The Western Pushback Against Russian State Media – The Canadian Framework of the Russia Today Ban

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# Introduction:

In response to Russia’s unprovoked military incursion into Ukraine, an alliance of democratic countries, including the European Union (‘EU’), the United States (‘US’), and democratic Commonwealth countries, including Canada, adopted a wide range of sanctions targeting Russia’s military, economic, and cultural industries. This paper aims to better understand the CRTC regime governing the listing and delisting of non-Canadian programmes for distribution in Canada, the rationale for delisting RT from distribution in Canada, and analyze whether this decision would survive challenges at a Federal Court of Appeals under the administrative law framework.

# What is RT?

RT is the international facing state media operated and funded by the Russian Government. It was launched in 2005 to ameliorate Russia’s public image problem.[[1]](#footnote-1) There is nothing heinous or unusual about this goal in itself. As late as 2003, public perception polls conducted in the US showed that Americans overwhelmingly associated Russia with negative concepts such as communism, the KGB, snow, and the mafia. In the same poll, positive concepts such as Russian art and culture only appeared in the 10th place. Russian businesses and brands were unheard of except for the infamous Kalashnikov rifles and Molotov cocktails.[[2]](#footnote-2)

RT describes itself as an autonomous, non-profit organization that is publicly financed from the budget of the Russian Federation.[[3]](#footnote-3) RT management is acutely aware of the restrictions of being funded by the government. In an interview with the head of image improvement, Alexander Babinsky, at RT’s parent organization, Novostis, Mr. Babinsky explains that RT has to walk a fine line between mindlessly praising how great the government is, which would not be exciting or credible to the international audience, and airing the government’s dirty affairs publicly.[[4]](#footnote-4) There is a big difference regarding journalistic independence between what one would expect from western state-owned media (such as the CBC, the BBC, Deutsche Welle (DW), etc.) and RT. In the West, we rely upon state media to cover both sides of a story and help us keep the government responsible. The western state-owned press usually has a transparent governance structure and editorial board.[[5]](#footnote-5) While we can expect neutral stories from RT, it wouldn’t be the first platform to air a story about Putin’s corrupt riches.

## The argument for permitting RT

Comparing RT to the BBC, CBC, or DW might be misguided. RT is intended for a foreign audience primarily. RT’s programming is entirely in foreign languages and not easily accessible to Russians in their native language. A better comparison would be with BBC World, DW English, France 24 English, or NHK 1 International. These channels are subsidiaries of their parent state-owned broadcasters, and their primary purpose is foreign public image management. These international state-owned channels promote their country's culture and business by producing programs for foreign audiences. Their news programming has minimal news value. For the same reasons, it is a misplaced expectation to look for critical, hard-cutting journalism at RT regarding the political affairs of the Russian government. Its primary purpose is to provide a slice of life perspective into Russians’ daily experiences and promote their business and culture to bring in business and tourists.

Furthermore, RT covers stories from the bloc of former soviet republics countries that the Western press doesn’t customarily cover. It covers news stories generally from Russia and other former Soviet republics, and China. It also has specific programming for Russian business and sports. It produces programming in English, Arabic, Spanish, and German. It covers Russian perspectives on major global events and often gives a voice to non-mainstream commentators. For example, RT America hosted Chris Hedges, a left-wing socio-anarchist commentator, William Shatner, Ross Ashcroft and many more accomplished entertainment figures and commentators at the beginning of their careers. In 2013, RT won the best 24-hour news coverage award at Monaco’s Monte Carlo Television Festival. It was also a finalist 11 times at the Emmy awards for news coverage, documentaries, and talk shows. Its Emmy nominated news stories have covered topics such as Guantanamo Bay Inmates’ hunger strike (2014), Occupy Wall Street protests (2012), and the Nagorno-Karabakh dispute (2020). RT’s unique location in Russia allowed it to approach both sides of conflicting parties in Nagorno-Karabakh and gain the trust of anti-establishment activists within Occupy Wall Street protests and Guantanamo Bay inmates who would be reticent to talk with mainstream Western media. RT News and documentaries have won the following awards: Cannes Lions, the Webby, the Lovies, the Shorty, the Association for International Broadcasting, and the Asia-Pacific Broadcasting Union.[[6]](#footnote-6)

## The argument for banning RT

 One of the main criticisms laid at RT is that it fails to present a balanced perspective on the issues it covers and that it produces misinformation. The supervisory board that governs RT is a secret. However, it is suggested that Kremlin significantly influences what RT airs. In an interview in 2013, Vladimir Putin commented that RT’s programming necessarily reflects the Russian government’s official position on the events it covers.[[7]](#footnote-7) This has resulted in programmes wherein RT made allegations against parties anachronistic to the Russian government at the time without allowing the accused parties to defend themselves. For example, RT alleged in 2014 that BBC had staged a chemical weapons attack by the Assad regime in Syria and edited an interview with a Syrian doctor to skew what the doctor said. The same year, RT also released a programme that alleged Ukraine’s Refugee authority was killing civilian migrants based on first-hand accounts. RT was sanctioned by Ofcom (British Office of Communications) for not allowing the BBC or the Ukrainian government to respond to the allegations in those programmes.[[8]](#footnote-8) When Turkey shot down a Russian jet in Syria, RT broadcasted interviews with pro-Kurdish activists in Syria that accused the Turkish government of genocide without providing the Turkish government’s stance on the matter.[[9]](#footnote-9) Ofcom sanctioned RT on this publication as well.

This kind of unbalanced programming drew the ire of the US government as well. In 2017, RT was required to register under the Foreign Agents Registration Act (FARA) in the United States for having become a propaganda tool.[[10]](#footnote-10) The United States does not ordinarily ban foreign media outright. Instead, it requires registration under FARA to force certain disclosures regarding funding, relationships, and activities when there is sufficient evidence that an individual or organization is a foreign agent engaged in domestic political or advocacy work. The FARA was passed in 1938 to bring transparency to covert Nazi propaganda activities in the US.

The second major criticism against RT is that it gives a platform to extremist ideas that foster hatred and undermine democracies. RT has been criticized for being a platform for anti-Semitic opinions by interviewing white nationalists such as David Duke, Jared Taylor and Richard Spencer.[[11]](#footnote-11) RT has consistently villainized Ukrainians since 2014, alleging that the Ukrainian government was taken over by a Nazi regime and committed humanitarian crimes against refugees and Russian minorities. Similarly, CRTC found that RT hosted speakers that amplified the anti-LGBTQ policies of the Russian government. Another concern was that RT generally provided a platform for anti-democratic movements in the West. RT extensively reported on the American and Canadian protestors that called for “the absolute removal of the current political structure” in Canada and the US.[[12]](#footnote-12) The European Commission found that through its media apparatus, including Russia Today, the Russian government pursued a destabilization strategy, repeatedly and consistently targeting European political parties during election periods and democratic institutions in the EU and its member states.[[13]](#footnote-13) RT hosted and continues to host commentators that deny the January 6 conspiracy in the US.[[14]](#footnote-14) Both the CRTC and the European Council noted that persons who were individually sanctioned for their pro-Russian war opinions held influential positions, such as the editor-in-chief position of RT’s English language programming.

# CRTC decision on Russia Today’s broadcasting rights in Canada

## The regulatory framework

The Canadian framework for the carriage of foreign programming services is found in the Broadcasting Act. Under this Act, the CRTC has the power to make regulations regarding the carriage of foreign or other programming services by distribution undertakings. A distribution undertaking is an undertaking for the reception and retransmission by any means of telecommunication of broadcasting. Broadcasting is the transmission of programs by any means of telecommunication for reception by the public through a broadcasting receiving apparatus. In plain English, a distribution undertaking (BDU) is best understood as the operation of the physical framework, often cable, that is used to carry broadcasting signals to subscribers of that undertaking. In contrast, broadcasting is the original transmission of television programs by the producer of that content, often by signal transmitters. Even though the broadcasting signal is available for free to anyone equipped with a capable antenna, more than 90 percent of Canadians subscribe to distribution undertakings to receive television programming.[[15]](#footnote-15)

Under the Broadcasting Act, the CRTC has the power to issue licenses to BDUs (s.9) and make regulations regarding the broadcasting of Canadian programs (s.10) in furtherance of its objectives in s.3.[[16]](#footnote-16) The policy objectives in s.3 are mainly cultural. [[17]](#footnote-17) Generally, they require that Canadian broadcasting be effectively owned and controlled by Canadians, operate primarily in English and French, and enrich and strengthen Canada's cultural, political, social, and economic fabric. To this goal, distribution undertakings should be regulated to prioritize the carriage of Canadian programming services and local Canadian stations.

In accordance with the cultural goals briefly summarized above, CRTC does not license non-Canadian BDUs to broadcast in Canada. Instead, the CRTC whitelists certain non-Canadian programming services by adding them to the ‘the List’[[18]](#footnote-18) and authorizes Canadian BDUs to carry the listed non-Canadian programming services subject to various conditions.[[19]](#footnote-19) In 2008, CRTC signalled a move to a more open-entry approach to non-Canadian news services.[[20]](#footnote-20) CRTC’s general policy on Listing non-Canadian news services is a predisposition for whitelisting such services unless there is clear evidence that the news service will violate Canadian regulations, such as those regarding the abusive comment rules.[[21]](#footnote-21) The restriction on abusive comments or pictorial representation that tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt based on race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical ability is found on s.5 of the Television Broadcasting Regulations.[[22]](#footnote-22) As a result, CRTC does not directly regulate foreign programming services. Instead, it has discretionary authority over whether any foreign programming service will be on the List. The CRTC can de-List foreign programming services if it decides that if the foreign service had been Canadian and subject to Canadian laws and regulations, it would violate those laws and regulations,[[23]](#footnote-23) or if it determines that the distribution of the foreign service is no longer consistent with the policy objectives and no longer in the public interest.[[24]](#footnote-24)

## Particulars of the CRTC decision:

On 2 March 2022, the Governor in Council sent a request to the CRTC under s. 15 of the Broadcasting Act that the Commission hold a hearing to determine whether RT should be removed from the List and make a decision within two weeks from the date of the request.[[25]](#footnote-25) S.15 generally gives the Governor in Council the power to request that the CRTC hold hearings or make reports on any matter within the jurisdiction of the CRTC under the Broadcasting Act.[[26]](#footnote-26) In response, CRTC requested public input. Of the 373 interventions it received, 350 of those supported removing RT from the List.

The BDUs were made a party to the hearing because if RT were to be de-Listed, it would affect their ability to carry RT’s programming services. The BDUs all supported delisting RT on the basis that Russia was subject to sanction under the Special Economic Measures Regulations, that RT was a conduit of systematic information manipulation and disinformation by the Russian government, that RT was a tool in the assault on Ukraine, and that it was a significant indirect threat to domestic public order and security.[[27]](#footnote-27) The BDUs were generally of the opinion that where a foreign state is subject to economic sanctions in Canada, that is enough grounds to censor the state-owned press from that country. There was also concern that de-Listing was not a comprehensive solution to the information manipulation and public unrest dangers caused by RT because RT’s content would remain accessible over the internet, which the CRTC does not regulate. In addition to the BDUs, numerous civil society groups and individuals expressed their concerns that RT regularly promoted hatred against opponents of the Russian government and the LGBTQ community, and produced biased programming and misinformation.[[28]](#footnote-28)

### Abusive comment

The CRTC was concerned that RT promoted hatred or contempt towards Ukrainians, Canadians, and the LGBTQ community in the abusive comment analysis.[[29]](#footnote-29) However, it generally relied on ‘Russian-state broadcasters’ programming, which showed ‘Canada, NATO, and the West’ as the enemies without necessarily citing any proof that RT did the same. CRTC found that Russian-state media generally spread hate against Ukraine and dehumanized Ukrainians. As evidence, CRTC cites the high rate of support amongst Russians for the Russian aggression against Ukraine and news reports that Russian family members of Ukrainians generally believed the Russian state-media narrative that Russia was fighting a rogue Nazi regime in Ukraine. CRTC concluded that RT also historically targeted the LGBTQ communities based on historical evidence. Based on evidence from RT programming and programming from other Russian state media[[30]](#footnote-30), CRTC concluded that RT programming would constitute abusive comments.

### Furthering the general policy goals under s.3

 CRTC also generally considered whether de-Listing RT would further the policy goals its tasked to protect under s.3 of the Broadcasting Act. Under this leg of the decision, the CRTC looked at the steps taken by other bodies of the Canadian government and the actions taken by other Western jurisdictions. CRTC agreed with the BDU’s suggestion that whether the Canadian government has sanctioned the Russian state and individuals involved in directing RT is a relevant factor.[[31]](#footnote-31) CRTC took notice that Canada has sanctioned Russia generally and targeted RT’s editor-in-chief in particular as a central figure of Russian propaganda. CRTC also cited with approval the EU ban on RT based on RT being a conduit of the Russian strategy of destabilizing other countries through a systematic campaign of international disinformation, information manipulation and distortion of facts.[[32]](#footnote-32)

CRTC also determined that banning RT did not harm freedom of expression in Canada. CRTC considered that Russia clamped down on the operations of Western media in Russia, forcing many of them to suspend their Russian programming.[[33]](#footnote-33) The decision explained that the importance of freedom of expression and the concern for the dangers of one-sided media forms the basis of the CRTC’s open entry approach to the List. However, CRTC notes that the freedom of expression under the Broadcasting Act is of a narrower scope. The Act protects freedom of expression within the context of journalistic, creative and programming independence enjoyed by broadcasting undertakings. It found that because the Russian government limits journalistic independence in Russia and directs the content on RT, the inclusion of RT is offensive to furthering freedom of expression in Canada. Interestingly, the decision notes that any harm done to free expression in Canada is lessened because RT’s content will remain accessible on the internet, which is exempted from regulation.[[34]](#footnote-34)

# What remedies are available to RT?

There are two legal remedies RT may pursue in Canada. It has a statutory right to appeal the CRTC decision based on s.31(2) of the Broadcasting Act. In addition, it may argue that either s.5(1)(b) of the Television Broadcasting Regulations or the CRTC decision specifically violates s.2(b), freedom of thought, belief, opinion and expression, including freedom of the press and other media communication, of the Charter.

## Statutory right of appeal under s.31(2) of the Broadcasting Act

Post *Vavilov*, one of two standards of review applies to decisions from an administrative decision. Judicial review of an administrative decision begins with a presumption of reasonableness. This presumption is based on the assumption that an administrative body possesses greater relative expertise on the subject matter of its jurisdiction.[[35]](#footnote-35)

However, the presumption of reasonableness is replaced by the standard of correctness if one of the three following conditions apply:

1. The legislation specifically mandates correctness as the applicable standard of review.[[36]](#footnote-36) The legislation provides a statutory appeal mechanism to a court of appeals. This closes the door on a contextual analysis to determine the appropriate standard where the legislature has intentionally chosen a more active role for the courts in an appeal.[[37]](#footnote-37)
2. The statute that provides the right of appeal is a true right to appeal as opposed to merely a right to a review of procedural or other similar aspects of a decision. If the empowering statute uses clear language such as an ‘appeal,’ that is a clear indicator. The right to appeal on a correctness standard is often circumscribed. For example, a statute may provide an appeal on questions of law only. In that case, an appeal based on a mix of issues, including questions of law and procedural fairness, would use the standard of correctness on the questions of law and the standard of reasonableness on the review of procedural questions. Whether the right to appeal is subject to the leave of the court or automatic is not a factor that calls for a lower standard of review if the standard should be that of correctness absent the court’s discretion on hearing the appeal.[[38]](#footnote-38)
3. The principle of the rule of law requires a standard of correctness on constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies.[[39]](#footnote-39)

The statutory right of appeals under the Broadcasting Act s.32 reads, “an appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.” This provision permits an appeal on limited circumstances of questions of law or jurisdiction subject to leave of the Court. The basis of the CRTC decision is primarily on the grounds that RT’s programming services constitute abusive comments and secondarily on the grounds that listing RT is not consistent with the public interest. An appeal whether RT’s programming constituted abusive comments would be a question of fact. Based on the *Vavilov* framework, the applicable standard of review is reasonableness because a question of fact is not within the limited circumstances where a true right of appeal is granted. On the other hand, an appeal based on whether CRTC could apply s.5(1)(b) to RT’s programming is a question of law subject to the standard of correctness.

As much as I can tell, there aren’t any cases on Lexis or Westlaw where a court reviewed a CRTC decision on abusive comment. CRTC’s jurisprudence explains that a violation of s.5(1)(b) of the regulation requires fulfillment of three criteria.[[40]](#footnote-40) First, the comments must target at least one of the protected groups enumerated in the regulation. The enumerated groups or classes of individuals are protected based on race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.[[41]](#footnote-41) Second, the comments must be abusive. Unfortunately, what is ‘abusive’ is not clearly defined and will be discussed further below. Third, when taken in context, the comments must be likely to expose an individual or group of individuals to hatred or contempt.[[42]](#footnote-42)

Whether a comment is abusive is a finding of fact based on the surrounding circumstances. As a starting point, abusive comments must be offensive against the protected attributes listed in s.5(1)(b): race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability. An otherwise untasteful comment, no matter how offensive, can’t come under the scope of this provision. For example, calling for violence against a politician because they are a ‘communist’ will not violate this provision.[[43]](#footnote-43) Second, the comment must be inherently capable of being abusive. For example, the term ‘nigger gangs’ was considered in a CRTC decision to be inherently capable of being abusive based on its historical use in a discriminatory, demeaning and abusive manner.[[44]](#footnote-44) Third, the abusive comment must be abusive in its context and tend to or likely to expose an individual or group or class of individuals to hatred or contempt.[[45]](#footnote-45) The term ‘nigger gangs’ would not be abusive in its context if it was used by members of the protected group when referring to themselves. For example, if a black Haitian person used that term in Haitian Creole, that would be a relevant context where the comment is not abusive.[[46]](#footnote-46) Other relevant context includes the manner in which the comment was made within the program. For example, if the program host in his own presentation used respectful words such as ‘black gangs’ but quoted the journalistic work or research of another author that uses the term ‘nigger gangs,’ that would be the relevant context that shows the author likely made a momentary lapse and did not intend to perpetuate abuse towards the protected group. Similarly, if the abusive term appears in a talk show generally of an irreverent character, that can also indicate that the program did not intend to encourage abuse towards any specific group.[[47]](#footnote-47)

As was discussed in the arguments against RT section, the CRTC finding of abusive comments was based upon submissions that showed RT and RT’s parent media produced programs that likened Ukrainians to Nazis and did sow anti-Ukrainian sentiments in Russia. There was also evidence that RT or its parent media historically encouraged violence against the LGBTQ community. There is no doubt that such programming would constitute abusive comments under the framework explained above. The abusive comments at Ukrainians are targeted at protected groups based on their national origin. Allegations of Nazism and perpetuation of crimes against humanity against civilians such as refugees and minorities are inherently capable of being abusive. Furthermore, the context in which these programs aired suggests that the goal is to expose Ukrainians to hatred or contempt to justify Russian actions. Under the reasonableness standard, there is sufficient evidence to justify CRTC’s finding of abusive comments against Ukrainians in particular. The utility and merits of old RT programs aired almost ten years ago could be explored further. However, it should be reasonable to include old RT programs targeting Ukrainians because of the ongoing nature and context of the Russian – Ukrainian conflict. What might be an overriding and palpable error is attributing programs only aired at RT’s parent media to RT. It would have been a better-reasoned decision if the decision had been made only upon RT’s international programming. However, there is evidence that RT doesn’t have real editorial independence, and it is part of the general Russian media offensive against Ukraine. There is probably enough linkage between RT and its parent media that it was reasonable to take into account the programming aired on the parent media for this CRTC decision.

The finding that listing RT contravenes public interest is also likely to be found reasonable. CRTC sites evidence that RT promoted violence against the Canadian government and democratic establishments. The CRTC decision also refers to the European sanctions that argue RT was instrumental in undermining and destabilizing countries in Europe and North America, villainizing NATO, intervening with domestic elections and promoting conspiracy theories.[[48]](#footnote-48) The CRTC decision also notes that the Russian government is subject to sanctions and that the editor-in-chief of RT is on the list of sanctioned individuals. Based on this evidence, it is likely that CRTC’s finding that RT’s programming undermines Canadian public interest was reasonable.

If RT were to challenge CRTC’s jurisdiction to delist RT, that is very unlikely to be successful. The standard of appeal on questions of CRTC’s jurisdiction is subject to the correctness standard.[[49]](#footnote-49) S.10(g) of the broadcasting act empowers the CRTC to make regulations respecting the carriage of any foreign programming by distribution undertakings in a manner that furthers the objects of the Broadcasting Act. S.3(1)(n) broadcasting policy declarations only refer to public interest expressly where there is any conflict between the CBC and any other Canadian broadcasting undertaking, it should be resolved in the public interest. Even though 3(1)(n) does not directly apply to the question at hand, it shows the paramountcy of public interest for the purposes of the Act. An indirect reference to the public interest is found in 3(1)(d)(iii), which requires the Canadian broadcasting system to serve the needs and interests of Canadian men, women and children. Overall, it is likely that promoting social unrest in Canada and producing misinformation is against the interests of Canadians. CRTC has a mandate to regulate Canadian broadcasting in the public interest and likely has jurisdiction to delist foreign services when they harm the public interest.

## Charter challenge to s.5(1)(b) of the Television Broadcasting Regulations

Section 2(b) of the Canadian Charter of Rights and Freedoms recognizes that everyone has freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. However, these rights are not absolute. S.1 of the Charter provides that these rights are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. First, RT has to show that s.5(1)(b) of the regulation prima facie violates s.2(b) of the Charter. If this is established, the prosecution would have to argue that the legislation is a reasonable limit under s.1 of the Charter using the Oakes framework.

### s.5(1)(b) prima facie violates the Charter

The most authoritative decision on freedom of expression and suppression of hate speech in Canada is R v *Keegstra*. As my research has not found any case where a Canadian court has looked into the constitutionality of the abusive comment provision[[50]](#footnote-50) in the Television Broadcasting Regulations or comparable provisions in related regulations,[[51]](#footnote-51) *Keegstra* is an appropriate starting point. In *Keegstra*, the issue was whether hate speech against Jews, which is an offence under s. 319(2) of the Criminal Code makes it an offence to communicate, except in private conversation, statements that wilfully promote hatred against an identifiable group. An identifiable group means any group distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability. This definition encapsulates the groups protected under s.5(1)(b) of the Regulation, making the *Keegstra* analysis highly relevant to the question at hand.

In *Keegstra*, the term ‘expression’ used in the Charter was defined comprehensively and extensively. The SCC adopted the description of ‘expression’ from Irwin Toy :

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

 This definition is comprehensive and covers both physical and verbal expressions of meaning, regardless of how unpopular or distasteful the expression might be. In *Keegstra*, the SSC also considered whether hate speech or inciting speech falls within the broad protection of this interpretation. It found that hate speech and even threats of violence are prima facie protected speech that falls within this description. The only excluded form of expression is expression communicated directly through physical harm.[[52]](#footnote-52) Based on this broad understanding of expression, s.5(1) that restricts certain examples of undesirable expression is prima facie in breach of the Charter.

### Restriction justified under s.1 of the Charter

The first step of the Oakes analysis is identifying the objective of the relevant legislation. A legislative limit on a Charter-protected right is permissible only if the objective relates to concerns that are pressing and substantial in a free and democratic society.[[53]](#footnote-53) The objective of this provision is similar to the objective of s.319 of the Criminal Code, which was discussed in *Keegstra*. There are two harms provisions against hateful expressions against identifiable groups respond to. First, hate speech causes psychological and social damage to the people targeted. People at the receiving end are humiliated and degraded. The psychological harm includes a severe negative impact on the affected persons’ sense of self-worth and acceptance. Hate speech can encourage affected people to voluntarily become more marginalized by avoiding activities that would bring them into contact with the society-in-large.[[54]](#footnote-54) The second harm is that hate speech is likely to attract other people to its cause and create serious discord in society. The Special Committee on Hate Propaganda in Canada (‘the Cohen Committee’) that published the unanimous Report of the Special Committee on Hate Propaganda in Canada in 1996 warned that individuals can be persuaded to believe almost anything if information or ideas are communicated using the right technique and in the proper circumstances.[[55]](#footnote-55) These findings of the Cohen Committee that were accepted by the Court in *Keegstra* continue to be highly relevant in 2022. As the Court acknowledged, significant hate propaganda activity occurs in Canada. While some propaganda is generated domestically, some are imported from other countries. Thus, it would seem that the purpose of s.5(1)(b) is to prevent the harm caused by hate-promoting expressions by preventing such expressions from being distributed by Canadian distribution undertakings regardless of their origin.

The underlying concern of preventing hate-promoting expressions is pressing and substantial in a free and democratic society. Canada is a nation that prides itself on tolerance and the fostering of human dignity through respect for the many racial, religious and cultural groups in the Canadian society.[[56]](#footnote-56) Intimidation of identifiable groups that leads them to self-marginalize substantially harms Canada’s free and democratic ideas. Similarly, hate speech radicalizes people by convincing individuals to adopt the hateful ideas expressed and desensitizing the silent majority of reasonable Canadians to the harm intended to the targets of hateful expression.[[57]](#footnote-57) Furthermore, Canada’s obligations under international law to prevent hate speech inform that preventing hate speech is a legitimate concern in a free and democratic society.[[58]](#footnote-58) Canada is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR). Article 4 of the CERD calls on all parties to condemn all propaganda and organizations based on theories of superiority based on colour or ethnic origin and to undertake positive measures to eradicate such discrimination, including criminalizing the dissemination of such ideas. ICCPR article 20 carves out hate speech from protecting freedom of expression.[[59]](#footnote-59) The actions of other democratic countries are also instructive. Freedom of expression enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Commission of Human Rights to permit the prohibition of hate speech.[[60]](#footnote-60)

The second step of the Oakes test is a proportionality test[[61]](#footnote-61) that inquires whether there is a rational connection between the legislative measure and the objective of Parliament,[[62]](#footnote-62) whether the limitation achieves its objective with minimal impairment of the protected right[[63]](#footnote-63), and whether the benefits of the legislation outweigh the harms to Charter rights.[[64]](#footnote-64) For the minimal impairment and cost-benefit analysis, it is necessary to find the relative value of the particular category of expression in relation to the ideals that motivated the Charter protection. The central values of freedom of expression are (1) ensuring that truth and common goods are attained,[[65]](#footnote-65) (2) ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas,[[66]](#footnote-66) (3) and to ensure participation in the political process to all persons.[[67]](#footnote-67) Hate expressions such as abusive comments contribute little to the central values of freedom of expression and often undermine them by denying targeted individuals their right to freedom of expression.[[68]](#footnote-68) This kind of expression, while having the form and content that attracts protection, is inimical to the democratic aspirations that inspire the protections enshrined under the free expression guarantee[[69]](#footnote-69) and restrictions upon them are easier to justify.[[70]](#footnote-70)

In *Keegstra*, the court found that legislation that suppresses hate speech is rationally connected to reducing the harms of such expression.[[71]](#footnote-71) The same argument is likely to apply for the purposes of s.5(1)(b) of the Regulation. Under the minimal impairment inquiry, it is noteworthy that there is no requirement for the government to rely upon the absolute least impairing option.[[72]](#footnote-72) Where the objective is important, there may be more valid options. In *Keegstra*, preventing the harms of hateful expression was found to be important enough that criminal limitations were a reasonable limitation on Charter protected rights. The limitations under s.5(1)(b) are much more limited and non-criminal. In addition, freedom of expression does not include a right to inclusion in the broadcasting system.[[73]](#footnote-73) Revoking an institution’s broadcasting license pursuant to s.5(1)(b) merely takes away a privilege they were granted subject to various conditions. These considerations suggest that s.5(1)(b) imposes minimal impairment on affected persons’ freedom of expression. Under the cost-benefit step, the benefits of the legislation’s objectives are compared to the harms to the protected right. The benefits of this anti-hate speech legislation outweigh the costs. Hate speech causes substantial harm to both the society-at-large and the targeted persons. On the other hand, hate speech itself does not promote the values that are meant to be furthered by the principle of freedom of expression.[[74]](#footnote-74)

In conclusion, a Charter challenge to s.5(1)(b) abusive comment rule in the regulation is highly unlikely to be successful. Even though hate speech is in the form of expression that prima-facie falls within the scope of freedom of expression protected under the Charter, Canadian jurisprudence has recognized that it is inimical to the ideals protected by freedom of expression and does not attract the high level of protection that expression regularly attracts. Similarities between s.319 of the criminal code and s.5(1)(b) with regards to the scope of the limitation on expression imposed by s.319 and s.5(1)(b) suggest that abusive comment rules have the same purpose as s.319. The Supreme Court of Canada decision in *Keegstra* is highly indicative of the kind of Oakes analysis that would be used to justify abusive comment rules.

## Charter challenge to the CRTC decision

 As a final retort, RT can try to challenge the particular CRTC decision. The Supreme Court of Canada decision in *Dore v Barreau du Quebec* affirmed that administrative law decisions are subject to Charter challenges.[[75]](#footnote-75) However, the standard of review and considerations that go into assessing whether an adjudicated decision violates the Charter are different from assessing legislation for the same purpose.[[76]](#footnote-76)

Dure found that when Charter values are applied to an individual administrative decision, the standard of review is reasonableness. The Dure Court relied upon the *Dunsmuir* contextual approach and deference for the specialized expertise of the administrative body under that approach.[[77]](#footnote-77) According to *Dunsmuir*, when a particular “law” is being assessed for Charter compliance, the question is that of principles of general application. In such circumstances, the contextual approach required a standard of correctness and the Oakes test. In comparison, when a particular decision is assessed for Charter compliance, the Charter values are being applied to a particular set of facts, and this requires a standard of reasonableness. This approach was adopted in a challenge to an s.3(1)(b) decision under the Radio Regulations that is identical to the abusive comment rule at hand in Genex Communications Inc. v. Canada (Attorney General), [2005] F.C.J. No. 1440, and the court applied a standard of reasonableness to the CRTC decision. The problem is that the *Vavilov* decision made the *Dunsmuir* contextual approach based on deference to the specialized expertise of administrative bodies obsolete without providing any guidance regarding how to decide the standard of review applicable to an administrative decision. Even though part of the reasoning operative in Dure that relied on *Dunsmuir* is now obsolete, additional reasons compelled the Dure court to adopt a standard of reasonableness for review of administrative decisions. In particular, the SCC noted that it is difficult to find the ‘pressing and substantial’ objective of a decision and who would have the burden of defining and defending it.[[78]](#footnote-78) Even though the administrative body that made the decision seems to be the ideal candidate to undertake this burden, the SCC did not entertain this option. Assuming the Dure decision is still good law in the post-*Vavilov* world, the applicable standard is reasonableness.

The CRTC decision is likely to survive a Charter challenge under the reasonableness standard. An administrative decision-maker must balance the Charter values with its statutory objectives. At judicial review, the question is whether the decision reflects a proportionate balancing of the Charter protections at play.[[79]](#footnote-79) As discussed under the ‘Statutory Right of Appeal under s.31(2) of the Broadcasting Act’ section, the CRTC had plenty of evidence that RT and RT’s affiliates propagated hate speech and abusive comments targeted at Ukrainians and other adversaries of the Russian government. The decision showed concern regarding the negative impact this decision might make on freedom of expression as well. As explained above, Canadian jurisprudence affords a lower level of protection to hate speech. CRTC found that protecting freedom of speech in Canada required preventing Russian propaganda, which seems consistent with the reasoning in *Keegstra*. In addition, CRTC looked at practices in other democratic jurisdictions such as Europe and found that protecting democratic ideals and free society in Canada required taking action against RT in the public interest. CRTC’s decision likely evidences a genuine concern for balancing freedom of expression with the statutory objectives and where the public interest in a free and democratic society lies.

# Conclusion

The CRTC justified banning RT on the grounds that RT’s programming constituted abusive comments towards Ukrainians and other enemies of the Russian government, and that it is in the interest of public interest. The decision shows concern regarding the freedom of expression precedence this decision might create. However, the CRTC correctly identifies that whitelisting Russian propaganda and hate speech would not contribute to freedom of speech in Canada. The weakest aspect of the CRTC decision is that it relies on a mix of evidence that includes programming that was aired on Russian state-owned media, but not necessarily on RT. However, given that sanctioned propagandists are in key-positions of RT and the concerns and actions of other democratic jurisdictions, it is likely that there was enough evidence for the CRTC to make the decision that it made.

1. Julian Evans, “Spinning Russia”, *Foreign Policy* (1 December 2005), online: <[foreignpolicy.com/2005/12/01/spinning-russia/](https://foreignpolicy.com/2005/12/01/spinning-russia/)>. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. About Us, online: *Russia Today* <[www.rt.com/about-us/](http://www.rt.com/about-us/)>. [↑](#footnote-ref-3)
4. Julian Evans, “Spinning Russia”, *Foreign Policy* (1 December 2005), online: <[foreignpolicy.com/2005/12/01/spinning-russia/](https://foreignpolicy.com/2005/12/01/spinning-russia/)>. [↑](#footnote-ref-4)
5. *Broadcasting Act,* SC 1991, c11, s 3(1). [↑](#footnote-ref-5)
6. About Us, online: *Russia Today* <[www.rt.com/about-us/](http://www.rt.com/about-us/)>. [↑](#footnote-ref-6)
7. James Kirchick, “RT wants to spread Moscow’s propaganda here. Let’s treat it that way”, *The Washington Post* (20 September 2017)*,* online: <[www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/](http://www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/)>. [↑](#footnote-ref-7)
8. Jasper Jackson, “RT sanctioned by Ofcom over series of misleading and biased articles”, *The Guardian* (21 September 2015), online: <<https://www.theguardian.com/media/2015/sep/21/rt-sanctioned-over-series-of-misleading-articles-by-media-watchdog>>. [↑](#footnote-ref-8)
9. *Review of the authorization to distribute Russia Today (RT) and RT France pursuant to the List of non-Canadian programming services and stations authorized for distribution* (16 March 2022), CRTC 2022-68 at para 32 [CRTC Russia Today Decision]. [↑](#footnote-ref-9)
10. James Kirchick, “RT wants to spread Moscow’s propaganda here. Let’s treat it that way”, *The Washington Post* (20 September 2017)*,* online: <[www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/](http://www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/)>. [↑](#footnote-ref-10)
11. *Ibid* at para 30. [↑](#footnote-ref-11)
12. *Ibid* at para 26. [↑](#footnote-ref-12)
13. European Council, Press Release, “EU imposes sanctions on state-owned outlets RT/Russia Today and Sputnik’s broadcasting in the EU” (2 March 2022), online: <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/>>. [↑](#footnote-ref-13)
14. Frank Furedi, “The sinister legacy of January 6”, *Russia Today* (5 January 2022), online: <[www.rt.com/op-ed/545161-capitol-legacy-culture-fear/](http://www.rt.com/op-ed/545161-capitol-legacy-culture-fear/)>. [↑](#footnote-ref-14)
15. *Reference Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168,* [2012] 3 SCR 489 at para 2. [↑](#footnote-ref-15)
16. *Ibid* at paras 26 - 33 [↑](#footnote-ref-16)
17. *Ibid*. [↑](#footnote-ref-17)
18. *Broadcasting Regulatory Policy* (30 June 2011), CRTC 2011-399. [↑](#footnote-ref-18)
19. *Broadcasting Act,* s 10(1)(g); *CRTC Russia Today Decision* at para 8. [↑](#footnote-ref-19)
20. *Broadcasting Public Notice* (30 October 2008), CRTC 2008-100, online: <[crtc.gc.ca/eng/archive/2008/pb2008-100.htm#h25](https://crtc.gc.ca/eng/archive/2008/pb2008-100.htm#h25)> at para 245 [*Broadcasting Public Notice* (30 October 2008)]. [↑](#footnote-ref-20)
21. I*bid* at para 246 [↑](#footnote-ref-21)
22. *Television Broadcasting Regulations,* SOR/87-49, s 5(1)(b). [↑](#footnote-ref-22)
23. *Broadcasting Public Notice* (30 October 2008) at para 246. [↑](#footnote-ref-23)
24. *CRTC Russia Today Decision* at para 42. [↑](#footnote-ref-24)
25. *CRTC Russia Today Decision* at para 1. [↑](#footnote-ref-25)
26. *Broadcasting Act,* s 15. [↑](#footnote-ref-26)
27. *CRTC Russia Today Decision* at paras 19 - 29. [↑](#footnote-ref-27)
28. See the arguments against RT section above. [↑](#footnote-ref-28)
29. *CRTC Russia Today Decision* at paras 51 – 61. [↑](#footnote-ref-29)
30. See the arguments against RT section above. [↑](#footnote-ref-30)
31. *CRTC Russia Today Decision* at paras 64-65. [↑](#footnote-ref-31)
32. *CRTC Russia Today Decision* at para 66. [↑](#footnote-ref-32)
33. *CRTC Russia Today Decision* at para 67. [↑](#footnote-ref-33)
34. *CRTC Russia Today Decision* at para 71. [↑](#footnote-ref-34)
35. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 46 [Vavilov]. [↑](#footnote-ref-35)
36. *Vavilov* at para 35. [↑](#footnote-ref-36)
37. *Vavilov* at paras 46 – 47. [↑](#footnote-ref-37)
38. *Vavilov* at paras 50-52. [↑](#footnote-ref-38)
39. *Vavilov* at paras 53 – 68. [↑](#footnote-ref-39)
40. *Canwest Television GP Inc. (the general partner) and Canwest Media Inc. (the limited partner), carrying on business as Canwest Television Limited Partnership)* (28 September 2010), CRTC 2010-716 at para 18 [CRTC Canwest Decision]. [↑](#footnote-ref-40)
41. *Television Broadcasting Regulations,* s 5(1)(b). [↑](#footnote-ref-41)
42. *CRTC Canwest Decision* at para 18. [↑](#footnote-ref-42)
43. *Complaint relating to the broadcast of Bouchard en parle on CJMF-FM Quebec* (30 July 2010), CRTC 2010-534 at paras 9 and 18. [↑](#footnote-ref-43)
44. *Complaint concerning the broadcast of an episode of Les Franchs-tireurs by Tele-Quebec* (28 July 2005), CRTC 2005-348 at para 14. [↑](#footnote-ref-44)
45. *Ibid* at para 13. [↑](#footnote-ref-45)
46. *Ibid* at para 17. [↑](#footnote-ref-46)
47. *Ibid* at paras 19 – 22. [↑](#footnote-ref-47)
48. *CRTC Russia Today Decision* at para 65, n 3. [↑](#footnote-ref-48)
49. *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 at para 34. [↑](#footnote-ref-49)
50. In *Genex Communications Inc. v. Canada (Attorney General),* [2005] FCJ No 1440 the appellant invites the Court to consider the constitutionality of the abusive comment restriction in s3(1) of the Radio Regulations. However, the Court takes a more limited approach and only looks at the constitutionality of the particular CRTC decision that was appealed. Judicial review of an administrative decision for compliance with the Charter attracts a standard of reasonableness under the Dure framework, explained later in this paper. It is not clear whether the Vavilov decision affects the standard of review where the appeal challenges not the validity of the statute that an administrative decision is based on, but only that of the administrative decision. [↑](#footnote-ref-50)
51. Such as s 3(1)(b) of *Radio Regulations*, SOR/86-982. [↑](#footnote-ref-51)
52. *R. v. Keegstra*, [1990] 3 S.C.R. 697 at paras 30 – 38 [Keegstra]. [↑](#footnote-ref-52)
53. *Keegstra* at para 81. [↑](#footnote-ref-53)
54. *Ibid* at paras 60 – 61. [↑](#footnote-ref-54)
55. *Keegstra* at para 62. [↑](#footnote-ref-55)
56. *Ibid* at para 61. [↑](#footnote-ref-56)
57. *Ibid* at 62 – 63. [↑](#footnote-ref-57)
58. *Keegstra* at para 66, citing *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038. [↑](#footnote-ref-58)
59. *Keegstra* at paras 68 – 69. [↑](#footnote-ref-59)
60. *Ibid* at 72. [↑](#footnote-ref-60)
61. *Ibid* at 81. [↑](#footnote-ref-61)
62. Dylan J. Williams, “If you do not have anything nice to say: Charter Issues with the offence of defamatory libel (section 301)” (2020) 43:4 Man LJ 197. [↑](#footnote-ref-62)
63. *Ibid*. [↑](#footnote-ref-63)
64. *Ibid* at 202. [↑](#footnote-ref-64)
65. *Keegstra* at 87. [↑](#footnote-ref-65)
66. *Ibid* at 88. [↑](#footnote-ref-66)
67. *Ibid* at 89. [↑](#footnote-ref-67)
68. *Ibid* at 90. [↑](#footnote-ref-68)
69. *Ibid* at 90. [↑](#footnote-ref-69)
70. *Ibid* at 94, citing *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. [↑](#footnote-ref-70)
71. *Keegstra* at 97 – 103. [↑](#footnote-ref-71)
72. *Ibid* at 130 . [↑](#footnote-ref-72)
73. *Genex Communications Inc. v. Canada (Attorney General)*, [2005] FCJ No 1440 at 43 [↑](#footnote-ref-73)
74. *Keegstra* at 134 – 136. [↑](#footnote-ref-74)
75. *Dore v Barreau du Quebec,* 2012 SCC 12 at para 24 [Dore]. [↑](#footnote-ref-75)
76. *Dore* at para 6. [↑](#footnote-ref-76)
77. *Dore* at paras 35, and 52. [↑](#footnote-ref-77)
78. *Dore* at paras 39 - 40. [↑](#footnote-ref-78)
79. *Dore* at 55 – 57. [↑](#footnote-ref-79)