



## The CRTC and 21<sup>st</sup> century expectations of openness, transparency and accountability: a month of comments on how Parliament's delegate performs its responsibilities

### 7: *Openness means disclosing relevant evidence*

7 March 2023

*This is the sixth of a series of comments by FRPC about the openness, transparency and accountability of the Canadian Radio-television and Telecommunications Commission (CRTC). Parliament established the CRTC on 1 April 1968 and delegated responsibility to it for implementing Parliament's broadcasting and telecommunications policies for Canada.*

*The Ministers of Canadian Heritage and Innovation, Science and Economic Development wrote Chairperson Eatrudes in early February 2023 to offer congratulations on her appointment to the Commission<sup>1</sup> and also to "inform her of the Government's vision and priorities with respect to Canada's broadcasting and telecommunications system".<sup>2</sup> The Ministers referred to "a perception among many that access to CRTC processes is unequal" for the public and civil-society organizations. Among other things the Ministers expressed confidence in the new Chairperson's ability to see to the CRTC's "to being more open ...".*

While the CRTC welcomes participation by the public in most of its proceedings<sup>3</sup> it bases its decisions on the evidence on the record in these proceedings. The general rule, according to the [Federal Court of Appeal in 2016](#), "is that only the evidence that was before the administrative decision-maker is admissible" when it comes to court challenges of such decisions. The CRTC said in [2019](#) that it requires "evidence of serious, recurring, deliberate or material non-compliance" with its regulations to take regulatory action in broadcasting matters, and in [2015](#) said it needed evidence before initiating certain telecom proceedings, including in [2011](#) evidence of inadequate market forces or market failure. It said in [2016](#) that it needed evidence to expedite its consideration of certain broadcasting matters such as the cancellation of all local news by an ethnic programming service, and in [2019](#) denied one telecom application because of eight failures to provide evidence the CRTC wanted.

So while the Commission welcomes public participation in its proceedings, members of the public and civil-society organizations must deal with several difficulties in obtaining the evidence the CRTC may want them to place on the record of those proceedings.

The first difficulty is that Parliament has empowered one tribunal to obtain evidence from broadcasters and telecommunications companies: the CRTC itself.<sup>4</sup> The CRTC is empowered to enact regulations that require licensed broadcasters to submit programming and financial information<sup>5</sup> and may require Canadian telecommunications carriers to submit "any information the Commission considers necessary" to administer the *Telecommunications Act*. The Commission is also empowered to research and determine questions of fact about

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<sup>1</sup> CRTC, "[Meet Vicky](#)" (accessed 1 March 2023).

<sup>2</sup> Department of Canadian Heritage, "[New CRTC Chair's Leadership Will Help Shape the Future of Canada's Communication System](#)", News release (Gatineau, 6 February 2023)

<sup>3</sup> The CRTC currently publishes some applications on the same date it issues decisions about those applications, making any public comment filed about the applications irrelevant to its decision-making. For example, its [decision approving a change in ownership and effective control of Peace Radio Network Ltd. and Peace River Broadcasting Corporation Ltd.](#) was decided on 16 November 2022 in decision 2022-56, and the related application was posted 22 November 2022.

<sup>4</sup> Under the 1991 *Broadcasting Act* Parliament declared that regulating and supervising Canada's broadcasting system is best achieved through "a single independent public authority" (s. 3(2)).

<sup>5</sup> *Broadcasting Act*, section 9(1)(i).



any matter within its broadcasting jurisdiction;<sup>6</sup> its determinations on questions of fact under the *Telecommunications Act* are “binding and conclusive”.<sup>7</sup>

Another difficulty is that if the CRTC decides not to place relevant evidence on the public record of its proceedings, members of the public and civil-society organizations may not know whether the CRTC has, or does not already have, that evidence, and therefore cannot request its disclosure. For example, while the CRTC’s [Rules of Practice and Procedure require licensed broadcasters to provide its audiences with notifications](#) about any CRTC hearings involving their services, few know that the CRTC formerly included documentation about these notifications in its public files. Yet when FRPC (being familiar with these older files) asked the CRTC to add the CBC’s broadcast notifications to the record of the CRTC’s hearing of CBC’s licence renewal applications, the CRTC declined the request because FRPC did not “[provide any evidence of non-compliance](#)” by CBC. As the broadcast notifications document is the evidence needed to determine compliance, the CRTC’s demand for evidence about CBC’s non-compliance created a ‘Catch-22’. (And, in fact, when the CBC disclosed the broadcast notifications following an access-to-information request, these showed among other things that [CBC had broadcast notifications about the CRTC hearing before the CRTC had issued the notice announcing the hearing and that the broadcasts it claimed it had made did not appear in CBC’s own television programming logs.](#))

A related difficulty concerning evidence is that even if members of the public and civil-society organizations may know that relevant evidence exists, they may be unable to convince the CRTC to request it from applicants. In 2006 the CRTC suggested on four separate occasions that ADISQ evaluate radio licensees’ programming itself, in decisions 2006-[388](#), [-390](#), [-392](#) and [-597](#). When CBC’s 2019 licence-renewal applications referred to and relied on a two-page PDF document that it described as the Corporation’s “new three-year strategy”<sup>8</sup> and FRPC asked the CRTC to ask CBC for a complete version of this document, the Commission declined. After FRPC obtained a redacted, [106-page long powerpoint presentation made to CBC’s Board of Directors \(on 20 March 2019\) of the \*Your stories, taken to heart: Our strategic plan\*](#), the CRTC [declined](#) to place the document on the public record because it did “not contain any new pertinent information for the process”. (Though heavily redacted, incidentally, this presentation arguably was relevant to Parliament’s requirement under the *Broadcasting Act* that CBC “be made available throughout Canada by the most appropriate and efficient means ....” (section 3(1)(m)(vii)) because this presentation stated CBC’s priority to re-imagine “our local/regional offerings across multiple platforms to better meet each community’s needs” (p. 12), said that its priorities “will guide the operational budgets for [CBC’s] digital and linear services” (p. 19) and considered the need to “preserve”, “optimize” and “transform” its technology (p. 30).)

A fourth difficulty confronting members of the public and civil-society organizations involves the CRTC’s decisions to publish evidence from applicants – but with a level of redaction that for the most part makes the ‘evidence’ unusable. For example, roughly a year after Bell, Eastlink (Bragg), Cogeco and Sasktel asked the CRTC to change its regulation increasing the maximum rate they may charge subscribers for “basic service” from \$25 to \$28 per month, the CRTC asked these and four other distribution companies for more information. The question asked by the CRTC is shown below, along with the answers from Bell and Bragg that were made available to the public:

In order to quantify the potential impact on the Canadian broadcasting distribution undertaking (BDU) subscribership, please indicate the number of BDU subscribers that could be subjected to an increase of any kind in their monthly bill should the Commission approve the proposed increase to the maximum price of the basic package. Please provide your underlying assumptions and implementation scope(s) by [listing the types of subscribers](#) (e.g. those who only subscribe to the small basic service, those who only subscribe to the small basic

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<sup>6</sup> *Broadcasting Act*, sections 14(1) and 17.

<sup>7</sup> *Telecommunications Act*, section 52(1).

<sup>8</sup> CBC, Supplementary Brief (BNoC 2019-379), (Ottawa, 9 October 2019), DM#3733727, page 6.





~ Forum for Research and Policy in Communications (FRPC)

*Other comments in this series*

1 March 2023: [Openness means not hiding applications from public view](#)

2 March 2023: [Openness means not just describing but explaining the CRTC's process and proceedings](#)

3 March 2023: [Openness means 'real' public hearings, published decisions and published meeting schedules](#)

4 March 2023: [Openness means publishing information about CRTC meetings with those it regulates](#)

5 March 2023: [Openness today means easier access to CRTC programming, ownership and financial data](#)

6 March 2023: [Openness means knowing who sets the CRTC's agenda](#)

7 March 2023: Openness means disclosing relevant evidence