the process of financing public broadcasters.

It is in light of these principles, which are nothing but explicit statements of the logical corollaries of editorial freedom as it is known and practised in Canada, that we must examine the financial provisions of the *Broadcasting Act*, in particular those which concern a priori budgetary controls and the obligation to justify budgetary demands before the Treasury Board through a corporate plan.

The relevant provisions of the *Broadcasting Act* concern parliamentary control, the role of the Treasury Board and the Minister, the Corporation's books, and the audit.

In order to evaluate the nature and extent of these provisions, we must go back to their historical origin and bring out the differences in relation to the equivalent mechanisms which apply to other Crown corporations under Parliamentary control. Next (in section 3(b)) we will first review the provisions which are compatible with the principles uncovered above and then explain (in section 3(c)) why certain present provisions are not compatible with editorial freedom.

(a) History of the Financial Provisions of the *Broadcasting Act*

The problems inherent to financing a national broadcasting service are not new: they have marked the entire history of Canadian broadcasting. The determination of an efficient mode of financing to ensure the adequate functioning of the CBC has been at the root of many recommendations.⁵³ As early as 1929, the Aird Commission recommended that the funding for a national service be taken directly from the result of licensing rights for receiving apparatus, from the rent for the time allotted, and from a government subsidies.⁵⁴ This

53 J. Frémont, *Étude des objectifs et des principes proposés et adoptés relativement au système de la radiodiffusion canadienne* (Study performed for the Task Force on Broadcasting Policy, Montreal, Centre de recherche en droit public, 1986).

54 Royal Commission on Radio Broadcasting, *Report* (Ottawa: King's Printer, 1929) rec. i.

principle of funding through the collection of an annual fee for receiving apparatus was also retained in the 1932 and 1936 Acts. To this were added the licences for private frequencies for broadcasting radio programs and the government subsidy.⁵⁵

In 1951, the Massey Commission⁵⁶ proposed that instead of charging an annual fee, there should be an excise tax on the purchase of receiving apparatus and parts. This tax was introduced in 1953. However, the Massey Commission also recommended the adoption of a 5-year financing method in order to be able to more adequately respond to the needs of the CBC. This method consisted in evaluating the needs of the CBC on the basis of one dollar per inhabitant. Three sources of revenue were then supposed to fulfil these needs: the Corporation's commercial receipts, the tax on receiving apparatus and pieces, and a government subsidy to complete the total. This recommendation of the Massey Commission was, however, meant to apply only to the radio sector. The Commission hoped that the radio and television sectors would do their accounting separately so that the quality of radio broadcasting would not be compromised by the introduction of television. It was suggested that the public purse pay for the establishment of a national television network and that the operating expenses be met by a tax on televisions and probable commercial receipts, and that the total required would be completed by a government subsidy.

The members of the Fowler Committee I, in the Bill which summarizes their recommendations, preferred to make no provisions regarding the financing of the Corporation.⁵⁷ Nonetheless, this report does contain a series of hypothetical methods of financing. One of them was preferred by the authors. Thus the capital budget for the CBC was to be ensured by the Federal Treasury through the excise tax of 15 per cent collected on apparatus and parts.⁵⁸ The operating

55 See *The Canadian Radio Broadcasting Act, 1932*, S.C. 1932, c. 51, s. 14; and *The Canadian Broadcasting Act, 1936*, S.C. 1936, c. 24, s. 14(1).

56 Royal Commission on National Development in the Arts, Letters, and Sciences, *Report* (Ottawa: King's Printer, 1951) rec. k.

57 Royal Commission on Broadcasting, *Report* (Ottawa: Queen's Printer, 1957) art. 47.

58 *Ibid.* at 305.

budget was to be established for a 5-year period⁵⁹ and be composed of commercial receipts and a percentage of the total of one element of the gross national product: that of personal expenditures on goods and services.⁶⁰ Under this system, a single budget would cover both radio and television.

The 1958 Act was not very explicit on this subject. It was limited to saying that the CBC's budget was composed of credits voted annually, while the Corporation was required to submit a 5-year capital program and its forecast for operations.⁶¹

Next, the Fowler Report II resorted back to the principle of a statutory government subsidy established for 5 years, but based on a sum calculated on \$25 for each Canadian home with television.⁶²

The 1966 White Paper⁶³ confirmed this position in its Chapter 15 on "Financial Provisions," but beyond this point, legislators and the various committees became silent. It became clear that the principle of 5-year financing was met with little enthusiasm from the government. Only the commercial activity of the CBC was still able to stimulate a few comments. Thus the 1968 *Broadcasting Act* provided nothing on the financing of the CBC.

In 1987, the Task Force on Broadcasting Policy⁶⁴ returned to the subject by recommending an approach by which budgetary guidelines would be decided on and announced by the government in the framework of the process of the CBC's licence renewal by the CRTC.

There is thus a constant divergence in the development of broadcasting policy in Canada: on one hand, there is an approach which advocates a mode of financing for the CBC which would shelter it from partisan upheaval; on the other hand, there is a manifest, but little expressed, will of the government to reserve a degree of discretion regarding the level of resources to be granted to the national broadcasting service.

59 Ibid. at 320.

60 Ibid. at 317ff.

61 *Broadcasting Act*, S.C. 1958, c. 22, s. 35(2).

62 Committee on Broadcasting, Report (Ottawa: Queen's Printer, 1965).

63 Canada, Secretary of State, *White Paper on Broadcasting* (Ottawa: Queen's Printer, 1966).

64 *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply & Services Canada, 1986).

In contrast, the consensus is much clearer when we come to the issue of the financial management and accountability of the Corporation.

The financial management and accountability of Crown corporations have been a source of concern for many years, especially at the federal level.⁶⁵ Various reports have discussed the proliferation of Crown corporations, deficiencies in their control mechanisms and in mechanisms to ensure they are accountable.

In his 1976 annual report, the Auditor General made Parliament aware of the difficulties in managing and controlling these corporations. Following this report, the government set up the Royal Commission on Financial Management and Accountability in order to study the best ways to ensure efficient financial management in the federal administration, including in Crown corporations. The Commission's report (the Lambert Report), submitted in March 1979, proposes the institution of an improved framework of governmental and parliamentary control over Crown corporations. Moreover, emphasis was placed on the necessity for such corporations to be accountable.⁶⁶

In 1977, the Privy Council Office undertook its own study of the relations which exist or should exist among Crown corporations, Ministers, the government and Parliament. This study, contained in a Blue Paper entitled *Crown Corporations: Direction, Control, Accountability*, included a Bill on the legal framework of Crown corporations. These propositions particularly "seek to underline the role of Crown corporations as instruments of public policy, while at the same time preserving degrees of autonomy requisite to commercial, quasi-commercial, and other activities the management of which requires a measure of independence."⁶⁷

65 P. Garant, "Les sociétés d'État: instruments d'intervention économique-aspects juridiques" in Royal Commission on the Economic Union and Development Prospects for Canada, vol. 48, *Les règlements, les sociétés d'État et les tribunaux administratifs* (Ottawa: Minister of Supply & Services Canada, 1986) at 4.

66 Royal Commission on Financial Management and Accountability, *Final Report* (Hull: Minister of Supply & Services Canada, 1979).

67 Privy Council Office, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply & Services Canada, 1977) at 7-8.

From then on it was accepted that the *Financial Administration Act* of 1951,⁶⁸ the principal instrument governing the legal framework and the controls over Crown corporations, was no longer capable of fulfilling the needs of governmental administration. Various Bills were proposed in order to remedy the problems raised by the accountability of Crown corporations. Thus, in 1979, in the short time it remained in power, the Clark administration introduced Bill C-27⁶⁹ with the goal of regulating Crown corporations. This Bill, which adopted many of the recommendations of the Lambert Report, was never passed. In 1982, the Liberal government submitted Bill C-123,⁷⁰ replaced by Bill C-153.⁷¹ Following many controversies and debates, the government proposed an entirely new Bill, Bill C-24,⁷² on March 15, 1984. This Bill was passed on June 29, 1984.⁷³

This Act abrogates Part VIII of the *Financial Administration Act* (hereafter called *An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations*)⁷⁴ dealing with Crown corporations, to institute a new part, Part XII, which is a true supervisory Act on the legal status of and the controls over such Crown corporations.⁷⁵

An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations consider-

68 R.S.C. 1952, c. 116; R.S.C. 1970, c. F-10.

69 *An Act respecting Crown Corporations and matters relating or incidental thereto*, 1st Sess., 31st Parl. Can. (1st reading).

70 *An Act respecting the Organization of the Government of Canada and matters related or incidental thereto and to amend the Regional Development Incentives Act*, 1st Sess., 32nd Parl. Can. (1st reading).

71 *An Act to amend the Financial Administration Act (Crown Corporations)*, 1st Sess., 32nd Parl. Can. (1st reading).

72 *An Act to amend the Financial Administration Act in relation to Crown Corporations and to amend other Acts in consequence thereof*, 2nd Sess., 32nd Parl. Can. (passed by the House of Commons June 28, 1984).

73 S.C. 1984, c. 31.

74 FM Compilation of the Revised Statutes of Canada, 1970, c. F-10, updated 31 December 1987. This Act was later revised under the title of *Financial Administration Act*, R.S.C. 1985, c. F-11. Part X concerns Crown corporations.

75 P. Garant, "Enfin une loi-cadre des sociétés d'État au fédéral" (1985) 26 C. de D. 549 at 551.

ably reworks the institutional system of Crown corporations and instruments. More precisely, it is meant to provide a solid framework for the legal status of Crown corporations in order to allow better control over them and to guarantee their accountability. It also aims to define the functions and responsibilities of upper management, boards of directors of corporations, Ministers, the government and Parliament.⁷⁶

There are provisions regarding parliamentary responsibility, control over the creativity and activities of corporations, government and ministerial power to instruct, government power to regulate certain activities of the corporation, nomination and conditions of employment of directors, government control over financial management. In fact, the primary goal of this Bill was to provide Crown corporations with "a strong but resilient framework for control."⁷⁷

Regarding the CBC and the other bodies working in the cultural domain, it was easily agreed that a slightly different approach was required. The CBC, like other corporations linked to cultural creativity and distribution, must operate in a climate of independence, safe from political interference. A balance must be found between the requirements of control and of independence in the domain of these cultural corporations. The autonomy necessary to their operation can be hindered by excessively heavy controls. This is the debate raised by the application of *An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations* to Crown corporations implicated in cultural activities in general, and to the CBC in particular.

Following concerns expressed by those groups threatened by government interference in the priorities of cultural corporations, in particular regarding their editorial decisions, such groups were excluded from the jurisdiction of the new Act on financial administration.⁷⁸ The government reserved the right to define its

76 Taken from the testimony of Herb Gray, President of the Treasury Board, to the Standing Committee on Miscellaneous Estimates, House of Commons, Ottawa, 2nd Session, 32nd Parl., vol. 26 at 73.

77 Ibid., vol. 18 at 29.

78 Bill C-24, s. 96(1).

relations with such cultural corporations through separate later legislation,⁷⁹ which was done with respect to the CBC in the 1991 *Broadcasting Act*. In the meantime, the CBC continued to be regulated by Part VIII of the previous *Financial Administration Act*, as if that Part had not been abrogated.⁸⁰ Thus it is in Part VIII of the previous *Financial Administration Act*, in its version prior to September 1984, that were found, until 1991, the provisions regarding the management of funds allocated to the Corporation. These provisions (sections 69 to 78) were applicable to the CBC, but in case these provisions were incompatible with those of the *Broadcasting Act*, or of any other legislation, the provisions of the latter would apply.

Since the CBC was a corporation of proprietors in the sense of Part VIII of the earlier *Financial Administration Act*, it was required only to seek approval for its operating budget. Under Part VIII of the earlier *Financial Administration Act*, only agent corporations were demanded to submit their operating budget to be approved by the competent Minister and by the President of the Treasury Board.⁸¹ Such budgets were not to be submitted to Parliament. In opposition, all other Crown corporations had to have their capital budgets approved by the Governor in Council.⁸² The Minister responsible was to submit this budget to Parliament.

The 1991 *Broadcasting Act*⁸³ includes a "made to measure" version of the principal provisions of the new Act on financial administration. Many of these provisions follow from the House of Commons Report of the Standing Committee on Communications and Culture,⁸⁴ submitted in February 1987. Sections 52 and 70 are, in fact, part of an approach intended to make the main provisions of the new legislation on management of Crown corporations applicable to the CBC, while respecting its special vocation. These provisions deal mainly with the development of "corporate plans," budgets, the

79 Ottawa, 2nd Sess., 32nd Parl., 1984, vol. 26 at 70.

80 *Broadcasting Act*, s. 38.

81 *Financial Administration Act*, s. 70(1).

82 *Ibid.*, s. 70(2).

83 Above, note 13, s. 52ff.

84 Canada, House of Commons, *La gestion et la responsabilité financière de la Société Radio-Canada: examen et recommandations faisant suite au rapport annuel 1985-1986* (Ottawa, February 1987).

organization of the Corporation's account, auditing and the obligation to submit an annual report.

(b) Compatible Provisions

In light of the principles which appear through the analysis of the state of the law regarding the editorial freedom of public broadcasters, we conclude that certain present provisions of the *Broadcasting Act* are compatible with editorial freedom. We will explain below the basis for this conclusion.

(i) Parliamentary control

Ultimately, the CBC is accountable to Parliament. Section 40 of the *Broadcasting Act* states in effect that "The Corporation is ultimately accountable, through the Minister, to Parliament for the conduct of its affairs."

To this end, it has the obligation to submit an annual report. This report must be submitted to the Minister and the President of the Treasury Board as early as possible in the 3 months after the end of each fiscal year. The Minister has a copy of the report submitted to each House of Parliament on one of the first 15 days on which the House is sitting following its reception by the Minister.⁸⁵ The report is permanently referred to the parliamentary committee responsible for issues concerning the activities of the Corporation.⁸⁶ This annual report contains, in particular, the financial statements of the Corporation, the auditor's report, a statement of the degree to which the Corporation attained its goals for the fiscal year targeted by the report, and other information about the Corporation's financial affairs.⁸⁷ The report may also include the summary of the Corporation's corporate plan.⁸⁸ Its presentation must make obvious the principal activities of the Corporation and its wholly-owned subsidiaries.

85 *Broadcasting Act*, s. 71(1).

86 *Ibid.*, s. 71(2).

87 *Ibid.*, s. 71(3).

88 *Ibid.*, s. 55.

Parliamentary control is a public process: it certainly can give rise to certain excesses, and reading the records of certain sittings can lead one to fear that certain parliamentarians misunderstand the mandate of public service devolved to the CBC. Nonetheless, in our political system, Parliament retains the mandate to decide, through the appropriate means, on the services which will be offered to Canadians and to examine the evolution of these services. Constitutional limits define the action which can be taken in this respect. On its own, the process of studying the reports submitted by the CBC cannot present any clear danger to the editorial freedom of the Corporation. However, the goal of this study, which is to ensure the responsible use of public funds, provides a reasonable justification for possible interference in the editorial freedom of the CBC.

(ii) *Accounting records and the corporation's auditing procedures*

The auditing procedures and the status of accounting records provided for in Part III of the *Broadcasting Act* appear equally compatible with the principle of editorial freedom. They are conceived so as to allow the public and elected politicians to determine whether the resources made available to the CBC have been used efficiently, given the mandates it must fulfil.

Section 57 of the *Broadcasting Act* prescribes the kind of records which the Corporation must hold in its own name. Section 57(2) states that sums received by the Corporation, even those from the conduct of its own affairs, shall be credited to its accounts and administered exclusively by the Corporation.

The Corporation must hold accounts under its name in an institution which is a member of the Canadian Payments Association or in a local Cooperative Credit Society which is a member of a Central Cooperative Credit Society which is itself a member of the Canadian Payments Association. With the Minister of Finance's approval, the Corporation may hold an account in a financial establishment abroad.⁸⁹ Sums received by the Corporation are credited to its accounts and administered exclusively by it as it exercises its powers

89 Ibid., s. 57(1).

and prerogatives.⁹⁰ Though it is under no obligation to do so, it may place the funds it manages in bonds issued or guaranteed by the federal government.⁹¹

The books of the Corporation's account must include a Proprietor's Equity Account which is credited with all money paid to the Corporation for capital purposes out of Parliamentary appropriations.⁹²

For itself and its wholly-owned subsidiaries, the Corporation must ensure that accounting records are kept, that control and information systems are maintained, and that management practices are applied.⁹³ Section 60(2) of the Act states that the Corporation must fulfil this dual obligation in order to guarantee, insofar as it is possible, the safeguard and control of its assets and those of its subsidiaries, as well as the conformity of the Corporation's and every subsidiary's operations with Part III of the Broadcasting Act and the by-laws of the Corporation. In the case of subsidiaries, the target must be to ensure their operations conform to the documents with which they are established.⁹⁴ Finally, the keeping of accounting records and the application of management systems must aim to guarantee that financial, human and physical resources are managed economically and efficiently, and that operations are effective.⁹⁵

The Corporation must have its financial statements prepared each year in accordance with generally accepted accounting principles. These financial statements must also take into account the complementary obligations prescribed by the Treasury Board.⁹⁶ The Treasury Board may prescribe regulations which are in addition to generally accepted accounting principles.⁹⁷

It is incumbent on the Corporation to have internal audits performed on its operations and those of its wholly-owned subsid-

90 *Ibid.*, s. 57(2).

91 *Ibid.*, s. 36(3).

92 *Ibid.*, s. 57(4).

93 *Ibid.*, s. 60(1).

94 *Ibid.*, s. 60(2).

95 *Ibid.*, s. 60(2)(c).

96 *Ibid.*, s. 60(4).

97 *Ibid.*, s. 60(6).

aries.⁹⁸ The Corporation is obliged to form an audit committee made up of at least three directors. This committee is responsible for examining the financial statements to be included in the annual report of the Corporation and for advising the Board of Directors on those statements. It is also responsible for supervising internal audits, for examining the auditor's report and the reports resulting from special audits, and for advising the Board in this regard.⁹⁹

The auditor has the right to receive notice of each meeting of the audit committee, to attend such meetings and to be heard; the auditor is required to attend at the request of a committee member.¹⁰⁰ The auditor, like any member of the committee, may call a meeting of the committee.¹⁰¹

The Corporation must have an auditor's report prepared. This report deals with the operations of the Corporation and of its wholly-owned subsidiaries. This report is submitted to the Board of Directors and to the Minister. It records the auditor's opinion on all issues in his competence and which he considers should be brought to the attention of Parliament.

It must include a statement on each of the following points:

- (i) the financial statements are presented fairly in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding year,
- (ii) any quantitative information in the Corporation's annual report in respect of which the Board has requested the auditor's opinion is accurate in all material respects and, if applicable, was prepared on a basis consistent with that of the preceding year, and
- (iii) the transactions of the Corporation and of each subsidiary that have come to the auditor's notice in the course of the examination for the report were in accordance with this Part and the by-laws of the Corporation or subsidiary.¹⁰²

The Auditor General of Canada is the Corporation's auditor.¹⁰³ The Corporation has an annual auditor's report prepared regarding its operations and those of its wholly-owned subsidiaries. This report is submitted to the Board of Directors.¹⁰⁴ The auditor

98 *Ibid.*, s. 60(3).

99 *Ibid.*, s. 69(2).

100 *Ibid.*, s. 69(3).

101 *Ibid.*, s. 69(4).

102 *Ibid.*, s. 62(2)(a).

103 *Ibid.*, s. 61.

104 *Ibid.*, s. 62(1).

performs those examinations he considers necessary for the preparation of his reports.¹⁰⁵ If he considers it useful to do so, he may rely on the results of any internal audit performed in accordance with the Act.¹⁰⁶

The auditor is not authorized to express an opinion on the well-foundedness of policy issues, in particular on the objectives of the Corporation and the restrictions on the activities it may pursue, on its goals and the decisions concerning its activities which are taken by the Corporation or by the Government of Canada.¹⁰⁷

Every 5 years, or when the Governor in Council, the Minister or the Board of Directors so requests,¹⁰⁸ the Corporation has the Auditor General perform a special examination of its operations and those of its wholly-owned subsidiaries. The goal of this special audit is to determine whether the management methods, and financial and administrative control and information systems have been applied effectively in order to safeguard and control its assets, to economically and efficiently manage its financial, human and physical resources, as well as the effectiveness of its operations.¹⁰⁹

Before performing a special examination, the auditor studies the systems and practices of the Corporation and presents to the audit committee a plan for the examination, dealing in particular with the criteria the auditor intends to apply.¹¹⁰ Disagreements between the auditor and the audit committee or the Board of Directors regarding the plan for the examination can be decided by the Corporation if the disagreement concerns a wholly-owned subsidiary, or by the Minister if it concerns the Corporation.¹¹¹

The report must include a statement indicating whether, given the criteria of the plan for the examination, the auditor considers that the systems and practices appear to have no major defect. The report must indicate the degree to which the auditor has relied on results of internal audits.

105 *Ibid.*, s. 62(5).

106 *Ibid.*, s. 62(6).

107 *Ibid.*, s. 66.

108 *Ibid.*, s. 64(2).

109 *Ibid.*, s. 64(1).

110 *Ibid.*, s. 64(3).

111 *Ibid.*, s. 64(4).

The special examination report is submitted to the Board of Directors.¹¹² After consulting the Board, the auditor may make a report to the Minister if he considers that the report contains information which should be brought to the Minister's attention. A copy of the report submitted to the Minister is provided to the directors.¹¹³ After consulting the Minister, the auditor may prepare a report on the information which, on the auditor's view, should be brought to the attention of Parliament. Such a report is included in the annual report the Corporation presents to Parliament.¹¹⁴

The auditor enjoys qualified privilege regarding oral or written statements and the reports he prepares in virtue of Part III of the *Broadcasting Act*.¹¹⁵ The costs incurred by the auditor when preparing audit reports of the Corporation are included in the next annual report of the Auditor General of Canada, and are assumed by that office.¹¹⁶

The present or former directors, officers and agents of the Corporation must provide the auditor with all necessary information and explanations. They must also give him access to the books, accounts, documents, records and vouchers of the Corporation and its subsidiaries.¹¹⁷ The Board of Directors obtains from the directors, officers, employees and agents of the Corporation's subsidiaries all information required by the auditor.¹¹⁸

The directors and officers immediately advise the auditor and the Corporation's audit committee of errors and omissions they discover in the financial statements.¹¹⁹ If the auditor is advised of an error he considers important, he notifies the directors of it.¹²⁰ After the auditor's notice, the Corporation prepares revised financial statements and the auditor issues a correction to his report. Copies of such

112 *Ibid.*, s. 64(5).

113 *Ibid.*, s. 64(8).

114 *Ibid.*, s. 64(9).

115 *Ibid.*, s. 67.

116 *Ibid.*, s. 68.

117 *Ibid.*, s. 65(1).

118 *Ibid.*, s. 65(2).

119 *Ibid.*, s. 63(1).

120 *Ibid.*, s. 63(2).

revisions and corrections are submitted to the Minister.¹²¹

The auditing system of the CBC's accounts is designed to ensure that the Corporation provides adequate explanation for the use of its funds. It is essentially an a posteriori control which does not allow the Corporation's mandate or missions to be reevaluated. This is why it is possible to conclude that these provisions are compatible with the requirements of the Corporation's editorial freedom, or that they impose reasonable and justified limits on the Corporation's editorial freedom.

(c) Incompatible Provisions: Corporate Plans and Budgets

There are provisions regarding the financing of the CBC which remain incompatible with the principle of editorial freedom as it is understood in Canada and in democratic states with a constitutional system comparable to ours.

The idea of preparing and having the government approve the corporate plan of public corporations is not entirely new. In fact, it is a revision of a provision contained in certain federal acts, such as the *Broadcasting Act, 1958*, in which the CBC had to prepare a 5-year capital plan with a forecast of its effect on the Corporation's operating needs. However, the 1977 Blue Paper was the first to reintroduce the idea and propose it be generalized to all Crown Corporations.

The authors of the Blue Paper considered that government approval of budgets, a means of policy control and direction, were not sufficiently effective and thus suggested the corporate plan as an additional instrument of control for the government.¹²²

The government proposed that each Crown corporation prepare a detailed plan of, among other things, its goals, its strategies, and the means it envisaged using to reach those goals. This plan was to be divided into stages over 3 to 5 years. The Corporation had to apply its plan step by step and bring it up to date annually. This plan was to be approved by the government.

121 *Ibid.*, s. 63(3).

122 See Office of the Privy Council, *Crown Corporations: Direction, Control, Accountability* (Ottawa, 1977) at 35-36.

The authors of the Blue Paper believed that after the plan was approved by the government, the directors could use it for establishing budgets and thus make their approval by the Minister or the Governor in Council faster and easier, in particular if there were no major differences with respect to the plan. Thus, by improving the quality and integrity of the budgetary process, the Ministers and Parliament would be better informed and communication between the corporations and the government would be benefited. In effect, if the government is aware of the problems and goals of the corporations, it is better able to give them a chance to emphasize the goals of government policies applicable to them, and to ensure that their corporate plan reflects them well. The authors of the Blue Paper thought that in this way it would be easier to evaluate the productivity of the administration of Crown corporations.

Returning to this government proposition, the Lambert Commission stated that it agreed with the concept of a corporate plan. This plan and administrative power are both means of clarifying and interpreting the mandate regarding the general direction a Crown corporation must take at the beginning.¹²³

The Lambert Commission proposed that the Executive Director of a corporation be responsible for the preparation of a strategic corporate plan which must cover a period of 3 years or more, and be approved by the Board of Directors. In this Commission's view, this plan was to be used as a general strategic blueprint and as a framework for drawing up capital budgets for the corporation.

Contrary to the Blue Paper's proposition, which required government approval, the Commission suggested instead that the plan be transmitted to the Minister responsible for information only. For the Commission, the role of the plan was seen as that of guiding and informing the Minister regarding the corporation's intentions. From the information on these intentions in the corporate plan, the Minister could determine whether the corporation's strategy was in agreement with the objectives stated in government policies and obtain advance notice of the possible content of the budgets which would be present-

123 See Royal Commission on Financial Management and Accountability, *Final Report* (Hull: Minister of Supply & Services Canada, 1979) at 382-383.

ed for approval. This would provide the Minister with good knowledge of the performance and perspectives of the corporation. The plan, combined with administrative power, would be an instrument permitting the definition of the mandates of Crown corporations.¹²⁴

Recognizing the difficulties which could result from the application of the general system resulting from the *Financial Administration Act*, the Applebaum-Hébert Committee¹²⁵ suggested the annual approval of a 3- or 5-year plan, which would justify requests for funding from the Boards of Directors of cultural corporations and of which the essential elements would be found in the annual reports submitted to examination by Parliament and the public.¹²⁶ Like the Lambert Commission, the Applebaum-Hébert Report did not require government approval. These recommendations seem to have been followed only in part.

The provisions of the *Broadcasting Act* are already a modified version of the *Financial Administration Act*.¹²⁷

Section 52 states that the financial provisions of the *Broadcasting Act* shall be interpreted in such a way as to have no effect on

124 Note that the Commission was of the opinion that the adoption of planning methods should remedy the government's need to have recourse to directives. It is probable, according to the Commission, that directives have their source in societal demand rather than an arbitrary decision of the government: *ibid.* at 384.

125 *Report of the Federal Cultural Policy Review Committee* (Ottawa: Minister of Supply & Services Canada, 1982) at 40.

126 *Ibid.* at 39.

127 Regarding corporate plans, the *Act to provide for the financial administration of Canada* reserves much more power for the government. It provides that parent Crown corporations shall prepare a corporate plan annually, to be submitted to the minister concerned so that the latter and, if so required by the regulations, the Minister of Finance may recommend it be approved by the Governor in Council (s. 129(1)). The Governor in Council may, by decree, delegate this power of approval to the Treasury Board (s. 5(3)).

This plan must cover all activities of the parent company and its wholly owned subsidiaries, including their investments (s. 129(2)). A company's plan shall include, in particular, information on the goals for which it was formed, on its objectives for the period covered by the plan and for each year, on the intended means to achieve these ends (ss. 129(3)(a) and (b)). Moreover, the plan must mention the forecasts for the results of the year during which the plan must be submitted, in accordance with the regulations, with respect to the goals for that year which were forecast in the last plan (s. 129(3)(c)). The plan must make clear the principal activities of the corporation (s. 129(4)).

the freedom of expression or the journalistic, creative and programming independence which the Corporation enjoys in the fulfilment of its mandate and the exercise of its powers.¹²⁸¹²⁸

This entails that the Corporation is not required to provide the Treasury Board, the Minister of Communications or the Minister of Finances with any information which, if divulged, could endanger this independence. The regulations concerning corporate plans are also subject to such a principle.¹²⁹

In consequence, an extensive interpretation cannot be given to sections 53 to 70 of the *Broadcasting Act*. These provisions are intrinsically limited in their scope by the restrictive clause in section 52 of the *Broadcasting Act*.

The problem remains of knowing whether these provisions, so limited, are compatible with the criteria shown above to follow from editorial freedom.

Under the present *Broadcasting Act*, the Corporation submits a corporate plan to the Minister each year.¹³⁰ The plan covers all of the Corporation's activities and, if applicable, those of its wholly-owned subsidiaries, including their investments.¹³¹ It contains the capital and operating budgets for the next fiscal year. It also presents a statement of the Corporation's mission as it appears in the *Broadcasting Act* and the goals for the next 5 years, globally and individually, including the means for their implementation. The plan also contains

128 It is forbidden for Crown corporations, and their subsidiaries, to engage in any activity whatsoever which is incompatible with the last plan approved (s. 129(5)). However, before the incompatible activity begins, they can submit a modification of the plan to the Minister concerned for approval (s. 129(6)).

Once its plan, operating or capital budget, or a modification of the above, has been approved, the parent Crown corporation prepares a summary of its plan and budget which it submits to the Minister concerned for approval (s. 132(1)). The latter then has a copy of the summary laid before each House of Parliament, which is permanently referred to the parliamentary committee which is designated or created to study the issues concerning the corporation's activities (ss. 132(4) and (5)). The Treasury Board may, by regulation, make provisions regarding the form of the plans, the information they must contain, the time at which they must be submitted and their length (s. 133).

128 *Broadcasting Act*, s. 52(1).

129 *Ibid.*, s. 52(2).

130 *Ibid.*, s. 54(1).

131 *Ibid.*, s. 54(2).

the forecast for the result of the present year in relation to the corresponding goals stated in the last plan.¹³² The form and the time at which these documents are to be submitted are determined by the regulations of the Treasury Board.¹³³

The Corporation must immediately notify the Minister of its intention, or that of one of its wholly-owned subsidiaries, to engage in an activity incompatible with the last corporate plan submitted.¹³⁴ Certainly the Corporation need not request permission from the Minister in such a case, but the Act does not state what happens after the Corporation has served such notice.

The budgets included in the plan cover all activities of the Corporation and, if applicable, those of its wholly-owned subsidiaries. They also cover the investments of the latter.¹³⁵ Their presentation must make clear the main activities of the Corporation and of its wholly-owned subsidiaries.¹³⁶ The capital budget presented in the plan is submitted to the Minister by the Corporation, for approval by the Treasury Board.¹³⁷ The Treasury Board may approve a capital-budget item for one or more fiscal years, depending on what is targeted by the plan.

For each fiscal year, the Corporation submits a summary of its corporate plan to the Minister. This summary recapitulates the information contained in the corporate plan. It notes the changes following from the budgetary forecasts of the fiscal year as laid before the House of Commons and in relation to the Corporation.¹³⁸ The summary covers all of the Corporation's activities and, if applicable, those of its wholly-owned subsidiaries, including their investments, and emphasizes major decisions taken in this respect.¹³⁹ Its presentation makes clear the principal activities of the Corporation and, if applicable, those of its wholly-owned subsidiaries.¹⁴⁰

132 *Ibid.*, s. 54(3).

133 *Ibid.*, s. 56.

134 *Ibid.*, s. 54(5).

135 *Ibid.*, s. 54(6).

136 *Ibid.*, s. 54(7).

137 *Ibid.*, s. 54(4).

138 *Ibid.*, s. 55(1).

139 *Ibid.*, s. 55(2).

140 *Ibid.*, s. 55(3).

The Minister causes one copy of the summary which has been submitted to him to be laid before each House of Parliament.¹⁴¹ The parliamentary committee responsible for issues concerning the Corporation's activities is permanently referred to the summary thus submitted.¹⁴²

The authors of various reports related to the accountability of Crown corporations are unanimous regarding the necessity for a corporate plan to be introduced. In contrast, there are disagreements regarding the level of authority which must approve this plan: the Board of Directors or the government. This reveals a deep gulf between the views regarding the goals and objectives which such a plan should pursue. Some see this plan purely and simply as another instrument of government control, like budgetary approval. Others see it as a strategic instrument helping corporations to better interpret their mandates.

The equivalent provisions in the *Financial Administration Act* have their inspiration in the propositions of the 1977 Blue Paper. However, the Act goes much further, requiring the prior approval of any activity not provided for in the last plan approved. By giving the Treasury Board the power to determine the information contained in the plan, the plan ceases to be a guiding instrument and could become a true control mechanism for the government. The *Broadcasting Act* eliminates this danger for the CBC.

However, in spite of a clear will to delimit their scope in order to establish an balance with the requirements of editorial freedom, the provisions of the *Broadcasting Act* regarding the corporate plan still present risks of interference in editorial decisions.

Under these provisions, the Corporation must submit its budgetary requirements each year in its corporate plan. The Treasury Board may approve the plan and the requests contained in it, and allocate financing in consequence. There is no guarantee that the government will grant financing in accordance with the requirements of the CBC's mandate. In fact, the Treasury Board reserves the right to prepare its own evaluation of the corporate plan of the Corporation,

141 Ibid., s. 55(4).

142 Ibid., s. 55(5).

and to make its own interpretation of the Corporation's mandate as stated in the *Broadcasting Act*.

Other than an extremely hypothetical recourse to public opinion, there is nothing in this mechanism which obliges the Treasury Board to justify its decisions, let alone to provide a detailed explanation of its reasons for its opinion that the level of financing granted is compatible with the CBC's mandate.

Since budget allocation for the CBC is conditional on the Treasury Board's approval of a corporate plan, the Treasury Board has a right to examine the way in which the Corporation intends to fulfil its commitments. It is far from certain that this is what Parliament intended when it passed the *Broadcasting Act*. Section 3 of this Act states the principle of the responsibility of each licence-holder for programs broadcast. Under a system of prior approval of the corporate plan, it is in fact the Treasury Board which makes the major decisions concerning the corporate plan, and thus concerning the activities in which the Corporation may engage.

The mechanism thus guarantees no adversarial process in order to determine if the level of resources granted is appropriate to the Act and the missions it assigns to the CBC. This lack makes the procedure of budget approval by the Treasury Board incompatible with the principles of editorial freedom as they are held in Canada.

Supervision of most of the Corporation's financial management obligations is in fact undertaken by the Minister together with the Treasury Board.

In order to reconcile the requirements following from the responsibilities of the Treasury Board regarding the proper management of public funds and the requirements of editorial freedom, it appears that we are referred to the interpretative provision of section 52 of the *Broadcasting Act*, according to which this process must not affect journalistic independence.

Regarding the budgetary process, such a provision can rapidly be shown to be purely rhetorical. How can we guarantee that in practice the process of submission and approval of the corporate plan will not give rise to pressures which could affect editorial independence? The budgetary process, as is well known, is essentially secret: the public has no guarantee that it will be undertaken with strict respect for the editorial independence of the CBC.

In order to make this mechanism for budgetary allocation compatible with editorial freedom, it must be situated in a public decision process with open debate.

The *Report of the Task Force on Broadcasting Policy* was in favour of doing something like this by integrating the preparation of the CBC's corporate plan in the public process of evaluation of the way in which the Corporation performs its task, while reconciling this approach with the government's responsibilities regarding public funds. In this respect, the Task Force recommended that

The CBC licence renewal process should be preceded by a statement from the government on the extent of funding it intends to provide over the pending CBC licence period. It should also be preceded by the CBC's plans for the licence period, including its promise of performance to the Commission. On this basis, as well as the public comment provided through a full licence renewal hearing and its overall view of the content of the Canadian broadcasting system as a whole, the CRTC would then attach to the CBC's licence such conditions as it deemed appropriate.¹⁴³

When the CRTC renews the Corporation's licences it is in effect expressing, following an open public process, an opinion on the way in which the Corporation intends to accomplish its mandate for the period of validity of its licences. This public evaluation would be better informed if it were performed in light of the level of resources which the government intends to allocate for the accomplishment of the missions of the public broadcasting service.

This is not to claim that only the mechanism suggested by the Task Force could, by itself, meet the requirements following from the editorial freedom of the CBC. However, it shows that there are ways to respect both the government's responsibilities regarding public funds, and the requirements of the independent operation of a national broadcasting service.

We conclude that the present provisions of the *Broadcasting Act* regarding this do not respect the requirements of the editorial freedom of the CBC.

143 *Report of the Task Force on Broadcasting Policy*, above, note 64 at 326-327.

CONCLUSION

In this study, we have reached the conclusion that the provisions concerning government financing of the CBC by granting annual parliamentary appropriations, as is presently provided for in the *Broadcasting Act* are not all compatible with the necessity to promote and increase respect for the freedom of expression and journalistic, creative and programming independence which is enjoyed by the Corporation, as provided for in sections 35(2) and 52 of the *Broadcasting Act*; and the freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication provided for in *Charter 2(b)*.

The *Broadcasting Act* establishes a general regime applicable to all those authorized to operate broadcasting undertakings in Canada. This general framework applies to the CBC. The principle of editorial freedom reserves for the broadcaster, to the exclusion of any other authority, the right to determine the content which will be broadcast. Editorial freedom certainly may be limited by regulations and explicit or general licensing conditions. There is no authoritative judicial decision which recognizes the right of the executive branch of government to interfere in programming decisions.

Since it is a question of a freedom, the prerogatives which editorial freedom guarantee to those who have it are generally defined negatively: it is to be seen whether the restrictive measures are reasonable or not in a democratic society. In other words, editorial freedom cannot be reduced to a list of subjects determined once and for all, and which would constitute its substance. Depending on the circumstances, any issue can become relevant to the exercise of editorial freedom. Respect for editorial freedom thus supposes general decision-making independence; in other words, decision-making which is exempt from interference from government authorities.

Since the provisions regulating the financing of public broadcasters must be compatible with the principle of independence, it is necessary to provide for a procedural mechanism regulating the process of allocation of funds which is compatible with editorial freedom.

The goal of ensuring that the CBC provides adequate account of the use it makes of public funds is ensured through the provisions dealing with auditing and parliamentary control of the Corporation. This goal is generally accomplished by means of a set of a posteriori controls taking place in a public setting. Parliament studies the CBC's report publicly. The auditor submits periodic reports and they may be seen by anyone. This process does not contravene the principle of editorial freedom, or at least is a reasonable limit which is justified by the need to ensure credible accountability regarding the use of public funds.

The process presently provided for in the *Broadcasting Act* for the establishment of budgets is not so clear and could just as well be carried out in such a way as to preserve editorial independence effectively. The provisions in the *Broadcasting Act* certainly proceed from a real will to supply effective protection for the Corporation's editorial independence. In spite of this, the Corporation remains obliged to submit its budgetary requests in its corporate plan each year. The Treasury Board is charged with approving the plan and the requests included in it, and with allocating financing in consequence.

With the exception of a declaratory provision in the *Broadcasting Act*, the process contains no guarantee that the government will grant financing in accordance with the requirements of the CBC's mandate. In fact, the Treasury Board reserves the right to prepare its own evaluation of the Corporation's corporate plan and to make its own interpretation of the Corporation's mandate as stated in the *Broadcasting Act*. Yet it is the very essence of editorial freedom that the organization should retain control over the interpretation of its mandate and that it not be continually held to justify itself before authorities with the power to grant, or to not grant, the resources necessary for accomplishing the mandate as elsewhere provided for under the Act.

Other than an extremely hypothetical recourse to public opinion, there is nothing in this mechanism which obliges the Treasury Board to justify its decisions, much less provide a detailed explanation of its opinion that the level of financing granted is compatible with the CBC's mandate. The mechanism does not guarantee an adversarial process in order to determine whether the level of

resources granted is appropriate to the Act and the missions it assigns to the CBC. This lack makes the process of budget approval by the Treasury Board incompatible with the principle of editorial freedom as it is interpreted in the countries studied and as it is, in our opinion, perceived in Canadian law. This is why the provisions regarding corporate plans and budgets cannot be justified with respect to the requirements of editorial freedom as they exist in Canada.