

## Notes from introductions to the morning and afternoon sessions of the 3 November PIAC-FRPC law and policy conference, C-10: The Legal Issues

Afternoon session: Context regarding the CRTC's discretion

### I. Introduction

On 3 November 2021 the Public Interest Advocacy Centre and the Forum for Research and Policy in Communications (FRPC) held an online law and policy conference concerning new broadcasting legislation proposed by then-Minister of Canadian Heritage, the Hon. Steven Guilbeault.

The conference addressed two questions about Bill C-10. The conference' morning session asked whether C-10's broadcasting policy (set out in section 3) 'hit the mark' as Canada's 21st century broadcasting policy for Canada. The afternoon session asked whether C-10's grant of discretion to the CRTC will ensure implementation of Canada's broadcasting policy.

To provide context for the afternoon session the Forum's Executive Director, Monica Auer, briefly discussed case law concerning discretion in the administrative law context and provided factual information about the CRTC's exercise of the mandatory and discretionary aspects of its responsibilities as defined by the 1991 *Broadcasting Act*.

### II. The law on discretion

Administrative agencies such as the CRTC are often expected to exercise their discretion in the implementation of their statutory mandates.

Canadian law requires agencies to exercise their discretion in accordance with fundamental principles of law, including the duty to make decisions using fair procedures. One of the leading cases on discretion and procedural fairness was issued by the Supreme Court of Canada in late 1999 - *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

The Supreme Court held in *Baker* that a decision-maker's consideration of factors not specified in their enabling legislation – "irrelevant factors" – meant that their exercise of discretion was not exercised in accordance with the rule of law:

56 ... The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule

of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.

The Court also noted that “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.”

More recently the Supreme Court held in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) that, while administrative tribunals such as the CRTC “have considerable discretion in making a particular decision, that decision must ultimately comply ‘with the rationale and purview of the statutory scheme under which it is adopted’” (para. 108). The Court pointed out that “there is no such thing as absolute and untrammelled ‘discretion’” and that “any exercise of discretion must accord with the purposes for which it was given” (*Ibid.*). The Court added that administrative decision-makers must justify their interpretation of their authority: while

... a decision maker’s interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it.

(para. 109)

The Court went on to highlight legislators’ role in either granting or constraining administrative decision-makers’ exercise of authority, noting that open-ended, highly qualitative language such as “public interest” indicates Parliament’s intent that its decision-making delegate may exercise more of its own discretion in interpreting its enabling statute:

... a legislature wishes to precisely circumscribe an administrative decision maker’s power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker’s ability to interpret the provision. Conversely, **where the legislature chooses to use broad, open-ended or highly qualitative language — for example, “in the public interest” — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language.** Other language will fall in the middle of this spectrum.

(para. 110, bold font added)

Parliament’s 1991 *Broadcasting Act* refers to the “public interest” four times – twice to explain (somewhat confusingly) how the CRTC should make decisions between the CBC and other broadcasters, and twice to provide the Commission with guidance about holding public hearings:

3(1)(n): “where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the **public interest**, and where the **public interest** would be equally served by

resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);

..

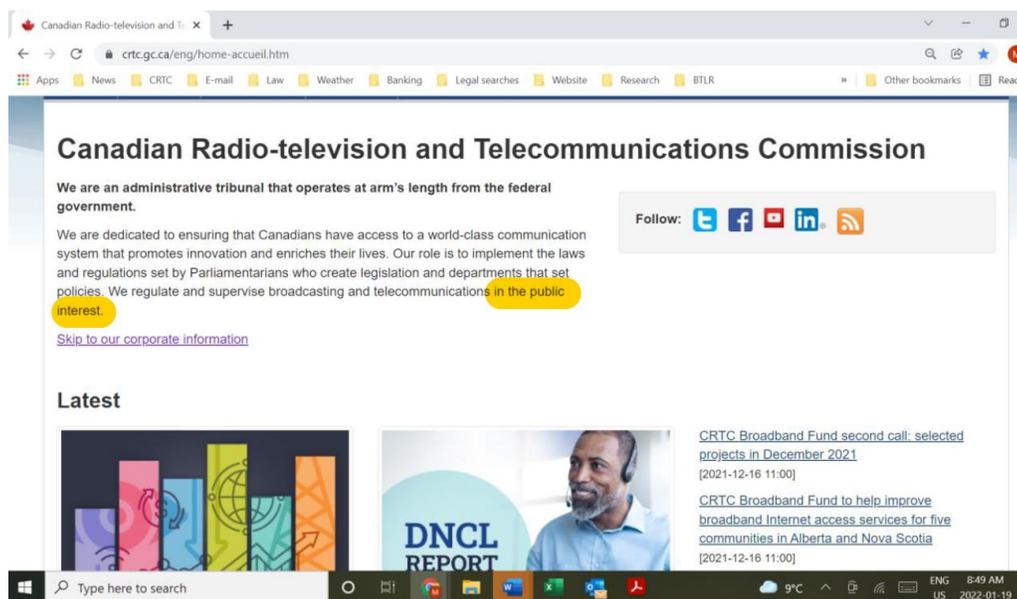
Idem

(2) The Commission shall hold a public hearing in connection with the amendment or renewal of a licence unless it is satisfied that such a hearing is not required in the **public interest**.

Marginal note: Where public hearing in Commission's discretion

(3) The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the **public interest** to do so.

According to *Vavilov* the CRTC has flexibility when it comes to making decisions about the CBC with respect to other broadcasters, and insofar as its decisions to hold hearings to amend licences, to renew licences or to hear complaints or representations in public hearings are concerned. The CRTC, however, has said for several years that it performs its responsibilities in the public interest



Yet unlike statutes such as the [Nunavut Waters and Nunavut Surface Rights Tribunal Act Planning and Project Act](#) the 1991 Act simply does not say that the Commission should make decisions in the public interest.

Rather, the 1991 *Broadcasting Act* requires the CRTC to “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection

*Nunavut Waters and Nunavut Surface Rights Tribunal Act, S.C. 2002, c. 10*  
Permission to expropriate  
77 (1) An applicant for a licence, or a licensee, may apply to the Board for permission from the Minister to expropriate, in accordance with the Expropriation Act, land or an interest in land in Nunavut, and the Minister may grant that permission where the Minister, on the recommendation of the Board, is satisfied that  
...  
(c) it is in the public interest that such permission be granted.  
....

3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).” As the

**A. 1991 Broadcasting Act’s requirements of CRTC**

While the 1991 *Broadcasting Act* requires the CRTC to regulate and supervise the broadcasting system “with a view to implementing the broadcasting policy for Canada set out in section 3(1)”, just eight of its 59 policy objectives set out in its policy are mandatory. Parliament presumably intended that the CRTC would exercise its discretion in implementing the remaining 51 objectives. The Federal Court of Appeal noted in 2016 that CRTC policy decisions call “for the exercise of considerable discretion and the consideration of multiple polycentric factors” ([Bell Canada v. Canada \(Attorney General\)](#), 2016 FCA 217, at para. 37).

The *Broadcasting Act* both grants and sets limits on the CRTC’s discretion when it comes to regulation, licensing, decision-making, enforcement and research. No limits are placed, for example, on the rules of procedure that the CRTC must follow or on whether the CRTC must hold hearings on broadcasters’ regulatory non-compliance. On the other hand the CRTC must hold public hearings before issuing mandatory orders or in connection with the issuance, suspension or revocation of licences, and it must also publish notice of such hearings (implying, at least, that notification about a hearing is different from the public hearing itself).

Explicit discretion of CRTC	Explicit limits on CRTC discretion
<b>Regulation in general</b>	
<p>Of 59 objectives in the 1991 Act, 51 are discretionary, including</p> <ul style="list-style-type: none"> <li>• Safeguards Canadian political, social &amp; economic fabric</li> <li>• Wide range of programming</li> <li>• Displays Canadian talent</li> <li>• Offers information</li> <li>• Employment opportunities</li> <li>• Serves &amp; reflects Canadians’ needs/interests</li> <li>• Adapts to technological change</li> <li>• High standard</li> <li>• Varied, comprehensive, balanced programming</li> <li>• Local, regional, national and international sources</li> <li>• Includes educational and community programs</li> <li>• National pub broadcaster provides programming that informs, enlightens, entertains</li> <li>• “aboriginal” reflection</li> <li>• Some programming “accessible by disabled persons”</li> <li>• Possibility of alternative programming service</li> <li>• Private broadcasters contribute to Canadian programming</li> <li>• Private broadcasters responsive to public’s demands</li> <li>• Affordable distribution rates</li> </ul>	<p>Of 59 objectives in the 1991 Act, 8 are mandatory:</p> <ul style="list-style-type: none"> <li>• construing and applying the Act consistent with freedom of expression as well as journalistic, creative and programming independence: s. 2(3)</li> <li>• Canadian broadcasting system to be effectively owned and controlled by Canadians: s. 3(1)(a)</li> <li>• Public, private and community elements of the broadcasting system must contribute appropriately to creation and presentation of Canadian programming: s. 3(1)(e)</li> <li>• Each undertaking must make maximum or at least predominant use of Canadian creative and other resources in creating and presenting programming: s. 3(1)(f) [note – this section has 3 objectives – use, creation &amp; presentation]</li> <li>• Licensees are responsible for the programs they broadcast: s. 3(1)(h)</li> <li>• Range of English-language and French-language broadcasting services to be extended to all Canadians as resources become available: s. 3(1)(k)</li> </ul>
<p>May set regulations</p> <ul style="list-style-type: none"> <li>• to define Canadian programming: s. 10(1)(b)</li> </ul>	<p>Must regulate and supervise all aspects of Canadian broadcasting system “with a view to implementing” the s.3(1) broadcasting policy: s. 5(1)</p>

Explicit discretion of CRTC	Explicit limits on CRTC discretion
<ul style="list-style-type: none"> <li>for % of time to be devoted to Canadian programming: s. 10(1)(a)</li> <li>for program standards: s. 10(1)(d)</li> <li>re character of and time for adv'g: s. 10(1)(d)</li> <li>re time for partisan political content: s 10(1)(e)</li> <li>for network programming: s. 10(1)(f)</li> </ul>	
<p>May regulate taking into account</p> <ul style="list-style-type: none"> <li>different characteristics and conditions of English-language and French-language broadcasting</li> <li>regional needs and concerns</li> <li>scientific and technological change</li> <li>provision of broadcasting to Canadians</li> <li>inhibition of information technology development and their application or delivery of such services to Canadians</li> <li>administrative burden that regulation and supervision may impose: s. 5(2)(a)-(g)</li> </ul>	<p>Must exempt those carrying on broadcasting undertakings from any or all of the requirements in Part 2 if compliance with would not contribute materially to the implementation of the broadcasting policy for Canada: s. 9(4)</p>
<p>May issue guidelines and statements about any matter within its jurisdiction but these do not bind the Commission: s. 6</p>	<p>Must consider s. 5(2) regulatory policy: s. 5(1)</p>
	<p>Must publish proposed regulations in <i>Canada Gazette</i> and give interested persons chance to "make representations" to the CRTC about the regulations: s. 10(3)</p>
	<p>Must accord primary consideration to s. 3(1) broadcasting policy objectives if these conflict with s. 5(2) regulatory policy objectives: s. 5(3)</p>
	<p>Must not regulate employment equity of broadcasters subject to <i>Employment Equity Act</i> : s. 5(4)</p>
<b>CRTC rules</b>	
<p>CRTC may make rules of procedure for making applications and conducting hearings: s. 21</p>	
<b>Licensing</b>	
<p>May establish licence classes: s. 9(1)(a)</p>	
<p>May amend conditions of licence at request of licensee or on own motion if 5 years have passed since licence issued or renewed: s. 9(1)(c)</p>	<p>Must publish notice of any application to amend a licence: s. 19(a)</p>
<p>May issue licences for up to 7 years, subject to conditions related to licensee's circumstances which CRTC deems necessary to implement s.3(1) broadcasting policy: s. 9(1)(b)(i)</p>	<p>Must hold public hearing before granting applications for licences other than temporary networks: s. 18(1)(a)          Must publish notice of licence applications received: s. 19(a)          Must publish notice of decisions to issue licence: s. 19(b)</p>
<p>May renew licences for up to 7 years: s. 9(1)(d)</p>	<p>Must publish notice of renewal applications received: s.19(a)          Must publish notice of decisions to renew licence: s. 19(b)</p>
<p>No public hearing required to issue temporary network licence: s. 18(1)(a)</p>	<p>Must advise Heritage Minister when CRTC finds CBC has breached condition(s) of licence s. 25(1)</p>
<p>May require distribution licensees to give priority to carriage of broadcasting and to Canadian programming: ss. 9(1)(h)</p>	
<b>CRTC hearing panels</b>	
<p>CRTC chairperson may appoint panels of 3 or more Commissioners to hear and determine any matter on behalf of Commission: s. 20(1)</p>	<p>Decisions of a panel appointed by the CRTC chairperson must be made by a majority of the Commissioners on the panel: s. 20(3)</p>

<b>Explicit discretion of CRTC</b>	<b>Explicit limits on CRTC discretion</b>
CRTC hearing panels appointed by the CRTC Chairperson have and may exercise the powers, duties and functions of the CRTC regarding any matter before the panel: s. 20(2)	CRTC hearing panels appointed by the CRTC Chairperson must consult with the Commission to ensure consistent interpretation of the s. 3(1) and 5(2) policies and CRTC's s. 10 and 11 regulations: s. 20(4)
<b>Enforcement</b>	
May hold inquiry into non-compliance: s. 12(1)	
Inquiry panel may order any person to do anything required to be done under Part 2 regulation, licence, decision or order: s. 12(2)	Must hold public hearing before issuing mandatory orders and publish notice of such hearings: s. 18(1)(d) s. 19(c)
CRTC may rescind or vary any panel order, or rehear matter before deciding: s. 12(3)	
May suspend or revoke any licence: s. 9(1)(e)	Must hold public hearing before suspending or revoking licences: s. 18(1)(b)
<b>Research</b>	
May undertake, sponsor, promote or assist in research about any matter within its jurisdiction: s. 14(1)	CRTC must review and consider any technical matter referred by the Heritage Minister: s. 14(2)
CRTC may hold public hearing, make report, issue any decision and give any approval in connection with any complaint or representation made to the Commission if in the public interest to do so: s. 18(3)	CRTC must hold hearings or make reports on any matter within its jurisdiction when requested by Cabinet: s. 15(1)

**1. Mandatory report to Minister concerning CBC regulatory breach not submitted**

While some aspects of the *Broadcasting Act* promote the objectives of transparency and accountability –for instance, by mandating reports on regulatory non-compliance by the CBC, public notifications of applications and decisions, or requiring public hearings to be held about certain matters – actions taken by the CRTC can have the effect of circumventing these objectives. Section 25(1), for instance, requires the CRTC to submit a written report to the Heritage Minister when the Commission finds the CBC in breach of conditions of its licences – and section 25(2) then requires the Minister to notify both the House of Commons and the Senate:

Report of alleged contravention or non-compliance by Corporation

25 (1) Where the Commission is satisfied, after a public hearing on the matter, that the Corporation has contravened or failed to comply with any condition of a licence referred to in the schedule, any order made under subsection 12(2) or any regulation made under this Part, the Commission shall forward to the Minister a report setting out the circumstances of the alleged contravention or failure, the findings of the Commission and any observations or recommendations of the Commission in connection therewith.

Marginal note: Report to be tabled

(2) The Minister shall cause a copy of the report referred to in subsection (1) to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is received by the Minister.

[FRPC research](#) found that when the Commission determined that the CBC had breached a condition of its 2013 French-language television licence “for certain years” ([Decision CRTC 2013-263](#), para. 83), the CRTC did not submit a report to the Minister – who, presumably, was therefore unable to send that report to the House of Commons and the Senate.

## **2. ‘Public’ hearings to issue licences or mandatory orders not open to public**

Section 18(1)(a) requires the CRTC to hold a public hearing before issuing a broadcasting licence, while section 18(1)(d) requires a public hearing in connection with the making of a mandatory order. The *Broadcasting Act* does not define ‘public hearing’ and the CRTC has for some time used the term in relation to hearings to which it invites no outside parties to attend. [FRPC research](#) found that, in 2018, the Commission issued 4 decisions with mandatory orders following hearings to which no members of the public were invited. Decisions 2018-110, 2018-168, 2018-172 involved licensees with three consecutive terms involving non-compliance, while Decision 2018-468 involved a licensee with four consecutive terms involving non-compliance. The same [FRPC research](#) found that, in 2019, the CRTC heard 8 applications for new licences in ‘public hearings’ that were attended only by CRTC Commissioners and CRTC staff.

## **3. CRTC publishes some decisions before or after their applications are made public, and does not publish others at all**

Section 19 of the 1991 *Broadcasting Act* requires notice of the applications it receives and the decisions it makes “to be published in the Canada Gazette and in one or more newspapers of general circulation within any area affected or likely to be affected by the application, decision or matter to which the public hearing relates.”

The *Act* does not define “notice” or “receipt”, and does not stipulate whether the CRTC should publish applications before making decisions about them. [FRPC research](#) has found that of 7% (39) applications made to the CRTC in 2019, 13 were posted on or after the date the CRTC issued the relevant decision.

In analyzing the CRTC’s determinations over the past several years, the Forum found 221 letter decisions that the CRTC did not publish:

71 letter decisions issued in 2017 (including 11 changes in ownership)

58 letter decisions issued in 2018 (including 10 changes in ownership)

39 letter decisions issued in 2019 (including 8 changes in ownership), and

53 letter decisions issued in 2020 (including 2 changes in ownership).

## **B. Discretion granted to CRTC by 1991 Act’s silence**

To the extent that the 1991 *Broadcasting Act* promotes transparency and accountability, the discretion it implicitly grants to the CRTC through the statute’s silence leaves these two goals

unfulfilled in at least seven areas involving decision-making and outcomes. These are summarized below:

Areas in which 1991 Act is silent	
1. Decisions	<p>While Commissioners who dissent from a specific CRTC determination are identified, CRTC determinations are otherwise not signed by those who made the decisions but by the Commission’s Secretary General. The Act does not establish time frames for issuing decisions; of 100 Part 1 applications listed in the CRTC’s Broadcasting Applications Report in 2019, decisions were issued about 55 within 4 months, about 16 within 5 to 11 months and about 6 after 12 months. By Fall 2020, when FRPC undertook its review was undertaking, no decisions were listed for 23 of the 2019 applications.</p> <p>In some cases the CRTC decisions are not published, as in the case of 39 applications listed in the CRTC’s broadcasting applications report for 2019 (whose applications were published either the date of or after the Letter Decisions were issued) .</p>
2. Achievement of objectives of broadcasting policy for Canada	<p>S. 3(2) declares that “the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority” – the CRTC. While section 13(2) of the <a href="#">CRTC Act</a> requires CRTC to submit an annual report to the Minister on its “activities”, neither the CRTC’s <a href="#">Departmental Results Report</a> nor its annual <i>Communications Monitoring Reports</i> (broken into separate <a href="#">broadcasting</a> and <a href="#">telecommunications</a> reports in 2021 and renamed “<a href="#">Current Trends</a>” in late 2021) provide data describing the achievement of section 3 objectives.</p>

### 1. [CRTC committees](#)

S. 11 of the [Canadian Radio-television and Telecommunications Act](#) empowers the CRTC to make by-laws, including the delegation of its duties to committees it creates. CRTC [By-Law No. 26](#) and [By-Law No. 29](#) establish two broadcasting committees whose members (or a quorum of their members) may make decisions concerning among other things

- To hold a public hearing to amend or renew a broadcasting licence
- As to whether the public interest requires public hearings about complaints, representations or any other matter in the CRTC’s jurisdiction, and
- About
  - applications that are not heard at public hearings
  - Administrative licence renewals
  - Certain licence renewal or amendment applications
  - Questions related to procedure

The CRTC does not publish any information about the membership, meetings, minutes or decisions of these committees. ([By-Law No 10](#) also creates a Telecommunications Committee; neither its members, its decisions nor its minutes are published.)

## 2. Delegation

Parliament has delegated its responsibility for regulating Canada’s broadcasting system to the CRTC. Section 10(1)(j) of the *Broadcasting Act* specifically permits the CRTC “or persons acting” on its behalf to audit or examine licensees’ records and books of account.

The CRTC has nevertheless effectively delegated another of its powers elsewhere. Section 18(3) of the *Broadcasting Act* specifically empowers the CRTC to hear and decide complaints about broadcasting – but the CRTC directs those with concerns about programming, advertising or BDU services to non-government entities established by the private sector: the [Canadian Broadcast Standards Council](#) (CBSC), [Ad Standards](#) and [Commission for Complaints about Telecom-television Services](#) (CCTS).

The “A-Z Index” on the CRTC’s website redirects those looking for information about complaints to a page entitled, “Ask a question or make a complaint” and in the case of “concerns about programming” states that “[t]he CBSC is the complaints resolution body for private radio and TV stations and discretionary services” – identifying the CRTC as the appropriate contact only for broadcasters that are not CBSC members.

The CRTC stopped publishing information about the complaints it received about broadcast programming, broadcast advertising and/or broadcast distribution services in 2018; none of the 443 tables in its Open Data list of tables refers either to ‘complaints’ or ‘contacts’.

## 3. Decisions to hear applicants

The CRTC’s own [2010 procedural rules](#) require it to post all applications that meet its rules on its website. [FRPC research](#) found that, in 2019, the CRTC did not post 5% (26) of the applications it had received: the CRTC said that by 2020 five (5) of these applications remained ‘active’ but were not posted, and that 21 others had been returned to or withdrawn by applicants. [FRPC research](#) also found that from 2016 to September 2020 the CRTC received 62 broadcasting applications that it did not post on its website – and the CRTC also disclosed that while it also received other broadcasting or telecommunications applications not post to its website, its decision not to assign numbers to or process the applications meant that it did not know the number of such applications.

The screenshot shows a web page titled "Make a Complaint or Ask a Question" with the subtitle "Tell us what you're looking for and we'll guide you to the right place." Below the title, there is a breadcrumb trail: "TV → Programming → Programming concerns (including violence, offensive language, false or misleading content, and other concerns)". The main text explains that for programming concerns, users should first try to resolve the issue with the station. It then asks, "Is the broadcaster a member of the Canadian Broadcast Standards Council (CBSC)?" and provides information about the CBSC as the complaints resolution body for private radio and TV stations. A blue button labeled "Contact the CBSC" is visible. Below this, there is a section titled "What to do if the broadcaster is not a member of the CBSC." which states that if the broadcaster is not a member, users should contact the CRTC. It also includes a list of required information for a complaint: a description of the problem, the name of the station, and the date and time of the program. A second blue button labeled "Contact us" is at the bottom of this section.

The CRTC's decisions not to process or to return certain applications may be made by CRTC committees that the CRTC established under [three by-laws](#). The work and decisions made by the [Broadcasting Committee](#), [Telecommunications Committee](#) and [Broadcasting committee sub-committee for routine and non-contentious matters](#) are unknown, however, as the CRTC does not publish information about the committees' meetings or their membership. Due to existing quorum rules, it is possible that as few as one or two of the Commissioners may be responsible for decisions of these committees:

Committee	Membership	Appointed by	Quorum
Broadcasting committee sub-committee for routine and non-contentious matters	Three members and one alternate; must include Vice-Chair Broadcasting and one regional member	CRTC Chairperson	"any two members": implies 1 may make a decision?
Broadcasting committee	All members of the CRTC	GIC (which appoints all Commissioners)	"any three members": implies 2 may make a decision?
Telecommunications committee			

#### 4. **'Appearing' vs 'non-appearing' hearings**

The *Broadcasting Act* does not define "public hearing". In the early 2000s the CRTC issued [one decision](#) involving the change in ownership of 134 cable systems (including 21 large Class 1 systems) without hearing the applications at the [public hearing](#) at which they were [scheduled](#). (The lack of a public hearing may have contributed to the absence, in Decision CRTC 2000-419, of any discussion of the tangible benefits that, under the [then-current 1993 benefits policy](#), would have applied to these applications.<sup>1</sup>)

<sup>1</sup> The applications resulted from the "major deal" announced by Rogers Communications and Shaw Communications on 23 March 2000 to "swap" some of their "cable assets":

...

Under the deal Shaw will pick up Roger's [*sic*] cable assets in British Columbia, primarily in the Vancouver market in exchange for Shaw's cable operations in Ontario and Quebec. ... The new cable operations when combined with Rogers' proposed merger with Videotron, will create a super-cluster of approximately, 3.5 million customers in Ontario and Quebec connected by fibre. ....

CBC News, "Rogers, Shaw swap cable assets, strike Internet alliance", (23 March 2000, 8:14 PM ET, Last Updated: 11 November 2000), <https://www.cbc.ca/news/business/rogers-shaw-swap-cable-assets-strike-internet-alliance-1.229973>.

The CRTC's [1993 tangible benefits policy](#) was then in force, and provided that benefits were to be 'paid' by cable systems: *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1993-68 (Ottawa, 26 May 1993), <https://crtc.gc.ca/eng/archive/1993/pb93-68.htm>. (While the CRTC revised its BDU policy in [1997](#), it did not state that the 1993 benefits test did not apply to BDUs:

D. Transfers of Ownership and Control

220. The Commission's existing regulations permit a transaction to take place, without the need to obtain prior Commission approval, that results in a person holding less than 30% of the voting interests of a licensee company, provided that there is no change in effective control of the licensee. Prior approval is required for

The Forum reviewed the 1,198 public hearing transcripts from 1998 to 2018 which were posted on the CRTC's website. Of these transcripts, 1,179 involved broadcasting or broadcasting-telecommunications matters. Non-appearing hearings – attended only by CRTC Commissioners and CRTC staff – were first identified in the transcripts in 2005, and involved only broadcasting or broadcasting-telecommunications matters. (All telecommunications hearings were 'appearing'.) Of the 1,179 broadcasting hearings, 352 (29%) were 'non-appearing' hearings attended only by CRTC Commissioners and CRTC staff; neither applicants nor interveners are invited to attend. The first transcripts for CRTC non-appearing hearings were issued in 2005; while the numerical balance between appearing and non-appearing hearings changes frequently, by 2013 the CRTC held more non-appearing hearings (59) than appearing hearings (24).

As noted previously, [FRPC research](#) found that, in 2019, the CRTC held non-appearing public hearings issuing decisions in matters whose procedure – public hearings – was stipulated by the *Act*: new licences and mandatory orders. The only persons attending these public hearings were CRTC Commissioners and CRTC staff. It is unclear who decides which hearings should invite non-CRTC participants; presumably the only remedy available to those who might wish to appear before the CRTC hearing panel is a writ of mandamus. In any event, given Parliament's decision in 1991 to require 'public hearings' for specific broadcasting matters, should the CRTC's use of non-appearing hearings to address those matters be viewed as a matter fully within its jurisdiction, or a flouting of Parliament's authority that new broadcasting legislation could and should address?

## **5. Decision-makers**

The *Broadcasting Act* does not require the CRTC to identify the Commissioners who make determinations on behalf of the full Commission, for instance, and all determinations of the Commission – from decisions and policies to information bulletins – are instead issued by the CRTC's Secretary General on behalf of the Commission. Decisions of other Federal tribunals – the Canada Agricultural Review Tribunal, Canadian Human Rights Tribunal, Canada Industrial Relations Board, Competition Tribunal and the Copyright Board of Canada – all make it a practice to identify the decision-makers.

Many CRTC licensing decisions and policies are made by panels of CRTC Commissioners. Hearing panels "deal with, hear and determine any matter on behalf of the Commission" (s. 20(1)).

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any transaction that results in an increase in a person's holdings to 30% or more of the voting interests. The Commission proposed in Public Notice CRTC 1996-69 to include these same provisions in the new regulations. 221. In its written comments, Stentor proposed that prior approval of non-controlling acquisitions and intra-corporate transactions should not be subject to any application or approval process, even where such a non-controlling transaction would result in a person holding 30% or more of the voting interests.)

222. The Commission considers that the existing threshold for determining whether prior Commission approval is required remains appropriate. Accordingly, it intends to include in the new regulations ownership provisions similar to those that exist in the existing regulations.

Section 20(1) of the *Broadcasting Act* empowers the CRTC chairperson to establish such panels, “consisting of not fewer than three members of the Commission”. The CRTC chairperson’s reasons for selecting specific panel members are not published.

[By-law No. 29](#) authorizes the CRTC’s Chairperson to appoint members of the CRTC subcommittee that makes decisions as to whether applications are “routine and non-contentious”, and section 20(1) of the *Broadcasting Act* empowers the Chairperson to select the members of CRTC hearing panels.

While CRTC Commissioners on hearing panels self-identify when they offer ‘dissenting’ views on matters under consideration, CRTC determinations are otherwise unsigned except by the CRTC’s Secretary General. The only way to identify which Commissioners have made decisions is to examine the transcripts of CRTC hearings – if held. Some determinations are issued without public hearings, including Information Bulletins.

In 2018, [FRPC research](#) using public hearing transcripts from 1998 to 2018 found that CRTC Commissioners did not have the same chance of being appointed to CRTC hearing panels. Individual Commissioners’ participation in hearings increased or decreased when new CRTC Chairpersons were appointed; some Commissioners appeared three to four times more often on hearing panels than colleagues appointed in the same general time period and women’s representation as panel Chairpersons decreased from the late 1990s to the 2010s.

## **6. Fulfilment of mandate**

In thinking about the CRTC’s role under the 1991 *Broadcasting Act* and Bill C-10, two elements are of special relevance. The first involves the reason that Parliament created the CRTC, and the second involves the CRTC’s own choices about its work.

In terms of mandate, the *Broadcasting Act* implies that the CRTC exists to ensure, through its regulation and supervision, that Parliament’s broadcasting policy is met: subsection 3(2) states that “the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority” – the CRTC. Although section 10(1)(i) enables the CRTC to collect licensees’ programming information, very little is known about the degree to which the broadcasting policy’s objectives have been or are being met because the CRTC does not publish results from its collection of this information.

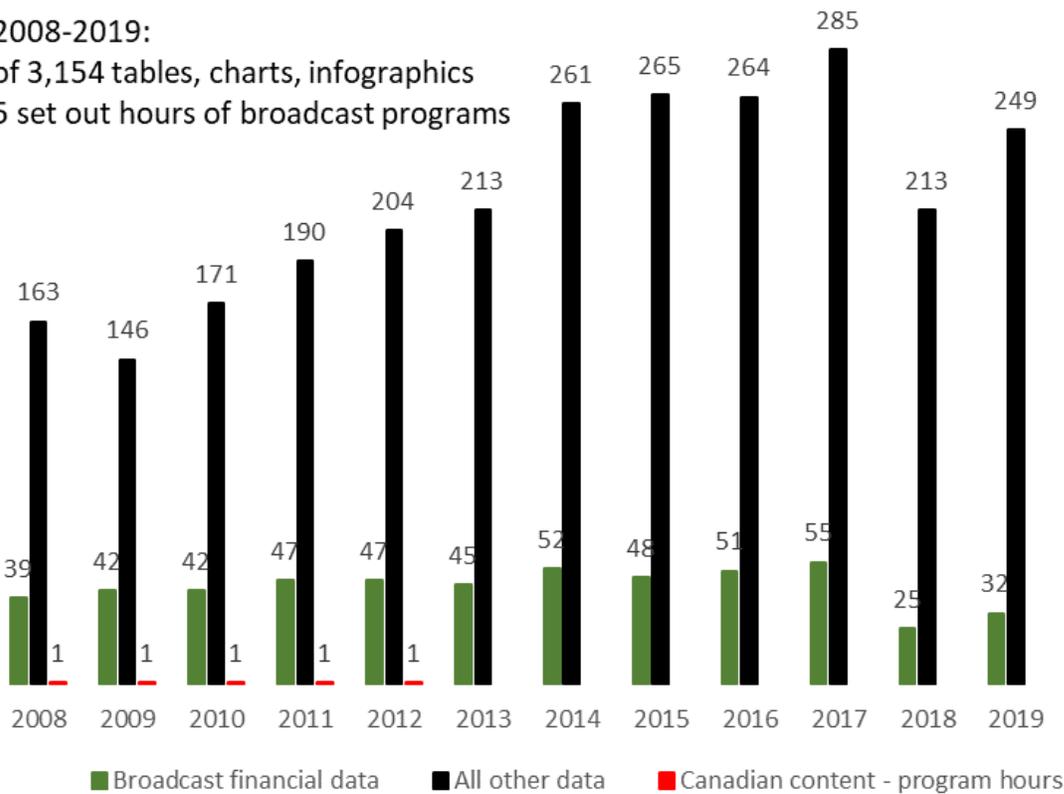
While section 13 of the *CRTC Act* requires the CRTC to submit a report on its activities to the Heritage Minister each year, neither this *Act* nor the *Broadcasting Act* requires the report to include information about the implementation of Parliament’s broadcasting policy for Canada.

Neither the CRTC’s [Departmental Results Report](#) nor its annual *Communications Monitoring Reports* (renamed “[Current Trends](#)” in late 2021 and broken into separate [broadcasting](#) and [telecommunications](#) reports) provide data describing the achievement of section 3 objectives.

FRPC found that the Commission last reported information about the programming broadcast by its licensees in 2013, when it published a single table setting out the number of hours of Canadian priority programming broadcast annually in the evening (from 7 pm to 11 pm). In the absence of subsequent publication of quantitative information about programming, it is unclear whether or how the CRTC is currently implementing Parliament’s broadcasting policy for Canada. Of the more than three thousand tables, charts and infographics published by the CRTC in twelve *Communications Monitoring Reports* from 2008 to 2019, just five (5) presented data about broadcast programming:

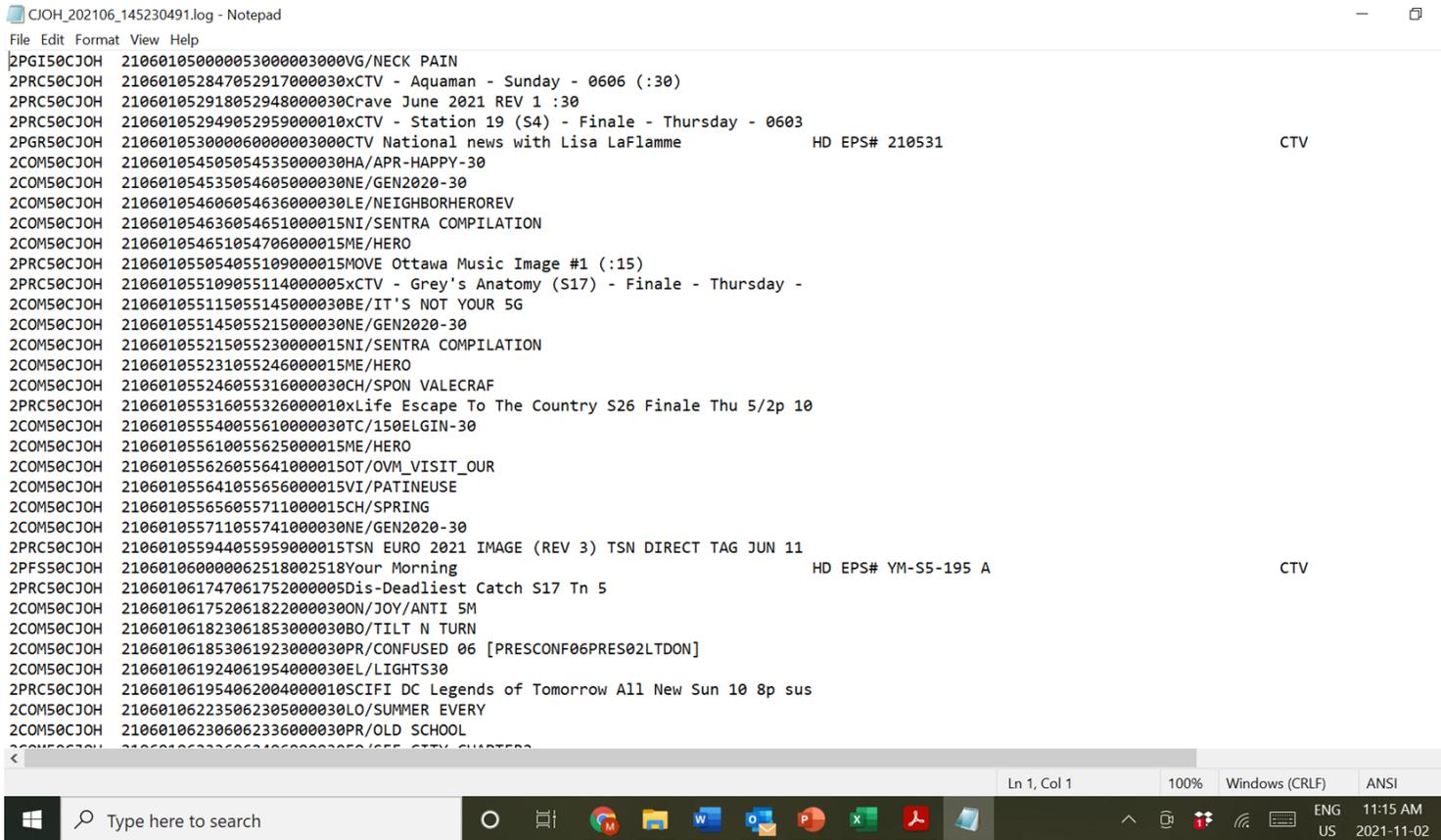
### *CRTC, Communications Monitoring Reports, 2008-2019*

2008-2019:  
of 3,154 tables, charts, infographics  
5 set out hours of broadcast programs



The CRTC makes limited information about broadcast programming available to the public. If resourced to interpret them, the public can access and download the monthly logs submitted by conventional and discretionary Canadian television programming services at <https://open.canada.ca/data/en/dataset/800106c1-0b08-401e-8be2-ac45d62e662e>. The CRTC does not make logs for radio programming services available.

Unfortunately, the TV logs made available by the CRTC are not intuitive, consisting of columns and thousands of rows of data. The following June 2021 log for CJOH-DT is typical of the logs posted by the CRTC:



While possible to analyze through spreadsheet programs, relatively few Canadians have the time and resources required to undertake a comprehensive review of such information presented in this form.

A second aspect of the CRTC’s mandate involves the work it undertakes. Like every other part of Canadian government, the CRTC and its operations have been affected by the global Covid-19 pandemic. Its work was put on hold for much of 2020, and it undertook fewer proceedings than usual in 2021. That said, information exists about the CRTC’s operations before the pandemic struck. The Forum compared the number of determinations – being policies, notices, decisions and orders – issued by the Commission with respect to broadcasting and telecommunications over time: though the CRTC operates even when it does not publish determinations about proceedings or other matters, public information about the CRTC’s work in relation to its mandate consists of its published determinations and is easy to collate.

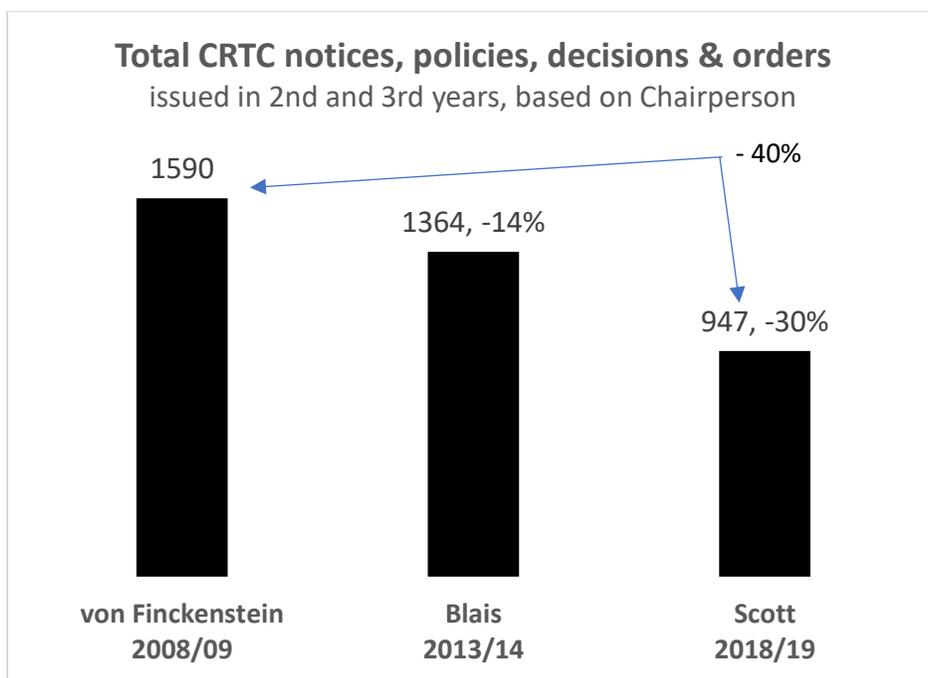
Rather than simply comparing Commission determinations over time, we decided to look at the CRTC’s work output in terms of its Chairperson who, under section 6 of the *CRTC Act* is responsible for supervising and directing the work of the Commission:

6 (1) The Governor in Council shall designate one of the members to be Chairperson of the Commission and two of the members to be Vice-Chairpersons of the Commission.

(2) The Chairperson is the chief executive officer of the Commission, has supervision over and direction of the work and staff of the Commission and shall preside at meetings of the Commission.

As previously mentioned, the global pandemic has affected the CRTC since 2020. The current CRTC Chairperson (Ian Scott) was appointed in September 2017. The first two full calendar years of his term were 2018 and 2019. We compared the number of broadcasting and telecommunications determinations<sup>2</sup> issued in this two-year period, with the first two calendar years of work of the two previous CRTC Chairpersons: Jean-Pierre Blais, Chairperson from 2012 to 2017: first two full calendar years of work being 2013 and 2014; and Konrad von Finckenstein, Chairperson from 2007 to 2012: first two full calendar years of work being 2008 and 2009.

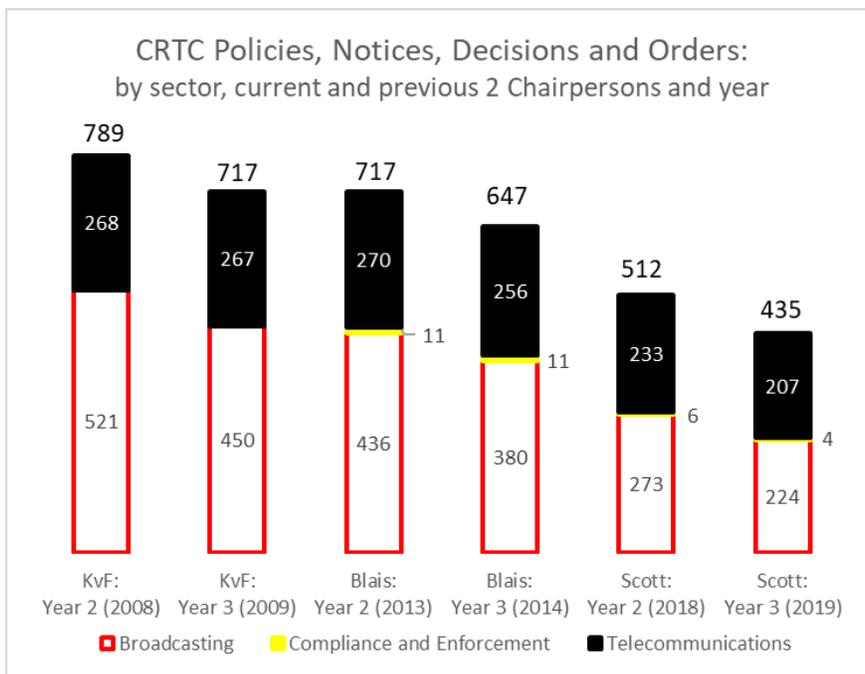
The number of determinations for comparable periods of each Chairperson's term decreased over time, between Chairpersons and overall. CRTC determinations decreased by 14% from Chairperson von Finckenstein to Chairperson Blais, by 30% from Chairperson Blais to Chairperson Scott, and overall by 40% from Chairperson von Finckenstein to Chairperson Scott:



It may be that the introduction of Bill C-10 to the House of Commons in late 2019 affected the number of determinations issued by the CRTC in the third full calendar year of Chairperson Scott's term – 435, a 15% reduction from the 512 determinations issued in Chairperson Scott's second full calendar year. That said, the number of determinations issued by the CRTC in the second year of Chairperson Blais' term – 717 – was just 9% lower than the number issued in the second year of Chairperson von Finckenstein (789). In comparison the number of

<sup>2</sup> Policies, notices, decisions and orders.

determinations issued in the second year of Chairperson Scott’s term – 512 – was 29% lower than the number of determinations issued in the second year of his predecessor, Chairperson Blais:



Another way of thinking about the CRTC’s work is to compare the CRTC’s activities under the 1968 *Broadcasting Act* with today’s work under the 1991 *Act*. The CRTC’s 1986/87 *Annual Report* reported that the Commission

- Heard 301 broadcasting applications in public hearings
- Heard 10,143 interveners at broadcasting hearings
- Considered 3,079 broadcasting applications (to issue, amend, renew radio, television and distribution undertakings or to change their ownership)
- “received over 14,000 calls from the public concerning both broadcasting and telecommunications” and
- Answered “1,940 verbal and 3,038 written complaints and requests for inquiries [sic] about telecommunications”

In comparison the CRTC’s 2018/19 and 2019/20 *Departmental Results Reports* provided no information about

- the complaints it received or considered (pursuant to sections 18(3) and 21(a))
- the representations it received or considered (pursuant to sections 18(3) and 21(a))
- the interventions it received and considered (pursuant to section 7(4)) or

- the applications submitted to it and/or considered by it (pursuant to sections 19(a) and 21(a))

### *C. Changes to discretion and limits introduced by Bill C-10*

The broadcasting policy set out in Bill C-10's new section 3 would have increased the broadcasting objectives over which the CRTC would have discretion to implement.

The 1991 *Broadcasting Act* has 59 objectives, of which 51 (86%) were discretionary – in that they lacked the mandatory language (“shall” or imperative tense) used by the remaining 8 objectives.

Bill C-10's broadcasting policy for Canada includes 74 objectives, of which 60 (81%) are discretionary. The 14 new mandatory objectives include new requirements

- to support official languages and official language minority communities in Canada (Bill C-10, s. 2(3)(b))
- that each Canadian broadcasting undertaking employ Canadians to create, produce and present programming (Bill C-10, s. 3(1)(f))
- that “each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming ....” (Bill C-10, s. 3(1)(f.1)), and
- for online undertakings to “clearly promote and recommend Canadian programming, in both official languages as well as Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery” (Bill C-10, s. 3(1)(r)).

### *D. Cabinet's new power to regulate online registration*

Had the Senate passed Bill C-10 as presented by the House of Commons it is likely that a new ‘registration’ regime would have been developed for online broadcasters since section 10(1)(i) of Bill C-10 empowered the CRTC to set regulations “respecting the registration of broadcasting undertakings with the Commission”. Registration may include or be limited to online undertakings, as Bill C-10 defines “broadcasting undertaking” as “a distribution undertaking, an online undertaking, a programming undertaking and a network”.

The breach of such regulations could result in the imposition of new administrative monetary penalties – making it important to understand what the House of Commons understood by the term ‘registration’.

Where the 1991 *Broadcasting Act* established a relatively complete framework for licensing, Bill C-10 is silent about every aspect of registration beyond the mere fact that the CRTC may regulate registration.

To put the lack of any framework for registration in context, the 1991 *Broadcasting Act* establishes that it is an offence to broadcast without a licence if required to hold a licence (s. 32(1)). The *Act* expressly empowers to the CRTC to create classes of broadcast licence, to issue, suspend or revoke such licences, to set the terms and conditions of such licences, to renew licences for up to seven years, to exempt persons from the requirement to hold licences (s. 9(4)), and collect programming and financial information from licensees (s. 10(1)((i) and (j))).

<b>1991 Act's provisions for licensing</b>	<b>Bill C-10's provisions for registration</b>
Offence to broadcast without a licence or if not exempted from requirement to hold licence: s. 32(1))	Offence to broadcast without a licence, if not exempted from requirement to hold licence, but "a person may carry on an online undertaking without a licence and without being so exempt" (31.1(2))
CRTC may	9 (1) Subject to this Part, the Commission may, in furtherance of its objects, (a) establish classes of licences other than for online undertakings;
Establish licence classes: s. 9(1)(a)	
• Issue, suspend or revoke licences: s. 9(1)(b),(d)	
• Exempt persons from requirement to be licensed: s. 9(4)	
• Set licence terms and conditions: s. 9(1)(b)	
• Renew licences up to 7 years: s. 9(1)(b)	10 (1) The Commission may, in furtherance of its objects, make regulations
• Collect licensees' programming information: s. 10(1)(i)	
• Collect licensees' financial information: s. 10(1)(i)	
• Audit or examine licensees' records and books of account: s. 10(1)(j)	... (i) respecting the registration of broadcasting undertakings with the Commission;

Another striking feature of Bill C-10 is that its new section 7.1 would now enable Cabinet to issue orders to the CRTC about the regulations it makes under section 10(1). Would it be possible, therefore, for Cabinet to order the CRTC to establish specific regulations for the registration of broadcasting undertakings? If so, does this effectively transfer to Cabinet regulatory functions previously solely within the purview of the CRTC as an independent administrative tribunal?

With this background in mind, I am pleased to introduce the second panel of the PIAC-FRPC conference on Bill C-10. It deals with the question of whether Bill C-10's grant of discretion to the CRTC will ensure implementation of Canada's broadcasting policy, and is moderated by Mr. Jeffrey Dvorkin. The four panellists are: Bram Abramson, Ken Engelhart, Monica Song and Jay Thomson.