



Bill C-11

*An Act to amend the Broadcasting Act and to
make related and consequential
amendments to other Acts*

**Practical and Necessary Changes
To ensure that the *Online Streaming Act* achieves
Parliament's goals**

Remarks to the
Senate Standing Committee on
Transport and Communications

By the Forum for Research and Policy in Communications (FRPC)

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Monica Auer, Executive Director
execdir@frpc.net

CHECK AGAINST DELIVERY

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Introduction

- 1 FRPC is a non-profit organization that undertakes empirical, policy and legal analysis of Canadian communications.
- 2 We support C-11's passage by the Senate, if amended.
- 3 Our remarks address the rationale for Canada's broadcast laws, C-11's improvements and its problems.

I. Why does Canada have broadcasting legislation?

- 4 Many people believe that broadcast laws are obsolete because the Internet has solved spectrum scarcity.
- 5 But Canada's broadcast laws also wired the nation, protected national security during two World Wars, limited harmful broadcasts and ensured broadcast warnings during local emergencies. They reduced foreign broadcasters' destabilizing impact on Canadian broadcasters, in return for their production of important programming such as Canadian news.

House of Commons, *Debates* (18 May 1932) at 3035-3036 (Right Hon. R.B. Bennett, then Prime Minister):
First of all, this country must be assured of complete control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control, radio broadcasting can never become a great agency for communication of matters of national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which national consciousness may be fostered and sustained and national unity still further strengthened
Secondly, no other scheme than that of public ownership can ensure to the people of this country, without regard to class or place, **equal enjoyment of the benefits and pleasures** of radio listening. Private ownership must necessarily discriminate between densely and sparsely populated areas. ... It does not seem right that in Canada the towns should be preferred to the countryside or the prosperous communities to those less fortunate. ...
Then there is a third reason to which I might refer, and one which I believe must commend itself to every hon. Member in this chamber. The use of the air, or the air itself, ... is a natural resource over which we have complete jurisdiction under the recent decision of the privy council [and which] the crown holds ... in trust for all the people. ... **I cannot think that any government would be warranted in leaving the air to private exploitation and not reserving it for development for the use of the people.**

- 6 C-11 builds on these principles.

II. What does Bill C-11 propose?

- 7 Its most helpful changes are in Part II of the *Broadcasting Act*. They clarify the CRTC's powers over individual broadcasters, and empower it to levy fines for non-compliance.

III. Drafting contradictions, errors and omissions – and practical solutions

- 8 Unfortunately, C-11 is also incoherent, makes errors and leaves gaps.

A. *Incoherence: when text contradicts intent*

- 9 Clear and coherent laws state Parliament's intent,¹ but C-11 is not coherent.

- 10 Where Parliament declared that broadcasters should be regulated, C-11 empowers the CRTC to regulate user-uploaded content and in turn, users, directly and indirectly.

- 11 Dropping 4.1 and 4.2 aligns the bill with Parliament's intent to regulate broadcasters' operations, not Internet user uploads.

- 12 C-11 also contradicts Parliament's declaration that "a single independent public authority" regulate broadcasters, by giving Cabinet final say over nearly all CRTC decisions, orders and regulations.

Elmer A. Driedger, *The Construction of Statutes*, 2d. ed. (Toronto: Butterworths, 1983), at p. 106 [bullets and bold font added]:

It may be convenient to regard 'intention of Parliament' as composed of four elements, namely

- The **expressed intention** – the intention expressed by the enacted words;
- The **implied intention** – the intention that may legitimately be implied from the enacted words;
- The **presumed intention** – the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and
- The **declared intention** – the intention that Parliament itself has said may be or must be or must not be imputed to it.

¹ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at p. 3.

<p><i>Broadcasting Act</i>, 1991, s. 3(2): Further declaration [3](2) It is further declared that the Canadian broadcasting system constitutes a single system and 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.</p>
<p>Bill C-11, s. 7 (adding new (7)); 11(10) (replacing s. 10(2) of the Broadcasting Act), and s. 28 (adding Part II.2 AMPs)</p>
<p>For greater certainty 7 For greater certainty, an order may be made [by the Governor in Council] under subsection [7](1) with respect to orders made under subsection 9.1(1) or 11.1(2) or regulations made under subsection 10(1) or 11.1(1). ... 10(1.2) The Governor in Council may make regulations prescribing matters that the Commission is required to consider under paragraph 10(1.1)(e).¹ ... 34.995 The Governor in Council may make regulations ~ <i>about exceptions, maximum penalty, factors to consider, undertakings</i>, “generally for carrying out the purposes and provisions of this Part.”</p>

13 Compared to the current Act, C-11’s re-politicization of broadcast regulation will further erode Canadians’ trust in government and the broadcast media, as well as accountability: courts are loath to interfere in Cabinet’s decisions.

14 7(7), 10(1.2) and 34.995 should be dropped.

15 Third, C-11 reaffirms that broadcasters enjoy “freedom of expression” and that Canadians are entitled to “differing views on matters of public concern”.

Standing Senate Committee on Transport and Communications, *Evidence*, Associate Assistant Deputy Minister, Cultural Affairs, Canadian Heritage, (Ottawa, 22 June 2022) [bold font added]:
... The Broadcasting Act is fundamentally about promoting those voices and making sure they’re part of the system. **This isn’t about limiting speech.** ... There’s a long-standing provision in the existing act that talks about how the act has to be applied in a way that respects creative and journalistic independence and freedom of speech.

<p>Bill C-11, ss. 2(3) (amending Act, s. 2(3)) and 3(7) (amending Act, s. 3(1)(s)(v)):</p>
<p>Interpretation 2(3) This Act shall be construed and applied in a manner that is consistent with (a) the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings; Broadcasting Policy for Canada Declaration 3(1) It is hereby declared as the broadcasting policy for Canada that</p>

...
 (i) the programming provided by the Canadian broadcasting system should
 ...
 (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern and to directly participate in public dialogue on those matters including through the community element; ...
 ...
 (s) the programming provided by the community element should
 ...
 (v) through community participation, strengthen the democratic process and support countering disinformation

16 A late addition by the Heritage Committee during its amendments to C-11, unavailable to witnesses who testified before that Committee, would now also enable the CRTC to address “disinformation” and greatly widen its authority over broadcast speech.

17 3(1)(s)(v) should be dropped.

B. Errors in drafting

18 As for errors C-11 uses a definition of ‘decision’ that differs from the *Telecommunications Act*. Consistent expression requires the same definitions.

Telecommunications Act, 1993, s. 2(1):	
decision includes a determination made by the Commission in any form; (décision)	décision Toute mesure prise par le Conseil, quelle qu’en soit la forme. (decision)
Bill C-11, s. 2(2) (amending s. 2(1) of the Broadcasting Act):	
decision means any measure of any kind taken by the Commission; (décision)	décision S’entend de toute mesure prise par le Conseil quelle qu’en soit la forme. (decision)

19 C-11 at last requires the CRTC to disclose its evidence and thinking – but only to some communities that its decisions would affect adversely.

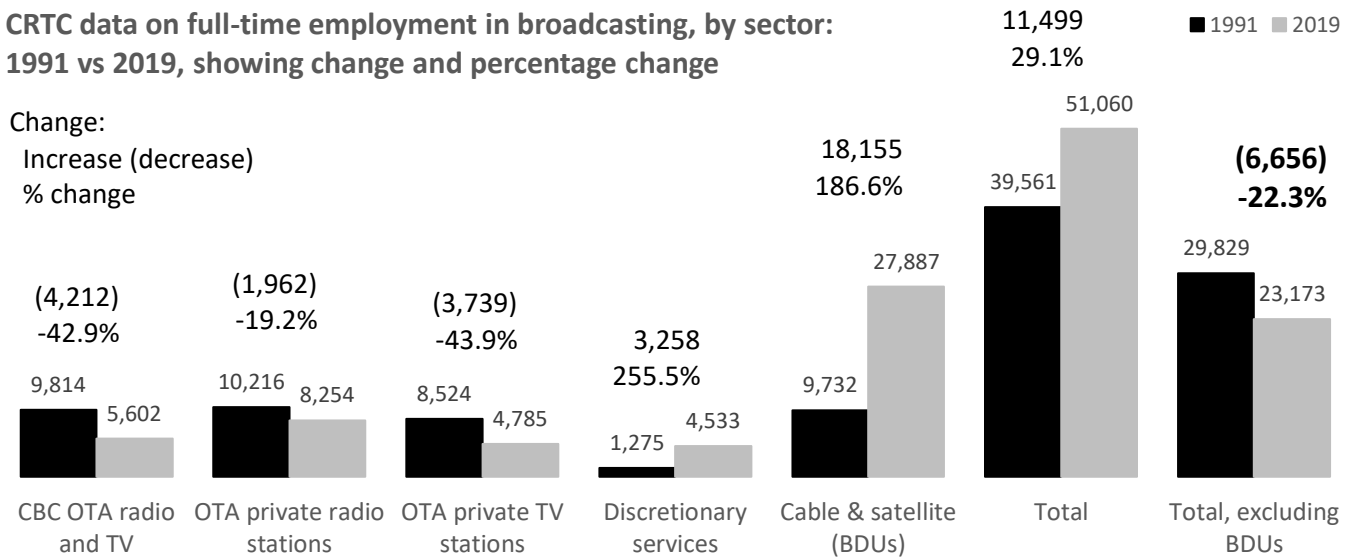
Bill C-11, s. 6 (amending s. 5(2) of the Broadcasting Act):
Consultation
5.2 (1) The Commission shall consult with English and French linguistic minority communities in Canada when making decisions that could adversely affect them.
Objectives of consultations
(2) When engaging in consultations required by subsection (1), the Commission shall
(a) gather information to test its policies, decisions and initiatives;
(b) propose policies, decisions and initiatives that have not been finalized;

20 5.2(1) should give transparency and accountability to all Canadians, in all CRTC proceedings.

- 21 And – though perhaps less an error than a choice – using “should” instead of “shall” in 33 (85%) of the broadcast policy’s 39 clauses makes them optional.
- 22 It is difficult to measure this empirically as the CRTC does not publish yearly data about broadcast programming.
- 23 But the '91 Act’s use of “should” in relation to “employment opportunities” apparently gave the CRTC the discretion to ignore the loss of a fifth of radio and TV jobs from 1991 to 2019:

Standing Senate Committee on Transport and Communications, *Evidence*, Associate Assistant Deputy Minister, Cultural Affairs, Canadian Heritage, (Ottawa, 22 June 2022):
 [Bill C-11] “... would also **continue to support the more than 120,000 jobs these industries generate** while serving the interests of all Canadians.”

CRTC data on full-time employment in broadcasting, by sector: 1991 vs 2019, showing change and percentage change



Source: CRTC, *Statistical and financial summaries*, various sectors and years

- 24 In fact, by ignoring employment the CRTC has literally recreated Baron Thomson’s ‘licence to print money’. In 2019, 50 Canadian discretionary services that each earned more than \$1 million employed no one at all:
- 25 If Parliament wants goals like employment to be met, it should use “shall”, not “should” or “may”.

CRTC, Individual Discretionary and On-Demand Services: Statistical and Financial Summaries, 2016-2020	
Number of discretionary services reporting in 2019:	187
Number with financial data	165
Total revenues	\$1,019 M
Number with revenues and zero staff	61
Zero staff and more than \$1 million in revenues:	
Number	50
Average revenue	\$8.2 M
Total revenue	\$517 M

C. Gaps and omissions ignore 21st century approach to governance

26 Finally, C-11 has gaps. It explains licensing, but says nothing about the scope, operation or application of registration.

<p><i>Broadcasting Act, 1991: synopsis re licensing</i></p>	<p>Bill C-11, s. 11 (8) (replacing ss. 10(1)(i) of the Broadcasting Act):</p>
<p>Scope: 4(2) Act applies to broadcasting undertakings “carried on in whole or in part within Canada” Operation 32 (1) Offence to broadcast without a licence unless exempt 32(2) Contravening regulations or orders constitutes an offence 33 Contravening conditions of licence constitutes an offence 18 (1) CRTC must hold public hearing [undefined term] to (a) issue a licence (b) suspend or revoke a licence; 19 CRTC must publish notice of [but not documents themselves] (a) any application it receives to issue, amend or renew licences (b) any decision to issue, amend or renew licences (c) any public hearing re licensing 9 (1) CRTC may (a) establish classes of licences; (b) issue licences for up to 7 years and subject to conditions Application [9](4) CRTC shall exempt persons from requirement to hold licence if its compliance with the Act “will not contribute in a material manner to the implementation of the broadcasting policy”</p>	<p>[10(1) The Commission may, in furtherance of its objects, make regulations ... (i) respecting the registration of broadcasting undertakings with the Commission</p> <p>Bill C-11, s. 29(2) (adding after s. 38 of the Broadcasting Act):</p> <p>[38] (3)(c) ~ Sets out eligibility requirements for Directors of the CBC, including a prohibition on those with ownership or control interests in a broadcasting undertaking that ... “ must be registered with the Commission under regulations made under paragraph 10(1)(i)”</p>

27 It permits anonymous decision-making that reduces accountability.

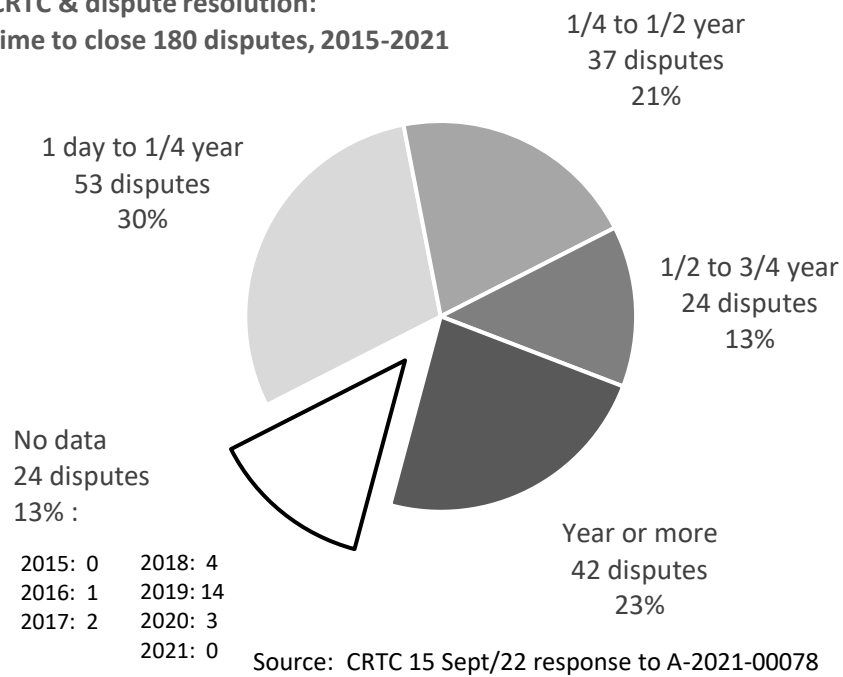
28 It condones untimely decision-making.

29 The CRTC’s data show that its spending rose 52% in real terms from 1991 to 2019, and its staffing by 21% (see charts next page).

30 Why, then, did it take more than half a year to close a third of the 180 disputes it mediated between 2016 and 2021?

31 Broadcasting is a business for many. Delays cost them money, time, lost opportunities – and disadvantage smaller broadcasters.

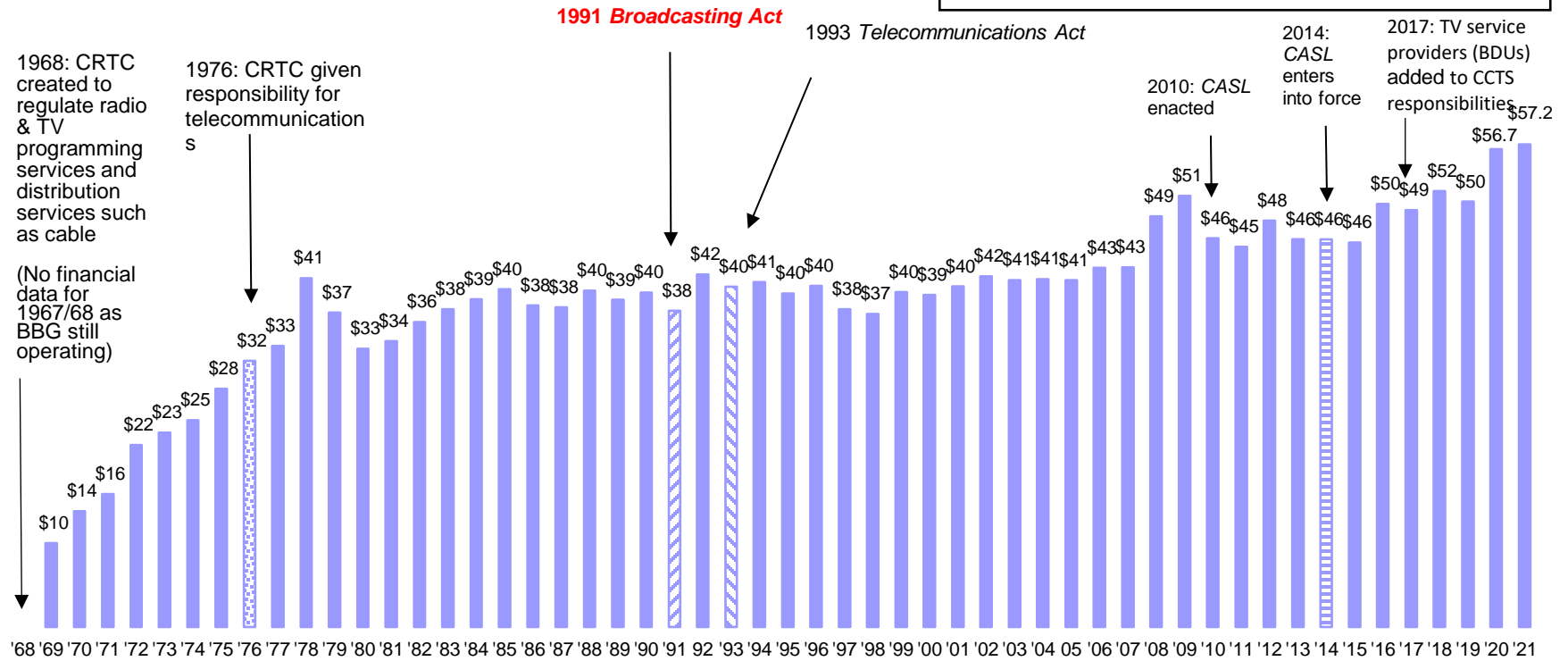
CRTC & dispute resolution: time to close 180 disputes, 2015-2021



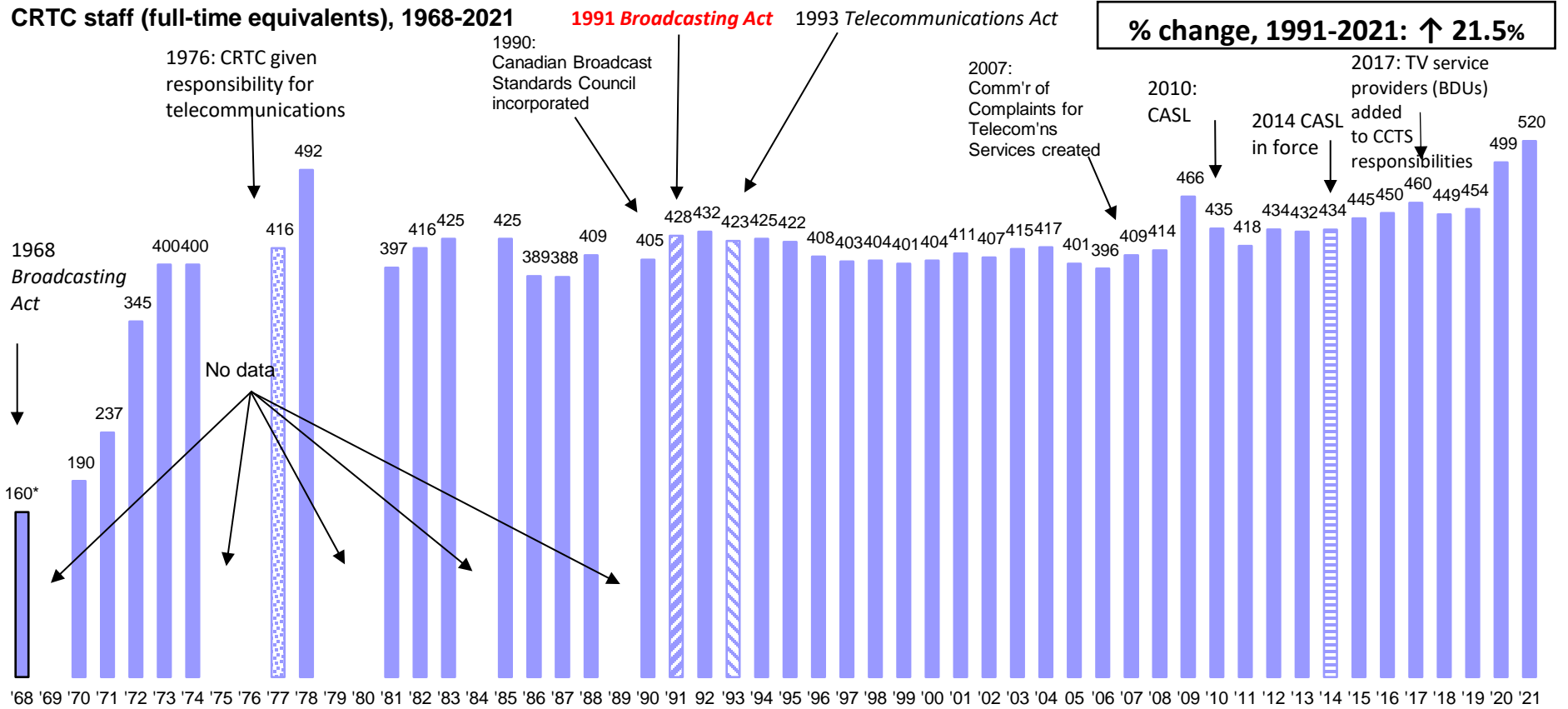
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CRTC annual expenditures, 1969-2021 (constant 2002 \$M)

% change in real terms, 1991-2021: 52.6%



Sources: CRTC Annual Reports, Performance Reports and Annual Plans



Source: CRTC Annual Reports, Performance Reports, Part III Estimates and three-year plans

* Staff transferred from other government departments

IV. Conclusion

32 Changing C-11 will not matter if the CRTC still ignores the Act.

Standing Senate Committee on Transport and Communications, *Evidence*, Associate Assistant Deputy Minister, Cultural Affairs, Canadian Heritage, (Ottawa, 22 June 2022) [bold font added]:

... once the bill achieves Royal Assent, the CRTC at that point would begin its regulatory processes and hearings to put in place the necessary regulatory instruments to bring the online streaming platforms into the system. As for what that will look like in practice, **the CRTC is skilled in this**. They are used to doing these kinds of hearings. They would put up a notice and invite submissions about the forms that those would take. It would be open to all interested parties to participate in those processes, including online streaming services, the creative community here in Canada and groups representing the public interest. Then the CRTC would enter into its decision-making and publish its final decision at the end.

33 It now holds public hearings without any witnesses. It does not hold the public hearings mandated for mandatory orders. It does not publish all applications it receives, and keeps some decisions hidden from public view altogether. It has not filed mandatory reports about CBC's non-compliance (see CRTC decisions [2000-1](#), [2004-531](#) and [2013-363](#)) for at least 22 years.

Broadcasting Act, 1991:

Mandatory orders

[12](2) The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part, under any regulation, licence, decision or order made or issued by the Commission under this Part

Where public hearing required

18 (1)(d) Except where otherwise provided, the Commission **shall** hold a public hearing in connection with ... the making of an order under subsection 12(2).

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.

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.

- 34 Even Cabinet agreed last week (Order in Council [2022-0995](#)) that the CRTC did not implement the Act's broadcasting policy when it renewed the licences of Canada's national public broadcaster.
- 35 If the CRTC cannot implement the broadcast policy now, will it serve the public interest in regulating online broadcasting? We fear not.
- 36 One easy solution is to enable effective oversight of the CRTC, by mandating transparency. C-11 should at least require the CRTC to publish annual objective data about its implementation of each clause of Parliament's broadcasting policy. This would facilitate public discussion of the policy, and strengthen CRTC accountability.
- 37 In brief, FRPC respectfully asks the Senate to ensure that in updating the *Broadcasting Act* for 21st century media, it also update its approach to coherent drafting standards, transparency, accountability and timeliness.

Standing Senate Committee on Transport and Communications, *Evidence*, Associate Assistant Deputy Minister, Cultural Affairs, Canadian Heritage, (Ottawa, 22 June 2022) [bold font added]:

...

We're asking the CRTC to do its job as an expert regulator and work with industry to actually articulate that in a meaningful way that makes sense for industry. ...

Thank you for your time; I'd be pleased to answer any questions you have.