

The CRTC at 50

Who decides what?: Transparency in CRTC decision-making

I. Introduction

The pivotal decision-maker in Canadian electronic communications is the CRTC: it has determined what happens and what does not happen in Canada's broadcasting and telecommunications sectors for the last half-century. In 2016 – the latest year for which data are available from the CRTC – the two sectors were worth just over \$62 billion (Table 1), a little more than 3% of Canada's Gross Domestic Product (Table 2).

Table 1 Canadian telecommunications and broadcasting revenues

\$ millions (current dollars)	2012	2013	2014	2015	2016
Total telecommunications	40,200	41,100	42,200	43,900	44,700
Total broadcasting	17,880	18,004	18,212	17,952	17,855
Total CRTC media	58,080	59,104	60,412	61,852	62,555
Canada, exp-based GDP	1,822,808	1,897,531	1,990,183	1,994,911	2,035,506

Source: CRTC, *Communications Monitoring Report 2017*, at 93 (Table 4.0.2 Broadcasting revenue distribution by region (\$ billions)) and 212 (Table 5.0.1 Telecommunications revenues (retail and wholesale) (\$ billions)); telecommunications data multiplied by 1000 to obtain figures in millions); Statistics Canada, CANSIM Table 384-0038 (Gross domestic product, expenditure-based, provincial and territorial – results for Canada)

Table 2 Canadian telecommunications and broadcasting revenues as percent of GDP

Sector as % of annual Canadian GDP	2012	2013	2104	2015	2016
Telecommunications					
Internet	0.395%	0.406%	0.422%	0.461%	0.501%
Wireline	0.549%	0.506%	0.462%	0.436%	0.388%
Wireless	1.070%	1.065%	1.050%	1.128%	1.140%
Total telecommunications	2.205%	2.166%	2.120%	2.201%	2.196%
Broadcasting	0.981%	0.949%	0.915%	0.900%	0.877%
Telecommunications and Broadcasting	3.186%	3.115%	3.035%	3.100%	3.073%

The CRTC's actions directly affect communications companies' finances. For more than four decades,¹ for example, the CRTC gave Canadian television broadcasters a financial advantage through a mechanism known as simultaneous substitution (simsub). It required cable companies to substitute American television broadcasts with Canadian television broadcasters' signals (including the advertisements sold by the Canadian broadcasters) when the broadcasters were simultaneously broadcasting the same program. Canadian broadcasters would then be credited with the audiences for their own and the American broadcasters' stations, permitting the Canadian broadcasters to set higher advertising rates.

In August 2016 the CRTC changed the simsub rules to permit program distribution services to carry the American version of a program instead of the Canadian version – but only for the American Super Bowl football game, to give Canadians access to its famous ads. The CRTC's order took effect at the beginning of 2017, and between 2016 and 2017 “more than 40 per cent of Canada's Super Bowl audience ... chose to turn on U.S. stations instead”, resulting in an estimated loss to Bell of \$45 million.²

Bell Canada and Bell Media³ unsuccessfully challenged the CRTC determination to end simsub for the Superbowl at the Federal Court of Appeal (FCA) in 2017.⁴ The Supreme Court has agreed to hear the companies' appeal of the FCA decision⁵ on 4 December 2018.⁶

In denying Bell's 2017 challenge of the CRTC's order, the FCA emphasized that the CRTC's transparent decision-making process guaranteed that courts would treat its decisions deferentially:

... [a]s long as the CRTC's decision demonstrates “justification, transparency and intelligibility within the decision making process” and “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”, the Court will treat it with deference.⁷

If individual CRTC determinations such as the 2017 simsub order are transparent, is the CRTC's decision-making process equally transparent? The question is worth asking because in 2008, the Federal Court of Appeal said that “... the CRTC could do a much better job than it has in ensuring that complainants

¹ CRTC, *Policy Statement on Cable Television: Canadian Broadcasting, "A Single System"*, (Ottawa, 16 July 1971).

² Emily Jackson, “Bell says CRTC Super Bowl ad policy cost Canadian economy \$158 million”, *financialpost.com* (1 August 2017, 5:59 PM EDT), <http://business.financialpost.com/telecom/bell-says-crtc-super-bowl-ad-policy-cost-canadian-economy-158-million>. The research undertaken for Bell concluded that another \$113 million was lost “to the wider Canadian economy by influencing people to buy from American instead of Canadian retailers.”

³ Along with the National Football League.

⁴ See *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (CanLII).

⁵ Brown J. granted motions to determine the application for leave to appeal the FCA decision on an expedited basis (Supreme Court of Canada, *Bulletin of Proceedings*, 2 February 2018) on 24 January 2018; (for those searching for the case on the SCC website, the docket number for *Bell Canada, et al. v. Attorney General of Canada* is 37896).

⁶ *Bell Canada, et al. v. Attorney General of Canada*, SCC Docket No. 37896, <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/17083/index.do>.

⁷ *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (CanLII), leave to appeal to SCC granted 24 January 2018, at ¶19.

understand ... the CRTC's administrative processes and procedures for dealing with complaints, and who may make decisions in its name."⁸

Neither the Federal Court of Appeal nor the Supreme Court of Canada has defined the meaning of or the factors that characterize 'transparency'. The FCA reflected the SCC's position in 2008 that "[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."⁹ Some characteristics of transparency have been addressed by other Canadian courts. The Ontario Court of Appeal pointed out in 2014 that in exercising a statutory power of decision, a tribunal's reasons need not be lengthy or complex, but "... must at least answer the question, 'Why?'"¹⁰; similarly, the Nova Scotia Court of Appeal in 2017 said that transparency is one of three criteria¹¹ that permit reviewing courts to understand *why* tribunals make their decisions.¹²

The question of 'why' a decision has been made could be interpreted as focussing on the reasons that are or are not set out in a decision. Yet transparency in decision-making must include more than decisional outcomes. In 1999, Professor William Mock¹³ developed "a working definition of transparency" in the context of rational-choice theory, explaining that,

[t]ransparency is a measure of the degree to which the existence, content, or meaning of a law, regulation, action, process, or condition is ascertainable or understandable by a party with reason to be interested in that law, regulation, action, process, or condition.¹⁴

Professor Mock then shortened the definition: "[t]ransparency is a measure of the degree to which information about official activity is made available to an interested party."¹⁵ He concluded that

... effective policies of governmental transparency not only promote, but are essential to good governance, including citizen participation, official accountability, clean government, and the rule of law. Such policies promote the most effective and inclusive debate on issue of public significance, and ensue that chosen policies are carried out in a manner that reflects the public consensus.¹⁶

⁸ *Communications, Energy and Paperworkers Union of Canada v. CanWest MediaWorks Inc.*, 2008 FCA 247 (CanLII), ¶19. The case dealt with the status of a letter from a CRTC Commissioner saying that a request to the CRTC to deal with a complaint about a broadcaster would only be addressed in the context of the broadcaster's renewal; the Court held that the letter of a CRTC Commissioner was not a decision of the CRTC.

⁹ *Dunsmuir v. New Brunswick*, [2009] 1 SCR 190, 2008 SCC 9 (CanLII), per Bastarache and Lebel JJ. for the majority, at para. 47 [*Dunsmuir*].

¹⁰ *Nova Scotia Government and General Employees Union v Metro Community Living Support Services Ltd.*, 2017 NSCA 15 (CanLII), <<http://canlii.ca/t/gxdcb>>, at para. 62.

¹¹ The other two being justification and intelligibility, citing to para. 47 in *Dunsmuir*, *supra* note 9.

¹² *Nova Scotia Government and General Employees Union v Metro Community Living Support Services Ltd.*, 2017 NSCA 15 (CanLII), <<http://canlii.ca/t/gxdcb>>, at para. 25.

¹³ Then Professor of Law and Director of the Center for International and Comparative Studies at The John Marshall Law School (Chicago).

¹⁴ William B.T. Mock, "On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency", 17 J. Marshall J. Computer & Info. L. 1069 (1999) at 1082.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 1100.

How transparent is CRTC decision-making? Who decides what the CRTC should decide? What is a CRTC decision? What do we know about the decisions made by the CRTC? How are decisions actually made? This research note discusses these questions, concludes that they have no clear answers and sets out recommendations for more transparency in CRTC decision-making. An outline of the note is provided below, for readers' convenience:

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The results of the review show that while the *Broadcasting Act* and *Telecommunications Act* require the CRTC to exercise its powers to implement Parliament's policies in these areas, its exercise of these powers is not transparent in terms of the decision-making process:

- 1 While the *Broadcasting Act* and *Telecommunications Act* each requires the CRTC to implement Parliament's broadcasting and telecommunications policies respectively,¹⁷ neither statute requires a majority of CRTC Commissioners to perform this function, and each statute permits as few as three Commissioners to act on behalf of the Commission as a whole, with just two Commissioners being required for a majority vote
- 2 The concept of 'decision' is not defined in the CRTC's enabling statutes, making it difficult to interpret the right to appeal 'decisions' of the CRTC, and in any event the CRTC publishes final determinations on a range of matters in nine categories of documents, only one of which is titled, 'decision': letters, decisions, orders, notices of violation, policies, administrative monetary penalty settlements, information bulletins, alternative dispute resolutions and undertakings
- 3 Decision-making at the CRTC is guided in part by by-laws that it is not required to publish and which were enacted by unidentified members of the Commission at unknown dates, and in part

¹⁷ *Broadcasting Act*, s. 5(1): "... the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)"

Telecommunications Act, s. 47(a): "The Commission shall exercise its powers and perform its duties under this Act and any special Act ... with a view to implementing the Canadian telecommunications policy objectives"

- by the CRTC's Chairperson whom Parliament empowered to supervise and direct the CRTC's work; the extent of the Chairperson's role and the specific actions he or she takes, are unknown, as the agenda and minutes of meetings of the CRTC are not published
- 4 Three committees of CRTC Commissioners, whose identity is not published, make decisions about the broadcasting and telecommunications matters that the CRTC will or will not hear, yet as neither the committees' membership nor the committees' minutes are published, it is unclear who within the CRTC actually decides which matters should or should not be heard by the CRTC
 - 5 No clear mechanism exists to challenge CRTC determinations to hear or not to hear different matters
 - 6 Commissioners do not have an equal opportunity to participate as members or Chairpersons of CRTC hearing panels. A review of CRTC hearing transcripts from 1998 to 2017 found that
 - Participation on hearing panels by Commissioners with nearly equal years of experience at the CRTC varied significantly within the term of individual CRTC Chairpersons and from one CRTC Chairperson to the next
 - Women had fewer opportunities to preside as the Chairpersons of hearing panels depending on the identity of the CRTC Chairperson, and that
 - Commissioners appointed by a government with the same party affiliation as the government that appointed the CRTC Chairperson were more likely to participate as members and Chairpersons of CRTC hearing panels than their colleagues (appointed by governments with a different party affiliation).
 - 7 It is unclear why, when and how the CRTC delegates decision-making to its staff, who is responsible for such delegation, whether such delegations of authority may be appealed, and to whom the appeals should be addressed.
 - 8 When matters are heard in the context of public hearings,
 - a. it is impossible to know who decided which Commissioners would participate on which hearing panels
 - b. it impossible to know which Commissioners subsequently heard the recommendations of each panel, what they concluded, or whether Commissioners other than those who were part the hearing panel had any influence on the panel's decision
 - 9 While the public hearing transcripts from 1998 on, which are [posted](#) on the CRTC's website, disclose the names of the CRTC Commissioners who attended public hearings at which specific policies and decisions were considered, these policies and decisions are not signed by individual Commissioners – meaning that determination of the Commissioners responsible for the outcomes relies on the availability of public hearing transcripts
 - 10 As CRTC policies and decisions are not signed, it is impossible to know which CRTC Commissioners decided the outcome of any given matter when it was or is not heard in the context of a public hearing— such as and including the CRTC's recent report on the [future of programming distribution in Canada](#), and
 - 11 As administrative decisions issued by the CRTC are not signed, it is impossible to know which CRTC Commissioners decided the outcome of any of these matters.

The analysis that led to these conclusions is set out in Part II, below; six recommendations are set out in the Part III.

II. CRTC decision-making

A. Who is the CRTC?

Parliament has delegated responsibility for implementing its broadcasting and telecommunications policies to the CRTC – in 1968, in the case of broadcasting, and in 1976, in the case of telecommunications. The *CRTC Act* requires the CRTC to exercise the powers and perform the duties set out for it in the *Telecommunications Act* (as well as Canada’s anti-spam legislation, the *Personal Information Protection and Electronic Documents Act* and the *Competition Act*).¹⁸ The CRTC also has responsibilities under other statutes,¹⁹ such as the *Canada Elections Act*,²⁰ and is subject to requirements for all government departments and agencies under statutes such as the *Financial Administration Act*.²¹

The CRTC currently describes itself as “an administrative tribunal that regulates and supervises Canadian broadcasting and telecommunications in the public interest, as well as enhances the privacy and safety of Canadians”²² with “the quasi-judicial powers of a superior court with respect to the production and

¹⁸ S. 12(2).

¹⁹ In April 2018 the Justice Laws website (<http://laws.justice.gc.ca/Search/Advanced.aspx>) listed 58 statutes that referred to the CRTC (based on a search for “radio-television”).

²⁰ *Canada Elections Act*, S.C. 2000, c. 9:

Broadcasting Arbitrator to prepare guidelines

346 The Broadcasting Arbitrator shall, not later than two days after the issue of the writs for a general election, prepare and send to the Canadian Radio-television and Telecommunications Commission a set of guidelines respecting

(a) the allocation of or entitlement to broadcasting time under this Act;

(b) the procedures for booking broadcasting time by registered parties and eligible parties; and

(c) any other matters that may be pertinent to the conduct of broadcasters and network operators under this Act.

Marginal note: C.R.T.C. to prepare and send guidelines

347 The Canadian Radio-television and Telecommunications Commission shall, not later than four days after the issue of the writs for a general election, prepare a set of guidelines respecting the applicability of the Broadcasting Act and the regulations made under that Act to the conduct of broadcasters and network operators in relation to a general election and send them, together with the set of guidelines sent by the Broadcasting Arbitrator under section 346, to all broadcasters and network operators.

...

348.03 Before a person enters into an agreement with a calling service provider for voter contact calling services, either in their own name or on behalf of another person or a group, the person shall inform the calling service provider that the agreement is for voter contact calling services and shall provide the calling service provider with their name, address and telephone number and a copy of a piece of identification authorized by the Canadian Radio-television and Telecommunications Commission that contains their name.

...

348.11 The Canadian Radio-television and Telecommunications Commission is responsible for establishing and maintaining a registry, to be known as the Voter Contact Registry, in which all documents provided to it under sections 348.06 to 348.09 are to be kept.

²¹ The CRTC is deemed a federal department under s. 2.

²² CRTC, “Raison d’être”, <https://crtc.gc.ca/eng/publications/reports/mandate-mandat.htm>.

examination of evidence and the enforcement of its decisions.”²³ CRTC Chairpersons have from time to time described the Commission as operating at “arms’ length” from government.²⁴ In 2016 the CRTC’s Chairperson explained to the House of Commons Standing Committee on Canadian Heritage that he was not answering a question because he would be breaching his “duty of discretion as a quasi-judicial member of a tribunal with respect to the matter.”²⁵

The CRTC consists “of not more than 13 members ... appointed by the Governor in Council”, or Cabinet.²⁶ (A previous [research note](#) described appointments to the CRTC.) The CRTC’s staff are not ‘members’ of the CRTC. (This is why ‘decisions’ issued by CRTC staff may in general be appealed to the CRTC’s Commissioners.)

Transparency exists with respect to the CRTC insofar as the names of its Commissioners are known, as are the terms of their appointments. In April 2018, when this research began, the CRTC’s website showed photographs of eight Commissioners: Ian Scott (Chairperson), Christianne Laizer (Vice-Chairperson, telecom), Caroline Simard (Vice-Chairperson, broadcasting), Christopher MacDonald (Atlantic Region and Nunavut), Monique Lafontaine (Ontario), Stephen Simpson (BC and Yukon), Yves Dupras (Quebec) and Linda Vennard (Alberta and NWT).

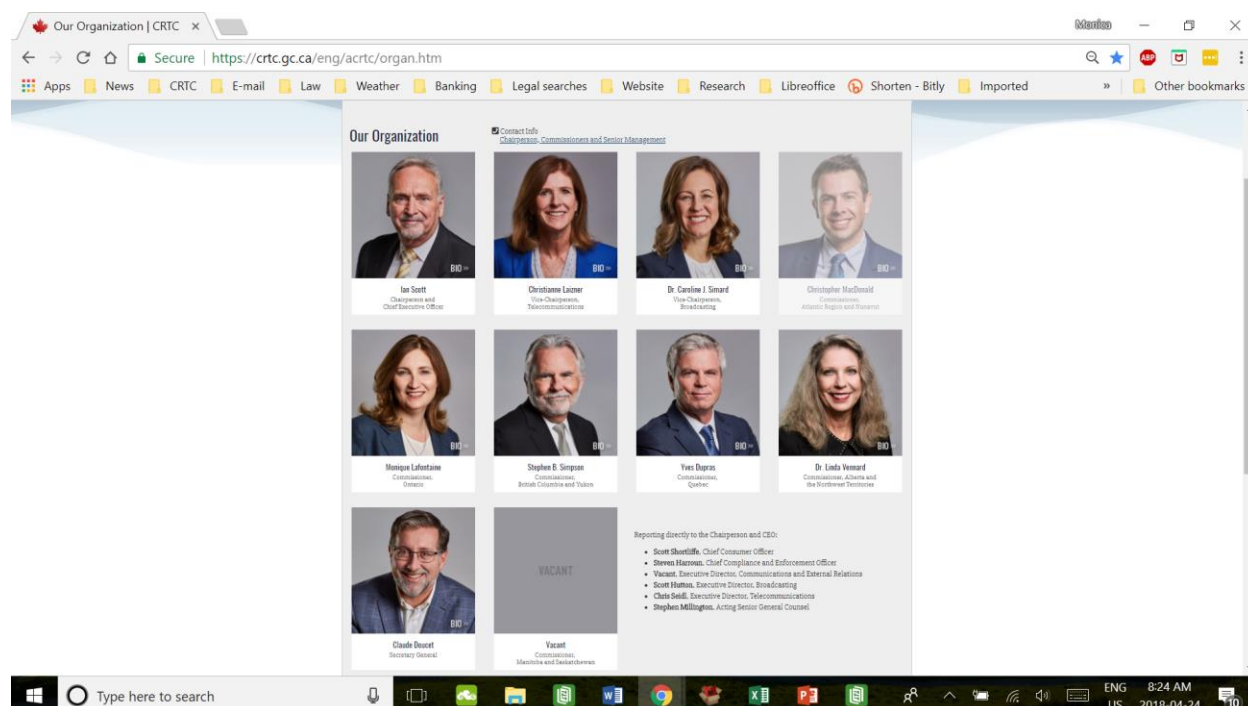
²³ CRTC, “Planned results: what we want to achieve this year and beyond - Core Responsibility Regulate and Supervise the Communications System: Description”, *Departmental Plan 2018-2019*, <https://crtc.gc.ca/eng/publications/reports/dp2018/dp2018.htm>.

In 2016 the CRTC described itself as “an administrative tribunal with quasi-judicial functions”, in CRTC, *Review of the Implementation of Section 41 of the Official Languages Act 2015-2016*, https://crtc.gc.ca/eng/5000/lo_ol/olc16-loc16.htm.

²⁴ See e.g. Keith Spicer, *Address to the Empire Club*, (Ottawa, 24 May 1990).

²⁵ CHPC, *Evidence*, (Ottawa, 20 October 2016), <https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-31/evidence>.

²⁶ *Canadian Radio-television and Telecommunications Commission Act*, R.S.C., 1985, c. C-22, s. 3.(1).

Figure 1 CRTC members and Secretary General as of 24 April 2018

The website notes that there “can be up to 13 full-time Commissioners” – meaning there were then five vacant CRTC positions. (When the screen snapshot in Figure 1 was taken, however, the CRTC’s website showed only one vacant position, that of the regional member for Manitoba and Saskatchewan [see Figure 1]. The deadline for [applying](#) for that position was 17 May 2018.²⁷)

In appointing CRTC members, Cabinet must designate one as Chairperson, and two as Vice-Chairpersons,²⁸ and may designate regional members.²⁹ Members may play a role in appointing the Chairperson if there is no Chairperson, if the Chairperson is absent or if the Chairperson is incapable. Then they may authorize one of the Vice-Chairpersons “to exercise the powers and to perform the duties and functions of the Chairperson”.³⁰

The *Telecommunications Act* and *Broadcasting Act* each specifies that the CRTC should implement Parliament’s telecommunications and broadcasting policies. The *Telecommunications Act* requires the CRTC to “exercise its powers and perform its duties ... with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27”, and in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.”³¹ The *Broadcasting Act* similarly requires the CRTC to “regulate and supervise all aspects of the Canadian

²⁷ It is unknown who has applied for the position.

²⁸ *Canadian Radio-television and Telecommunications Commission Act*, s. 6(1).

²⁹ *Ibid.*, s. 10(2).

³⁰ *Ibid.*, s. 6(3). If there are no Vice-Chairpersons (offices are vacant, they are absent or incapable), the members of the Commission may authorize one or more of themselves to Act in these roles: s. 6(4).

³¹ *Telecommunications Act*, s. 47.

broadcasting system with a view to implementing” Parliament’s section 3 policy objects, and with regard to the Act’s “regulatory policy”.³²

As the saying goes, however, “the Devil is in the details”,³³ and a number of details about the nature of the CRTC’s decisions and its decision-making process are, at best, fuzzy.

B. How does the CRTC make ‘decisions’?

Parliament declares in the *CRTC Act* that the CRTC’s 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.”³⁴ As neither the agendas nor the minutes of meetings of the CRTC are published, it is unclear to what extent the Chairperson’s general power to supervise and direct the CRTC’s work and staff affects the decision-making process at the CRTC.

Parliament also decided in the *CRTC Act* that a majority of Commissioners is required for a CRTC broadcasting meeting to occur.³⁵ It is unclear what actions are to be undertaken by CRTC broadcasting meetings, and as the CRTC does not publish either the agendas or minutes of its broadcasting meetings, this part of the CRTC’s performance is not transparent.

The *CRTC Act* then permits the CRTC’s Commissioners to make by-laws to establish committees of the members. Under Canada’s *Interpretation Act*, the CRTC’s by-laws, orders, regulations and rules constitute regulations of the CRTC.³⁶ The CRTC has enacted at least 29 by-laws of which three are posted on its website.³⁷ The online versions are undated, but the By-laws’ pages say they were last modified between 2011 and 2013:

By-Law 9	Telecommunications Committee (Date modified: 2011-12-29)
By-Law 26	Broadcasting Committee (Date modified: 2011-12-28)
By-Law 29	Broadcasting committee sub-committee for routine and non-contentious matters (Date modified: 2013-04-25)

Neither the *Broadcasting Act*, the *Telecommunications Act* nor the *CRTC Act* requires the CRTC to invite public comment on the substance or enactment of its By-laws. The CRTC is, however, required to publish proposed regulations for comment which deal with programming, carriage, examination of

³² *Broadcasting Act*, s. 5(1).

³³ The phrase is said to have first been used in print in 1963, by Richard Mayne when he described the European Union), and may have been based on a German saying from the early 1920s (“Der liebe Gott steckt im detail”, or [loosely] God sticks [fixes] on the details) (<https://www.phrases.org.uk/meanings/the-devil-is-in-the-details.html>).

³⁴ S. 6(2).

³⁵ S. 10(2) provides that “The Commission shall meet at least six times in each year.”, and section 10(3) that “A majority of the members in office constitute a quorum of the Commission.”

³⁶ R.S.C., 1985, c. I-21, s. 2(1).

³⁷ “Statutes and Regulations: Committee By-Laws”, <https://crtc.gc.ca/eng/statutes-lois.htm>. We assume the CRTC has enacted at least 29 by-laws, because the “Broadcasting committee sub-committee for routine and non-contentious matters” is described as by-law 29.

broadcasting records,³⁸ broadcast licence fees,³⁹ fees with respect to the National Do Not Call List,⁴⁰ rules of practice and procedure, telecommunications carrier transmission lines, international telecommunications service licences, costs awards and cost-recovery fees.⁴¹ To the extent that transparency exists when the CRTC publishes proposed regulations in these matters, the by-laws enacted by the CRTC are not transparent as they are not published for public comment.

Moreover, and while the CRTC's website suggests that By-laws 9, 26 and 29 have been published online since 2011 on a website page entitled "Statutes and Regulations",⁴² finding them may be a matter of luck: in early April 2018 a search for "crtc bylaws" using the CRTC's search engine yielded 58,558 results, and they are not listed separately on the CRTC's A-Z index (the CRTC website no longer has a site plan) or the CRTC's "About Us" page. When asked in early April 2018 for a copy of the bylaws under the *Access to Information Act* the CRTC's staff advised that they would respond in four weeks,⁴³ suggesting that even the CRTC's staff (who could have immediately indicated the online publication of three of the by-laws) may be unfamiliar with the by-laws' online presence.

As it is unknown why the By-laws were enacted, which Commissioners enacted them, how the By-Laws were developed or whether any of the other 26 By-laws remain in force, decision-making processes set out by the By-laws are not entirely transparent.

1. *Decision-making in broadcasting*

a) *Deciding which broadcast matters are or are not heard – the Broadcasting Committee*

The CRTC's "Broadcasting Committee" established by [By-Law No. 26](#)⁴⁴ decides which broadcasting matters the CRTC will or will not consider. While it consists of all CRTC Commissioners it needs only 3 Commissioners to meet.⁴⁵ Assuming the committee functions using the majority vote principle, only 2 CRTC Commissioners are required to decide which matters are considered by the CRTC.

The Broadcasting Committee

- decides whether to
 - hold a public hearing to amend or renew broadcasting licences,⁴⁶ or to

³⁸ *Broadcasting Act*, s. 10(3).

³⁹ *Ibid.*, s. 11(5).

⁴⁰ *Telecommunications Act*, s. 41.21(3).

⁴¹ *Telecommunications Act*, s. 69(1).

⁴² The website page for CRTC by-law 9, establishing the CRTC's "Telecommunications committee", was last modified on 2011-12-29; the website page for CRTC by-law 26, establishing a "Broadcasting committee", was last modified on 2011-12-28; while the website page for CRTC by-law 29, establishing a "Broadcasting committee sub-committee for routine and non-contentious matters", was last modified on 2013-04-25.

⁴³ The CRTC received the access-to-information request on 17 April and answered on 19 April 2018; the response said the CRTC would respond on 17 May 2018.

⁴⁴ Pursuant to s. 11 of the *Canadian Radio-television and Telecommunications Commission Act*. The By-law itself is undated; its website page shows: Date modified: 2011-12-28.

⁴⁵ By-Law 26(d): "a quorum for meetings of the Broadcasting Committee shall be any three members thereof and notice that such a meeting will be held shall be provided electronically at least two hours in advance".

⁴⁶ By-Law 26(c)(i)(A) and (B).

- consider complaints or representations made to the CRTC, or about any other matter in the CRTC's jurisdiction⁴⁷
- reviews applications made to the CRTC to schedules and sets the agendas for public hearings in broadcasting,⁴⁸ initiates proceedings, and approves the wording in CRTC broadcasting consultation notices⁴⁹
- deals with all broadcasting applications not included on the agenda of a public hearing⁵⁰
- consults with the CBC about any conditions of licence the CRTC proposes to attach to a CBC licence,⁵¹ and
- makes all procedural determinations under the CRTC's Rules of Procedure and the Broadcasting Act, except those dealt with by another standing committee or by a panel named by the Chair.⁵²

The Broadcasting Committee's exercise of its authority is not transparent, as it does not publish notices of its meetings, the points it takes into consideration, the names of those who attend specific meetings, the minutes of the meetings, or the determinations reached at these meetings. The past and current composition of the Broadcasting Committee is unknown outside the Commission.

The Broadcasting Committee's reasons for deciding to consider or not consider individual matters are also unknown, and as lists of applications that have been rejected for consideration by the CRTC are not published, it is impossible to know how many applicants are affected. An example of the CRTC's decision not to consider a broadcasting application only came to light when the Syndicat de la fonction publique (SCFP) posted an application that it submitted to the CRTC on 13 February 2018 [online](#), along with its 26 March 2018 [request](#) that the CRTC consider its application. The CRTC then published a [letter](#) stating that SCFP's "application will not be posted nor receive further process." How many other applications has the CRTC returned to applicants – and what matters is the CRTC choosing not to address? We do not know, because the CRTC does not publish this information.

The CRTC's enabling statutes are also silent as to the recourse available to parties affected by a Committee decision not to consider a specific matter.

The CRTC's second committee – the "Broadcasting committee sub-committee for routine and non-contentious matters" – was established under [By-Law 29](#) and as its name suggests, considers matters that do not appear to raise significant issues. The three members of the Broadcasting Subcommittee are

⁴⁷ By-Law 26(c)(ii).

⁴⁸ By-Law 26(c)(iii).

⁴⁹ By-Law 26(c)(iv).

⁵⁰ By-Law 26(c)(v).

⁵¹ By-Law 26(c)(vi).

⁵² By-Law 26(c)(vii).

chosen by the CRTC Chairperson,⁵³ and may meet if two of its Members are available.⁵⁴ The Subcommittee

- disposes of applications listed in Schedule 1 of the Rules of Procedure except for share transfer applications mentioned in Broadcasting Information Bulletin CRTC 2008-8-1, paragraph 14
- approves the wording and issuance of decisions for administrative licence renewals
- to dispose of matters that do not raise new or significant policy considerations, including
 - applications to renew or amend licences if the applications have not been “reserved” for a panel, and if the applications can be resolved within a CRTC regulatory policy or framework or are consistent with current Commission practice
 - applications to amend regional broadcasting licences in order to add and/or delete a broadcasting distribution undertaking;
 - requests to add non-Canadian television programming undertakings to the lists of eligible satellite services for distribution on a digital basis
 - radio programming applications to broadcast simultaneously broadcast on AM and FM
- to approve, except for hearings launched by a Cabinet order (via sections 28 or 12(3) of the *Act*), the wording and issuance of
 - information bulletins setting out the Commission’s disposition of applications for certain share transfer applications
 - notices of consultation and amended notices of consultation, in which the CRTC seeks interventions and comments from the public about licensing, amendments or renewals, and
 - matters that are not linked to a section 18 mandatory order hearing and for which a panel has not already been struck

If the Broadcasting Sub-Committee cannot make a decision on a matter, it is referred to the Broadcasting Committee.⁵⁵

The Broadcasting Sub-Committee’s operations are not transparent. The CRTC’s Chairperson has not published the names of those appointed to the Sub-Committee, its meetings are not announced and its minutes – that must be provided to the Broadcasting Committee⁵⁶ – are not published. It is unclear what recourse exists for parties affected by the Broadcasting Sub-Committee’s decisions.

⁵³ By-Law 29(b): “subject to the following, the members of the Sub-Committee and the alternate member shall be named by the Chairperson:

i Except when the office of the Vice-Chairperson of Broadcasting is vacant, the person occupying the office shall be a member of the Sub-committee;

ii At least one member of the Sub-committee, excluding the alternate member, shall be a regional member pursuant to subsection 10.1(2) of the *Canadian Radio-television and Telecommunications Commission Act*;

⁵⁴ By-Law 29(i).

⁵⁵ By-Law 29(j).

⁵⁶ By-Law 29(l).

b) Broadcast hearing panels

The *Broadcasting Act* requires the CRTC to hold public hearings to determine some matters⁵⁷ and makes hearings discretionary in others.⁵⁸ The *Act* does not state who decides when discretionary matters must be heard.

If matters are assigned to be heard by a CRTC panel, responsibility for decision-making lies with the panels hearing the matters.⁵⁹ The choice of CRTC Commissioners who make up a given CRTC hearing panel lies with the CRTC's Chairperson, who has the express authority to establish panels of at least 3 Commissioners "to deal with, hear and determine any matter on behalf of the Commission."⁶⁰ Presumably, therefore, a broadcast hearing panel may make decisions about both licensing and policy matters on behalf of the Commission.

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Broadcasting Act:

15. (1) The Commission shall, on request of the Governor in Council, hold hearings or make reports on any matter within the jurisdiction of the Commission under this Act.

...

18. (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

(a) the issue of a licence, other than a licence to carry on a temporary network operation;

(b) the suspension or revocation of a licence;

(c) the establishing of any performance objectives for the purposes of paragraph 11(2)(b); and

(d) the making of an order under subsection 12(2).

(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.

24. (1) No licence shall be suspended or revoked under this Part unless the licensee applies for or consents to the suspension or revocation or, in any other case, unless, after a public hearing in accordance with section 18, ...

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, ...

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Broadcasting Act

12. (1) Where it appears to the Commission that

(a) any person has failed to do any act or thing that the person is required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part, or has done or is doing any act or thing in contravention of this Part or of any such regulation, licence, decision or order, or

(b) the circumstances may require the Commission to make any decision or order or to give any approval that it is authorized to make or give under this Part or under any regulation or order made under this Part, the Commission may inquire into, hear and determine the matter.

12(3) Where an inquiry under subsection [12](1) is heard by a panel established under subsection 20(1) and the panel issues an order pursuant to subsection (2) of this section, any person who is affected by the order may, within thirty days after the making thereof, apply to the Commission to reconsider any decision or finding made by the panel, and the Commission may rescind or vary any order or decision made by the panel or may re-hear any matter before deciding it.

18(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.

20. (1) The Chairperson of the Commission may establish panels, each consisting of not fewer than three members of the Commission, to deal with, hear and determine any matter on behalf of the Commission.

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Under the 1968 *Broadcasting Act* hearing panels would make recommendations to the full Commission (all members of the CRTC), that would then vote on the recommendations. The 1982 *Charter of Rights and Freedoms* led to a change in the 1991 *Broadcasting Act*, as the they-who-hear-decide rule of section 11(d) of the *Charter* (with respect to criminal proceedings), sets out the right of a person charged with an offence "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" – not by individual members of that tribunal who presumably did not 'hear' the matter.

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Broadcasting Act, s. 20(1).

The exercise of this authority by the CRTC's Chairperson is not transparent: neither the Chairperson's decisions to establish hearing panels, the names of the Commissioners assigned to the panels, nor the identify of the parties who decided that specific matters ought to be heard, are announced or published. The items set down for specific hearings are announced in CRTC notices of hearings, but not the names of the Commissioners who will hear them.

The outcome of the Chairperson's exercise of authority to appoint CRTC Commissioners to hearing panels authority is somewhat transparent. While the determinations issued by the CRTC concerning licensing and policy matters are not signed, and do not say which Commissioners heard specific matters, it is possible to obtain some of this information from CRTC hearing transcripts. The transcripts for CRTC hearings held since 12 June 1998 are posted on the [CRTC's website](#). (Transcripts from the period before 12 June 1998 are not posted, however.⁶¹) Note that the transcripts reflect the content of hearings – meaning that matters that are not discussed at hearings, such as a range of policy matters and certain administrative licensing issues, will not be reflected by CRTC transcripts.⁶²

We approached our review of these data from the assumption that, given the CRTC's specialized expertise,⁶³ individual CRTC Commissioners acquire expertise in matters within the CRTC's jurisdiction, and therefore ought to, over the course of their appointment(s) to the CRTC, have an equal chance of being part of any given CRTC hearing panel during the term of any Chairperson appointed to the position of Chairperson on a full-time basis by Cabinet

The Forum reviewed 295 CRTC transcripts describing broadcasting, telecommunications and broadcasting/telecommunications proceedings, from 12 June 1998 to 27 March 2018. We then excluded 36 non-decision-related transcripts(from a discussion, a roundtable and 34 consultations⁶⁴ held across Canada during the term of Chairperson Bertrand, one transcript during a period when Chairperson Blais' term had already concluded and Chairperson Scott's term had not yet begun, and five

⁶¹ Note that until 1990, however, CRTC decisions were made by all CRTC Commissioners; the 1991 *Broadcasting Act* then introduced the 'those-who-hear' decide requirement, so that only members of hearing panels are able to make decisions.

⁶² A search of the CRTC's site for "policy" yielded 630 regulatory policies; a search of these results for "public hearing", "a public hearing" or "the public hearing" yielded 102 regulatory policies – implying that 528 policies did not mention "hearing", and implying in turn that these policies were not developed in part through a public process involving a hearing. Hence, the majority of the CRTC's policies may be developed without a public hearing, meaning that no hearing panel is required; if the policies are discussed at a CRTC hearing with quorum half (plus one) of the quorum – rather than half or more of the CRTC – may approve the policies.

⁶³ In *Bell Canada v. Amtelecom Limited Partnership*, [2016] 1 FCR 29, 2015 FCA 126 (CanLII), <http://canlii.ca/t/gj7tt>, at para. 38, for example, Pelletier J.A. held for the Court in the context of determining the lawfulness of the *Wireless Code*, "[t]he notion of a tribunal's specialized expertise has evolved to include the exercise of 'interpretative discretion' so that the CRTC is presumed to have the required expertise to resolve the question of whether section 24 authorizes it to promulgate a Code with retrospective effect."

⁶⁴ All but one of these consultations was clearly intended as venues for discussion, rather than for the presentation of arguments and evidence to a hearing panel. We also excluded a "public consultation" held in Winnipeg on 7 November 1998 because, although it was described as "MTS COMMUNICATIONS INC. MECHANISM TO RECOVER FUTURE INCOME TAX EXPENSE / MÉCANISME DE RECOUVREMENT DE IMPÔTS FUTURS DE MTS COMMUNICATIONS INC.", the CRTC did not later refer to or describe the consultation as part of a telecom decision or policy.

transcripts from Chairperson Scott's term).⁶⁵ We retained 231 transcripts from hearings conducted during the terms of four full-time Chairpersons (Chairpersons Bertrand, Dalfen, von Finckenstein and Blais). We then identified the Commissioners assigned to hearings, determining whether the hearings involved policy or licensing matters, whether they addressed broadcasting, telecommunications, or broadcasting and telecommunications matters, and whether the hearings were 'appearing' (applicants addressed the panel) or 'non-appearing'. (In non-appearing hearings neither parties, applicants nor interveners are invited to appear before the hearing panel; the first transcript that is posted on the CRTC's website for a non-appearing hearing is dated 14 November 2005, during Chairperson Dalfen's term.)

Table 3 shows the number of times CRTC Commissioners participated as part of hearing panels dealing with broadcasting and broadcasting/telecom matters:

Table 3 Commissioners appearing as part of CRTC broadcasting and broadcasting/telecom hearings, 1998-2017

Commissioner	Term	Bertrand, Francoise 1996-2001		Dalfen, Charles 2002-2007			von Finckenstein, Konrad 2007-2012			Blais, Jean-Pierre 2012-2017			Total
		Licensing	Policy	Licensing		Policy	Licensing		Policy	Licensing		Policy	
		App	App	App	Non-App	App	App	Non-App	App	App	Non-App	App	
Colville, David (1)	1990-2004	3	1	6									10
Wyllie, Andree (1)	1995-2005	15	1	18									34
Bertrand, Francoise	1996-2001	8	1										9
Cardozo, Andrew (2)	1997-2003	7		5									12
Grauer, Cindy (2)	1997-2003	6	1	3									10
McKendry, David	1997-2002	3	1	2									6
Cram, Barbara	1998-2007	6	1	9	1		3	1					21
Demers, Jean-Marc	1998-2005	6	1	8									15
Langford, James S. (2)	1998-2007	4		13	2		3	1	1				24
Noel, Andree	1998-2007	10	1	13	3	1	3	1	1				33
Pennefather, Joan	1998-2007	9	2	16	5	1							33
Wilson, Martha	1998-2002	5	1										6
Williams, Ron	1999-2008	4		15	1	1	5		2				28
Dalfen, Charles	2002-2007			16	2	1							19
Arpin, Michel (3)	2005-2010			7	2	2	14	3	9				37
Cugini, Rita (3)	2005-2012			4	1	2	21	1	10				39
Duncan, Elizabeth (3)	2005-2014			2	1	1	12	10	3	2	5		36

⁶⁵ To determine the number of public hearings held by the CRTC we downloaded a copy of the list of transcripts for each of the 21 years which are posted on the CRTC's website, and to count the number of times "Volume 1" (meaning the first volume of transcript describing the first hearing day) appeared. On two occasions a public hearing adjourned and resumed on a different day, with the first day of the resumed hearing being described as "Volume 1" (see the transcripts for 31 March 2009 and 12 June 2009; and for 16 May 2016 and 20 July 2016); in this case the resumed hearing was not included as a second hearing, but as part of the first hearing. On another occasion a public hearing adjourned and resumed on a different day; while the transcript of the second day was labelled "Volume 4", it was included as a separate hearing because one of the members of the first part of the hearing was replaced in the second part of the hearing: "2679 My name is Len Katz and I am the Vice-Chairman of Telecommunications. Acting Vice-Chairman Broadcasting Rita Cugini has been called away on a personal matter and will be unable to attend this hearing. As a result, Ms Cugini has stepped down from the panel and I will be assuming the duties of chairperson."

As well, during the late 1990s the CRTC held a series of meetings across Canada to discuss certain policy areas – 33 consultations led by one, two or three Commissioners, as well as a discussion and a roundtable. These 35 transcripts were excluded from our analysis as they did not involve not decision-making hearing panels.

Commissioner	Term	Bertrand, Françoise 1996-2001		Dalfen, Charles 2002-2007			von Finckenstein, Konrad 2007-2012			Blais, Jean-Pierre 2012-2017			Total
		Licensing	Policy	Licensing		Policy	Licensing		Policy	Licensing		Policy	
		App	App	App	Non-App	App	App	Non-App	App	App	Non-App	App	
French, Richard	2005-2007			4	1	1	1						7
Ray del Val, Helen	2005-2008			5	2		5	1					13
Katz, Len	2007-2013						16	4	6				26
Menzies, Peter	2007-2018						14	4	5	9	9	1	42
Molnar, Candace	2007-2017						7	8	4	4	11	2	36
Morin, Michel	2007-2012						10	6	7				23
von Finckenstein, K.	2007-2012						14	3	9				26
Denton, Timothy	2008-2013						8	4	5	1	3		21
Lamarre, Suzanne	2008-2013						7	5	3	4	1		20
Patrone, Marc	2008-2013						10	8	5	2			25
Poirer, Louise	2008-2013						8	5	6	2	1		22
Simpson, Stephen	2008-2018						5	6	5	8	15	3	42
Pentefountas, Tom	2011-2015						3		2	10	14	1	30
Blais, Jean-Pierre	2012-2017									13	2	3	18
Shoan, Raj	2013-2016									4	11		15
Dupras, Yves	2014-2019									3	11	2	16
MacDonald, Chris'r	2015-2020									3	2	2	7
Vennard, Linda	2015-2020									2	4	1	7
Larocque, Judith	2016-2017									2	1		3
Larocque, Judith	2016-2017									3	2		5

The results from our analysis of broadcast hearing transcripts demonstrates that some Commissioners appear as members of CRTC broadcast hearing panels more often than others. For example,

(1) During Chairperson Bertrand's term, Commissioner Wylie participated in five times (15) as many licensing hearings as Commissioner Colville (5), although both had extensive experience

(2) The number of hearings at which Commissioners Cardozo and Grauer participated decreased from the term of Chairperson Bertrand (7 each) to the term of Chairperson Dalfen (5 and 3, respectively), while the number of panels of which Commissioner Langford was a part increased from 4 during Chairperson Bertrand's term, to 15 during Chairperson Dalfen's term

(3) The number of hearings at which Commissioners Arpin, Cugini and Duncan participated nearly quadrupled from the term of Chairperson Dalfen (22) to the term of Commissioner von Finckenstein (83).

Overall, these data establish that CRTC Commissioners do not participate in broadcasting hearings to the same degree, either during the term of a single CRTC Chairperson, or over the course of the terms of two CRTC Chairpersons.

More generally, as individual CRTC decisions (and policies) do not disclose that these were made by the panel that heard specific matters, and as decisions are not signed by the Commissioners who heard specific matters but are instead published over the name of the Secretary General, little transparency exists in CRTC decision-making with respect to broadcasting hearings

2. Decision-making in telecommunications

In telecommunications matters, the *CRTC Act* says that “[t]he full-time members of the Commission and the Chairperson shall exercise the powers and perform the duties vested in the Commission and the Chairperson, respectively, by the *Telecommunications Act*” (as well as CASL and other special statutes).⁶⁶

The *Telecommunications Act* then provides that only two members of the CRTC are required for a quorum in telecommunications matters, and only one member in “uncontested matters”.⁶⁷ Rather than being made by the CRTC Commissioners in office at any given time or by a majority of those members, telecommunications decisions may therefore be made by as few as one or two Commissioners. The *Act* does not identify who chooses these decision-makers.

a) Deciding which telecommunications proceedings are or are not heard

At some point in its history the CRTC’s Commissioners established a Telecommunications Committee under section 12 of the *Canadian Radio-television and Telecommunications Commission*. CRTC [By-Law 9](#) defines the Telecommunications Committee as consisting of all the members of the CRTC,⁶⁸ although this Committee can also hold meetings with as few as three Commissioners.⁶⁹

By-Law 9(c) gives the Telecommunications Committee the authority to

- begin proceedings and approve the wording of Notices of Consultation⁷⁰
- decide whether a person is a "Canadian carrier" under the Telecommunications Act⁷¹
- dispose of all procedural matters under the Rules of Procedure and make all procedural determinations in relation to matters under the *Telecommunications Act* except those otherwise reserved to another standing committee or to a panel named by the Chair⁷²
- appoint any person to make an inquiry and report under s. 70(1) of the Telecommunications Act;⁷³
- dispose of applications
 - for new or amended tariff pages, or agreements that must be filed⁷⁴
 - filed pursuant to a Commission directive;⁷⁵
 - for an order to remove data restrictions⁷⁶

⁶⁶ S. 12(2).

⁶⁷ S. 49: “For the purposes of this Act, a quorum of the Commission consists of two members, but in uncontested matters a quorum consists of one member.”

⁶⁸ By-Law 9(b).

⁶⁹ By-Law 9(d): “A quorum for meetings of the Telecommunications Committee shall be any three members thereof and notice that such a meeting will be held shall be provided electronically at least two hours in advance”.

⁷⁰ By-Law 9(c)(iii).

⁷¹ By-Law 9(c)(xiv).

⁷² By-Law 9(c)(iv).

⁷³ By-Law 9(c)(vii).

⁷⁴ By-Law 9(c)(i).

⁷⁵ By-Law 9(c)(xii).

⁷⁶ By-Law 9(c)(xiii).

- seeking exemption from contribution payments⁷⁷
- that are contemplated by Part 2 of those Rules and consumer complaints⁷⁸
- that may be resolved within an existing CRTC regulatory framework, are contemplated by Part 1 of the Rules of Procedure, relate to CRTC decisions and do not try to stay, review or vary CRTC decisions⁷⁹
- approve rates other than those set by tariffs CRTC has approved, under s. 25(4) of the Act⁸⁰
- issue the interim *ex parte* orders under s. 51(2) of the Rules of Procedure⁸¹
- establish, change or rescind periodic reporting requirements and requirements as to the information to be submitted with respect to tariff filings for new services, changes in rates for existing services and floor prices⁸²
- make determinations about
 - depreciation and accounting matters;⁸³
 - Phase III and related costing procedures and practices⁸⁴
 - numbering resources used in telecommunications networks;⁸⁵
- review and evaluate the construction program of a regulated company;⁸⁶
- dispose of all costs applications except where a panel has been appointed;⁸⁷
- publish, or to give leave to publish, decisions and new or amended tariffs pursuant to section 65 of the Telecommunications Act;⁸⁸ and to
- refer any matter to a meeting of a majority of the members from time to time for disposition.⁸⁹

Overall, the operations of the Telecommunications Committee are not transparent. It is unclear which Commissioners make which decisions, and on what basis. The Committee's meetings are not announced, and its minutes are not published. It is unclear what remedies are available to parties affected by the Committee's decisions.

b) Telecom hearing panels

Neither the *Canadian Radio-television and Telecommunications Commission Act* nor the *Telecommunications Act* specifically explains how members of a CRTC telecom hearing panel are to be selected. As noted previously, section 12(2) of the *Canadian Radio-television and Telecommunications Commission Act* indicates that the CRTC's role in telecommunications is to be performed by the CRTC's members:

⁷⁷ By-Law 9(c)(xiv).
⁷⁸ By-Law 9(c)(v).
⁷⁹ By-Law 9(c)(xvi).
⁸⁰ By-Law 9(c)(viii).
⁸¹ By-Law 9(c)(v).
⁸² By-Law 9(c)(x).
⁸³ By-Law 9(c)(ix).
⁸⁴ By-Law 9(c)(xi).
⁸⁵ By-Law 9(c)(xvii).
⁸⁶ By-Law 9(c)(vi).
⁸⁷ By-Law 9(c)(xviii).
⁸⁸ By-Law 9(c)(ii).
⁸⁹ By-Law 9(c)(xix).

Marginal note: Telecommunications

The full-time members of the Commission and the Chairperson shall exercise the powers and perform the duties vested in the Commission and the Chairperson, respectively, by the *Telecommunications Act*

The *Telecommunications Act* then notes that “a quorum of the Commission consists of two members, but in uncontested matters a quorum consists of one member”.⁹⁰

CRTC By-Law 9 touches on two types of telecommunications matters. By-Law 9(c)(iv) deals with decisions about procedural matters under the *CRTC Rules of Procedure*, and permits the Telecommunications Committee to make these decisions, unless they have been “otherwise reserved to ... a panel named by the Chair”. By-Law 9(c)(xviii) deals with costs applications, and permits the Telecommunications Committee to make decisions about these applications “except in cases where a panel has been appointed”. In other words, a committee whose composition is unknown, created by a by-law enacted by unknown members of the CRTC, appears to have given the CRTC Chairperson the authority to establish panels in some, but not all, telecommunications matters.

The selection of telecommunications panel members was addressed by the Federal Court of Appeal in 2016. It held that the Chairperson had the authority to appoint two telecommunications panels,⁹¹ quoting a text on administrative law to the effect that implicit in the Chairperson’s position and responsibilities⁹² is the Chairperson’s authority “to assign cases and members to cases (particularly, but not exclusively, where the statute refers to the Chair as the Chief Executive Officer or as having the general management of the agency.”⁹³

The Court did not state, however, whether the two telecommunications panels mentioned in the case were considering procedural and costs issues, or other matters. As a result, the answer to the fundamental question of the Chairperson’s authority to establish panels to deal with matters other than procedural and costs issues, remains unclear.

As individual members of the CRTC do not sign its telecommunications decisions, it is unclear which Commissioners render these determinations.

We reviewed the CRTC’s hearing transcripts from 1998 to 2017 and identified 44 hearings held with respect to telecommunications and telecommunications/broadcasting matters.⁹⁴ Table 4 presents the results of our analysis. As in Table 3, CRTC Commissioners do not have the same opportunities to appear on hearing panels.

⁹⁰ S. 49.

⁹¹ *Shoan v. Canada (Attorney General)*, 2016 FCA 261 (CanLII), <<http://canlii.ca/t/gvds3>>, retrieved on 2018-04-25, see ¶¶1, 6-8 and 10.

⁹² The Court quoted from s. 6(2) of the *Canadian Radio-television and Telecommunications Commission Act*, noting that “... 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’.”

⁹³ *Shoan v. Canada (Attorney General)*, 2016 FCA 261 (CanLII), at ¶16 (citation omitted).

⁹⁴ Five hearings scheduled in 2017 and 2018 during Chairperson Scott’s term were excluded.

Table 4 Commissioners appearing as part of CRTC telecommunications and broadcasting/telecom hearings, 1998-2017

Commissioner	Term	Bertrand, Francoise 1996-2001		Dalfen, Charles 2002-2007		von Finckenstein, Konrad 2007-2012		Blais, Jean-Pierre 2012-2017		Total
		Lic'g App	Policy App	Lic'g App	Policy App	Lic'g App	Policy App	Lic'g App	Policy App	
Colville, David	1990-2004	1	3	4	1					9
Wyllie, Andree	1995-2005	1	1	2	1					5
Bertrand, Francoise	1996-2001		2							2
McKendry, David	1997-2002	1	3							4
Cardozo, Andrew	1997-2003		1							1
Grauer, Cindy	1997-2003	1	2							3
Wilson, Martha	1998-2002		1							1
Demers, Jean-Marc	1998-2005	1	1	3	1					6
Cram, Barbara (1)	1998-2007		1	6	3		1			11
Langford, James S.	1998-2007		1	2	4					7
Noel, Andree	1998-2007	1		2	3		1			7
Pennefather, Joan (2)	1998-2007		2	1	2					5
Williams, Ron	1999-2008	1	1	2	2					6
Dalfen, Charles	2002-2007				2					2
French, Richard	2005-2007			2	3					5
Ray del Val, Helen	2005-2008			2	2		1			5
Arpin, Michel	2005-2010				1	1	1			3
Cugini, Rita	2005-2012				2	2	1			5
Duncan, Elizabeth	2005-2014				3	5	4	2	1	15
Katz, Len	2007-2013					6	8			14
Menzies, Peter (3)	2007-2018					2	2	1	8	13
Molnar, Candace (3)	2007-2017					2	6	2	3	13
Morin, Michel	2007-2012						3			3
von Finckenstein, K.	2007-2012					2	7			9
Denton, Timothy	2008-2013					2	7			9
Lamarre, Suzanne	2008-2013					3	4			7
Patrone, Marc	2008-2013					1	4			5
Poirer, Louise	2008-2013					2		1		3
Simpson, Stephen	2008-2018					1	3	2	3	9
Pentefountas, Tom	2011-2015						1		3	4
Blais, Jean-Pierre	2012-2017							2	7	9
Shoan, Raj	2013-2016								2	2
Dupras, Yves	2014-2019								2	2
MacDonald, Christopher	2015-2020								5	5
Vennard, Linda	2015-2020								4	4

For example,

(1) Commissioner Cram appeared at 1 telecom hearing during Chairperson Bertrand's term, and 9 during Chairperson Dalfen's term;

(2) Commissioner Pennefather appeared at 2 telecom policy hearings during Chairperson Bertrand's term, and 3 during Chairperson Dalfen's term;

(3) Commissioner Molnar appeared at 8 telecom hearings during Chairperson von Finckenstein's term and 5 telecom hearings during Chairperson Blais' term, while Commissioner Menzies appeared at 4 telecom hearings during Chairperson von Finckenstein's term, and 9 hearings during Chairperson Blais' term.

The results of Table 4 reconfirm the conclusions reached with respect to broadcasting: CRTC Commissioners do not participate in telecommunications hearings to the same degree.

More generally, as individual CRTC decisions (and policies) do not disclose that these were made by the panel that heard specific matters, as decisions are not signed by the Commissioners who heard specific matters but are instead published over the name of the Secretary General, little transparency exists in CRTC decision-making with respect to telecommunications hearings

3. Who decides what the CRTC should decide – summary and discussion

Reviewing the *Canadian Radio-television and Telecommunications Commission, Broadcasting Act, Telecommunications Act* and CRTC By-Laws shows that there are inconsistencies in terms of the decision-makers actually required to make decisions on behalf of the Commission.

Parliament requires “the Commission” to implement its telecommunication and broadcasting policies, and the *Canadian Radio-television and Telecommunications Commission* establishes that the quorum for the Commission is a majority of the CRTC Commissioners. In early April 2018, when this article began to be written, there were eight Commissioners (see Figure 1) meaning that at least five Commissioners were required to implement Parliament’s broadcasting and telecommunications policies.

The *Broadcasting Act* then authorizes the CRTC’s Chairperson to choose hearing panels of three or more Commissioners to make decisions on behalf of the Commission with respect to the matters they hear. The *Telecommunications Act*, meanwhile, does not refer to panels of Commissioners that hear matters, but to “the Commission” as a whole – presumably meaning, thanks to the quorum set out in the *Canadian Radio-television and Telecommunications Commission*, at least five CRTC Commissioners.

Yet as Table 5 (below) shows, the committees established by CRTC by-law permit one CRTC Commissioner to make decisions about non-contentious telecommunications matter and two Commissioners to make decisions about non-contentious broadcasting matters; two Commissioners to make decisions about all other telecommunications matters, and three Commissioners to make decisions about all broadcasting matters.

Table 5 Three statutes, three by-laws and five quorum thresholds

<i>CRTC Act</i>	<i>Telecommunications Act</i>	<i>Broadcasting Act</i>
Chairperson		
Supervise and direct CRTC work and its staff (s. 6(2))		Decides where hearings held (s. 18(4)) Chooses panels with at least 3 Commissioners to deal with, hear and determine any matter on behalf of Commission (s. 20(1))
Commission members		
Make by-laws to (s. 11(1)) <ul style="list-style-type: none"> call meetings conduct business at CRTC meetings establish special and standing CRTC committees 	“The Commission” shall exercise its powers and perform its duties under the <i>Telecommunications Act</i> (s. 47)	“The Commission” shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy ... and ... shall have regard to the

<ul style="list-style-type: none"> • delegate duties to committees • fix quorums for committee meetings 		regulatory policy ...of the <i>Broadcasting Act</i> (s. 5(1))
Quorum permitted by statute and by-laws		
Act: Majority of the members in office (s. 11(1)(a),(b))	2 Commissioners (s. 49) or 1 Commissioner if uncontested (s. 49) By-Law 9(d), Telecommunications Committee: 3 Commissioners	Hearing panels of 3 or more Commissioners (s. 20(1)) By-Law 26(d), Broadcasting Committee: 3 Commissioners By-law 29(i), Broadcasting committee sub-committee for routine and non- contentious matters: 2 Commissioners

It is unclear which Commissioners ‘hear’ matters that are not assigned to public proceedings that do not require a public hearing panel.

In terms of transparency, none of the CRTC’s committees publishes their membership, the times when they meet, the agendas of their meetings, or the minutes of their meetings.

As for hearing panels, the data in Table 3 and Table 4 establish that Commissioners do not have equal chances of participating in all public hearings. Table 6 reformats the data on hearing panels to show which Commissioners participate in CRTC hearing panels most, and least, frequently. While Commissioners’ terms affect their availability to be selected for public hearings, Commissioners with the same or nearly identical terms at the CRTC do not attend the same number of hearings. For example,

(1) During Chairperson Bertrand’s term, Commissioners Wylie attended more than three times as many hearings (18) as Commissioner Langford (5), although the Commissioners’ spent nearly the same time at the CRTC;

(2) Years of experience is not consistently associated with attendance in CRTC hearing panels – under Chairperson von Finckenstein, Commissioner Katz attended a third more hearings (36) than Commissioner Duncan (24), although Commissioner Duncan had several years more experience at the CRTC than Commissioner Katz;

(3) The number of hearings attended by CRTC Chairpersons increased between 1998 and 2007 – where Chairperson Bertrand had the fourth highest attendance at CRTC hearings from 1998 to 2001, Chairperson Blais had the highest attendance of all Commissioners at CRTC hearings from 2012 to 2017;

(4) the use of non-appearing hearings increased from none under Chairperson Bertrand, to 15 under Chairperson Blais;

(5) Commissioners with the same term under the same Chairperson did not participate to the same degree in CRTC hearing panels – while their terms began and ended in the same years, Commissioner Lamarre attended four times as many hearings (4) as Commissioner Denton (1).

Table 6 Commissioners’ participation as part of all hearing panels, by CRTC chairperson

Chairperson	Five Commissioners appearing most and least frequently at all hearings
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	Attending most appearing hearings	Attending most non-appearing hearings	Attending fewest appearing hearings
Bertrand 1996-2001	(1) Wylie [1998]-2005 18 hrngs Noel 1998-2007 12 Pennefather 1998-2007 12 (3) Bertrand [1998]-2001 10 Grauer [1998]-2003 9	(4) Not applicable	McKendry [1998]-2002 7 hrngs Colville [1998]-2004 7 Williams 1999-2008 6 Wilson 1998-2002 6 (1) Langford 1998-2007 5
Dalfen 2002-2007	Wylie [1998]-2005 21 Pennefather 1998-2007 20 Williams 1999-2008 20 Noel 1998-2007 19 (3) Dalfen 2002-2007 19 Langford 1998-2007 19	(4) Pennefather 1998-2007 5 Noel 1998-2007 3 Ray del Val 2005-2008 2 Langford 1998-2007 2 Arpin 2007-2012 2	Cugini 2005-2012 8 Duncan 2005-2014 6 Cardozo [1998]-2003 5 Grauer [1998]-2003 3 McKendry [1998]-2002 2
von Finckenstein 2007-2012	(2) Katz 2008-2013 36 Cugini 2005-2012 34 (3) von Finckenstein 2007-12 32 Arpin 2007-2012 25 (2) Duncan 2005-2014 24	(4) Duncan 2005-2014 11 Patrone 2008-2013 9 Molnar 2008-2017 9 Morin 2007-2012 6 Poirier 2008-2013 6	Pentefountas 2011-2015 6 Noel 1998-2007 5 Langford 1998-2007 4 Cram 1998-2007 4 French 2005-2007 1
Blais 2012-2017	(3) Blais 2012-2017 24 Menzies 2007-2018 18 Simpson 2008-2018 15 Pentefountas 2011-2015 14 Molnar 2008-2017 11	(4) Simpson 2008-2018 15 Pentefountas 2011-2015 14 Dupras 2014-2019 11 Molnar 2008-2017 11 Shoan 2013-2016 11	(5) Lamarre 2008-2013 4 Poirier 2008-2013 3 Larocque 2016-2017 2 Patrone 2008-2013 2 (5) Denton 2008-2013 1

Notes: Square brackets indicate term began before 1998

The results from Table 3, Table 4 and Table 6 indicate that different Commissioners with roughly the same years of experience at the CRTC do not attend roughly the same number of hearings, or the same types of hearings. As the CRTC does not publish minutes of meetings where the assignment of Commissioners to CRTC hearing panels is discussed, it is unclear why these differences exist. Commissioners may be unavailable for personal reasons, for instance, or may express disinterest in the matters being discussed.

We note, though, that participation in CRTC hearing panels may be linked to other factors. We considered whether Commissioners' gender may affect their participation in CRTC hearing panels.

Table 7 Number and percentage of men and women as CRTC Commissioners, 1998-2017

Participation at all CRTC broadcasting and telecommunications hearings by men and women, 1998-2017, by CRTC Chairperson				
Gender of Commissioner	Chair			
	Bertrand, Francoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre
Female	7	8	8	6
Male	7	9	12	9
Total	14	17	20	15
% female	50%	47%	40%	40%

If gender plays no role, we would expect to see women appointed in proportion to their representation at the CRTC. As Table 8 shows, women were 'overrepresented' in CRTC hearing panels during the term of Chairperson Bertrand, appeared roughly in proportion to their representation at the CRTC during the terms of Chairpersons Dalfen and von Finckenstein, and were underrepresented during the term of

Chairperson Blais. In other words, a Commissioner's gender may have an impact on whether that Commissioner is or is not appointed to a hearing panel.

Table 8 Number and percentage of men and women at CRTC hearings, 1998-2017

Participation at all CRTC broadcasting and telecommunications hearings by men and women, 1998-2017, by CRTC Chairperson					
Gender of Commissioner	Chair				
	Bertrand, Francoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre	Total
Female	75	117	157	54	403
Male	42	116	249	163	570
Total	117	233	406	217	973
% female	64%	50%	39%	25%	28%

Note: the same person may appear as part of CRTC panels more than one

Women had fewer opportunities than men to chair CRTC hearing panels during the terms of male CRTC Chairpersons. As Table 9 shows, the representation of women as panel Chairperson with respect to all CRTC hearings decreased over time, from 76% in the late 1990s, to 13% in the 2010s.

Table 9 Number and percentage of men and women in the role of Chairperson at CRTC hearings, 1998-2017

Participation as hearing chairperson at all CRTC broadcasting and telecommunications hearings by men and women, by CRTC Chairperson, 1998-2017					
Gender	Chairperson				
	Bertrand, Francoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre	Total
Women as % of Commissioners	50%	47%	40%	40%	41%
Women as panel Chairperson					
Female	19	16	23	8	66
Male	6	39	68	53	166
Total	25	55	91	61	231
% female	76%	29%	25%	13%	28%

As Table 10 shows, women's participation as Chairpersons at appearing hearings where parties, applicants and interveners appeared, declined over time (to 0% during Chairperson Blais' term):

Table 10 Number and percentage of men and women in the role of panel chair at CRTC appearing hearings, 1998-2017

Participation as hearing chairperson at appearing CRTC broadcasting and telecommunications hearings by men and women, by CRTC Chairperson (1998-2017)					
Gender of panel Chairpersons	Chair				
	Bertrand, Francoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre	Total
Female	19	13	15	0	47
Male	6	35	55	31	127
Total	25	48	70	31	174
% female	76%	27%	21%	0%	27%

Overall, individual Commissioners' gender may affect decisions about the members of CRTC hearing panels, and the roles assumed on those panels (see summary, Table 11). No women were part of telecommunications hearing panels during the terms of Chairpersons Bertrand and Blais, and no women served as chair on any appearing hearing panel under Chairperson Blais. Overall, men outnumbered women on two out of three hearing panels from 1998 to 2017 – with just 2% of hearing panels during Chairperson Blais' having a majority of women.

Table 11 Summary – women's participation in CRTC hearings

Participation of women in CRTC broadcasting and telecommunications hearings, by CRTC Chairperson (1998-2017)					
% female as part of panels	Chair				
	Bertrand, Francoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre	Total
All hearings	64%	50%	39%	25%	28%
Broadcasting, Brg/tns	86%	33%	27%	15%	32%
Telecom, Brg/tns	0%	17%	17%	0%	11%
As chair, all hearings	76%	29%	25%	13%	28%
As chair, appearing hearings	76%	27%	21%	0%	27%
% of times women in majority on hearing panel	81%	50%	26%	2%	32%

We then also considered whether political party association plays a role in the choice of Commissioners who participate in CRTC hearing panels. We began by determining the political affiliation of the government that appointed CRTC Commissioners. Several Commissioners were initially appointed by one party, but re-appointed by a different party – in those cases we described the Commissioners in terms of the party that first appointed them, and that later re-appointed them (*i.e.*, a Commissioner appointed by the Liberal party, then re-appointed by the Conservative party would be described as 'Liberal/Conservative', and vice-versa ['Conservative/Liberal']). As Table 12 shows, three out of four of Commissioners were appointed by the same political party that appointed the CRTC Chairpersons during whose term they served. In the case of Chairperson von Finckenstein, while appointed by the Conservative government, a number of his colleagues had been appointed by the previous Liberal government.

Table 12 Governing political party that appoints Chairpersons and CRTC Commissioners

Governing political party that appointed CRTC Chairpersons and Commissioners					
Commissioner appointed by	Bertrand, Francoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre	Total
	Liberals	Liberals	Conservatives	Conservatives	
Conservatives	0	0	11	13	24
Liberals	13	14	7	1	35
Libs/Cons	0	2	2	1	5
Cons/Libs	1	1			2
Total	14	17	20	15	66

Same party	13	14	11	13	51
% of total	93%	82%	55%	87%	77%

We analyzed CRTC hearing-panel data to determine which Commissioners were or were not appointed to hearing panels, depending on whether they were appointed by the same party that appointed the Chairperson in whose term they served. We reviewed appointments to panels in general, and to hearing and non-appearing panels, and also determined whether Commissioners were appointed as chairperson or as members of individual panels. If Commissioners have an equal chance of being appointed to hearing panels, their representation on and role in hearing panels should not change by party association.

In fact, party association appears to play a role in appointment to hearing panels. As Table 13 shows, the level of representation of Commissioners appointed by the same party as the CRTC Chairperson was higher than expected, with the exception of panel Chairs during Chairperson Bertrand's term. Commissioners who were not appointed by the party that appointed the Chairperson had a lower chance of being chosen to attend hearings in general, and to chair panels when they did participate.

Table 13 Commissioners appointed to CRTC hearing panels by the party that appointed them

Commissioners on hearing panels (including CRTC Chairpersons)	Bertrand, Françoise	Dalfen, Charles	von Finckenstein, Konrad	Blais, Jean-Pierre	Total
	Liberals	Liberals	Conservatives	Conservatives	
# from same party	12	13	11	13	Not applic
# from different party/parties ⁹⁵	1	1	9	2	
% from same party	92%	82%	55%	87%	77%
% that same party appointed to panels	93%	88%	68%	94%	83%
As panel Chair	84%	89%	72%	98%	84%
As panel member	97%	88%	67%	92%	81%
% that same party appointed to appearing panels	Not applic	88%	67%	94%	82%
As appearing panel Chair		88%	70%	100%	82%
As appearing panel member		88%	67%	93%	82%
% that same party appointed to non-app'g panels		90%	75%	93%	86%
As non-appearing panel Chair		100%	81%	97%	91%
As non-appearing panel member		86%	72%	92%	83%

As shown by the yellow highlighting in Table 13, the role of hearing chair may be of special significance, as Commissioners appointed by the same political party as the CRTC Chairperson had a higher chance of being selected. In fact, under Chairperson Blais neither of the two Commissioners appointed by a party different than the one that appointed him was appointed to chair a hearing panel during his term; similarly the single Commissioner appointed by a different party during Chairperson Dalfen's term was never appointed to chair a non-appearing panel.

⁹⁵ As noted previously, some Commissioners were appointed by one party, and reappointed by a different party.

The questions raised by the results above with respect to women's representation on CRTC hearing panels and the representation of Commissioners in terms of their appointment by different governing political parties, is whether the CRTC's Chairperson, in exercising his or her authority, is able to select Commissioners based on their personal characteristics or pre-existing decision-making preferences. If so, this suggests that the Chair is able to obtain specific results, rather than ensuring that the Commission as a whole – all of its members – makes decisions that implement Parliament's communications policies for Canada.

The CRTC practice of unsigned decisions obscures these patterns, permitting the impression to be given that 'the Commission' – or a majority of its members – makes its decisions independent of independent Commissioners' assignment to hearing panels, and independent of their relationship with the current CRTC Chairperson.

C. What does the CRTC 'do'?

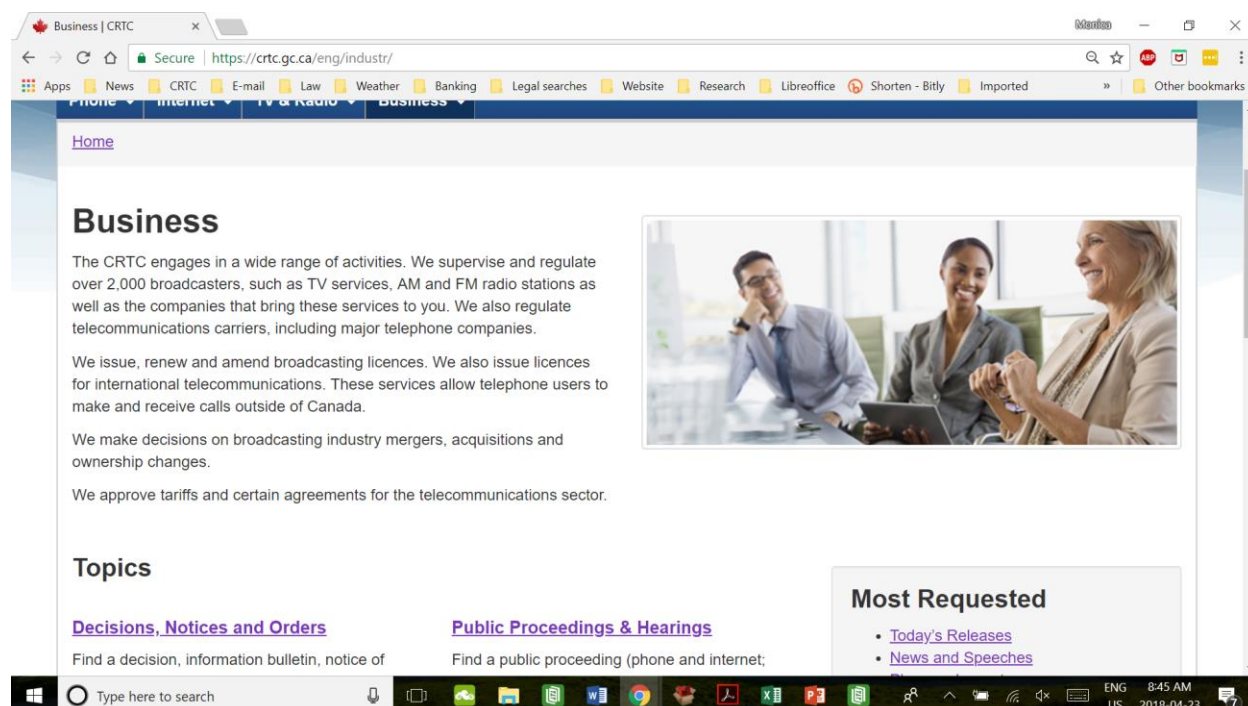
Another detail about CRTC decision-making that is fuzzy has to do with the activities undertaken by the CRTC which result in actual 'decisions'.

The CRTC, for example, says that it "engages in a wide range of *activities*" (see Figure 2) – not that it issues decisions. It says its activities include: supervising and regulating broadcasters, regulating telecommunications companies, licensing broadcasters and international telecommunications services, making decisions on broadcast ownership, and approving telecommunications tariffs and other agreements (Figure 2). Insofar as its licensing 'business' is concerned, the CRTC says that it issues, renews and amends licences – not that it makes decisions about applications asking for licences to be issued, renewed or amended.⁹⁶

⁹⁶

See Figure 1.

Figure 2 CRTC business



Parliament has set out dozens of actions that it permits or requires the CRTC to perform, though few are specifically described as requiring ‘decisions’. Actions expected of the CRTC set out in its enabling statutes are summarized below (Table 14), roughly in the sequence in which the acts appear in the two statutes.⁹⁷ Parliament has made some actions mandatory; these are denoted in red font in the table below, with the remaining actions in black font being at the CRTC’s discretion.

Today’s broadcasting and telecommunications statutes set out at least 74 actions that Parliament expects or enables the CRTC to perform.

Table 14 Types of CRTC ‘determinations’

Bold, italicized font: determinations, orders or decisions Red font: mandatory acts	
<i>Broadcasting Act</i>	<i>Telecommunications Act</i>
1 issue guidelines (s. 6)	27 make orders (s. 9(1), 40(1), 41(1), 42(1), 44, 51, s.46.1(b),51,56(2),57)
2 issue statements (s. 6)	28 inquire into and make a determination in respect of certain acts (s. 9(2), s. 48(1))
3 issue licences (s. 9(1)(b), s. 12)	
4 issue orders (ss. 9(4), 12(2))	

⁹⁷ It should be noted that this table focusses on functions, rather than approach or process; for example, it excludes the requirement under the *Broadcasting Act* that the CRTC must construe and apply the *Act* “in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings”. *Broadcasting Act*, s. 2(3). See also s. 35(2), regarding the CBC: Part III of the *Act* “shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers”

5	<i>exempt from regulation if complying with regulations will not materially implement Parliament's broadcasting policy (s. 9(4))</i>	29	exempt any Canadian carrier class from application of the Act (s. 9(1))
6	<i>give "licensees and other interested persons" opportunity to comment on regulations (ss. 10(3), 11(5))</i>	30	<i>hold public hearing for exemption orders (s. 9(1))</i>
7	issue regulations (s. 12)	31	<i>reconsider decisions referred back to it by the Minister (s. 12)</i>
8	issue decisions (s. 12)	32	make reports on matters within its jurisdiction (s. 14)
9	"determine" non-compliance (s. 12 (1))	33	set manner in which tariffs are available for public inspection (s. 25(3))
10	undertake, sponsor, promote, assist in research about matters within its jurisdiction (s. 14(1))	34	<i>Approve, disallow, change tariffs (s. 26(a),(b))</i>
11	<i>where appropriate use tech'l, economic and stat'l inform'n and advice from CBC or gov't departments or agencies (s. 14(1))</i>	35	<i>Publish written reasons for not approving, for changing or for disallowing tariffs (s.26(c))</i>
12	<i>make recommendations about technical broadcasting matters if asked by the Minister (s. 14(2))</i>	36	<i>Publish period of time when CRTC will approve or disallow tariffs (s. 26(c))</i>
13	<i>hold hearings on matters in its jurisdiction if asked by Cabinet (s. 15(1))</i>	37	determine Canadian carriers' compliance (s. 27(3))
14	<i>make reports on matters in its jurisdiction if asked by Cabinet (s. 15(1))</i>	38	approve classes of telecommunications services (s. 32(a))
15	give approval in connection with complaints or representations (s. 18(3))	39	'permit' different rates (s. 32(a))
16	if in public interest hold public hearing to amend or renew licence (s. 18(2))	40	<i>if asked, give Minister or Chief Statistician any information CRTC has (s. 37(3))</i>
17	<i>notify affected public of licence applications, licence decisions, public hearings (s. 19)</i>	41	<i>make proceedings' non-confidential information available to public (ss. 38, 39)</i>
18	<i>hold public hearing re licensing - to issue, suspend, revoke licences, set performance objectives (s. 18(1)(a),(c))</i>	42	determine technical standards (s. 41.2)
19	<i>hold public hearing re licensing to suspend or revoke licences (s. 18(1)(b), 24(1))</i>	43	require tariffs to be filed (s. 41.2)
20	<i>hold public hearing re enforcement - to make an order (s. 18(1)(d))</i>	44	amend tariffs (s. 41.2)
21	deal with matters on behalf of CRTC (s. 20(1))	45	administer the Do Not Call List (s. 41.2)
22	make rules for licensing procedures (s. 21(a))	46	prohibit some acts (s. 44(b))
23	make rules for representations and complaints to CRTC (s. 21(a))	47	make regulations (ss. 41.21(1), 57, 67)
24	make rules for hearings (s. 21(b))	48	<i>publish proposed regulations and give interested persons reasonable opportunity to make representations (s. 41.21(3))</i>
		49	delegate some responsibilities (s. 41.3, s. 70(1), 72.04(1), 71(1))
		50	<i>report annually on the do-not-call list (s. 41.6)</i>
		51	authorize and grant permissions for constructing transmission lines (s. 43(4), 45)
		52	make determinations in any form, on any matter (s. 46.1(b), s. 48(1))
		53	extend deadlines (s. 50)
		54	hold hearings or portions of hearings <i>in camera</i> (s. 54)

25	<i>if CBC asks, consult with CBC on any conditions CRTC proposes to attach to CBC licence (s. 23(1))</i>	55	award interim or final costs of and incidental to proceedings before it (s. 56(1))
26	<i>report to Minister if CBC has breached its licences, orders or regulations (s. 25(1))</i>	56	make rules (s. 57)
		57	issue guidelines on matters in its jurisdiction (s. 58)
		58	issue statements on matters in its jurisdiction (s. 58)
		59	give telecommunications applicants non-binding 'advice' (s. 59(1))
		60	grant whole or partial relief in any case (s. 60)
		61	set time when decision comes into force (s. 61(1))
		62	make decisions with conditions (s. 61(1))
		63	make decisions that are interim (s. 61(2))
		64	make decisions that are final (ss. 61, 62)
		65	make <i>ex parte</i> decisions if justified (s. 61(3))
		66	review, and then rescind or vary any decision it has made (s. 62)
		67	regulate fees to recover its costs (s. 68(1))
		68	<i>publish proposed regulations and cost-recovery fees (s. 69(1))</i>
		69	<i>give interested parties reasonable opportunity to comment on proposed regulations and cost-recovery fees (s. 69(1))</i>
		70	publish notices of violation, persons' names, penalty amounts (s. 71.13)
		71	impose monetary penalties (s. 72.003)
		72	<i>decide whether persons making representations about notices of violation have committed the violation (s. 72.08(2))</i>
		73	Impose penalties on persons CRTC deems to have committed violations (s. 72.08(3))
		74	<i>Send decision to those deemed to have committed violations and notify them of their right to review or appeal (s. 72.08(4))</i>

Table 14 highlights the broad discretion that the CRTC holds in exercising its duties: roughly a third (25) of the actions performed by the CRTC are mandated by Parliament; the rest need only be performed if the CRTC so wishes.

Table 14 also shows that relatively few CRTC actions – nine, altogether – expressly require 'decisions'. Most (65 or 88%) of the 74 acts authorized by the two statutes involve functions that Parliament did not specifically describe as requiring 'decisions'. The CRTC may, for instance, issue regulations, rules, reports, guidelines, statements, recommendations and licences; it may (or at times, must) hold hearings; and it may set deadlines. It may also make or issue 'determinations' and 'orders'.

What process does the CRTC use to exercise its decision-making authority in these many areas?

D. What is a CRTC decision?

As mentioned in the introduction, the Federal Court of Appeal recently commented that a CRTC decision will be treated with deference, if it “demonstrates ‘justification, transparency and intelligibility within the decision making process’....”.⁹⁸ In that case, however, the ‘decision’ at issue – referenced by the Court as “Final Decision” was actually a broadcast regulatory *policy*.⁹⁹

What, then, is a CRTC ‘decision’?

1. ‘Decision’ not defined by statute

Canada’s *Interpretation Act*¹⁰⁰ does not define “decision”. The *Broadcasting Act* and the *Telecommunications Act* each refers to ‘decisions’, though neither defines the term (see Table 15).

Table 15 **References to appeal and decisions in the broadcasting and telecommunications statutes**

<i>Broadcasting Act</i>	<i>Telecommunications Act</i>
31(4) Any document issued by the Commission in the form of a decision or order shall, if it relates to the issue, amendment, renewal, revocation or suspension of a licence, be deemed for the purposes of this section [31] to be a decision or order of the Commission.	2(1) “ decision ” includes a determination made by the Commission in any form; 41.3(4) The Commission may, in writing, revoke a delegation of powers. A revocation is deemed not to be a decision of the Commission. 46.2(4) The Commission may, in writing, revoke a delegation of powers. A revocation is deemed not to be a decision of the Commission.
12. (1) Where it appears to the Commission that (a) any person has failed to do any act or thing that the person is required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part, or has done or is doing any act or thing in contravention of this Part or of any such regulation, licence, decision or order, or (b) the circumstances may require the Commission to make any decision or order or to give any approval	62. The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.

⁹⁸ *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (CanLII), leave to appeal to SCC granted 24 January 2018, at ¶9.

⁹⁹ *Simultaneous substitution for the Super Bowl*, Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-334 (Ottawa, 19 August 2016), <https://crtc.gc.ca/eng/archive/2016/2016-334.htm>.

¹⁰⁰ R.S.C., 1985, c. I-21.

<p>that it is authorized to make or give under this Part or under any regulation or order made under this Part, the Commission may inquire into, hear and determine the matter.</p> <p>12(3) Where an inquiry under subsection (1) is heard by a panel established under subsection 20(1) and the panel issues an order pursuant to subsection (2) of this section, any person who is affected by the order may, within thirty days after the making thereof, apply to the Commission to reconsider any decision or finding made by the panel, and the Commission may rescind or vary any order or decision made by the panel or may re-hear any matter before deciding it.</p>	
<p>28. (1) Where the Commission makes a decision to issue, amend or renew a licence, the Governor in Council may, within ninety days after the date of the decision, on petition in writing of any person received within forty-five days after that date or on the Governor in Council's own motion, by order, set aside the decision or refer the decision back to the Commission for reconsideration and hearing of the matter by the Commission, if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1).</p>	<p>12. (1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.</p>
<p>31. (1) Except as provided in this Part, every decision and order of the Commission is final and conclusive.</p>	<p>52. (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.</p> <p>9(3) The decision of the Commission [with respect to exemption order applications] that a person is or is not an interested person is binding and conclusive.</p> <p>48(2) The decision of the Commission [with respect to eligibility to operate] that a person is or is not an interested person is binding and conclusive.</p>
<p>31(2) 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.</p>	<p>64. (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.</p>

The *Telecommunications Act* says that “decisions of the Commission” may be appealed to the Federal Court of Appeal,¹⁰¹ and defines decisions as including (and, therefore, not being limited to) “a determination made by the Commission in any form”.¹⁰² The *Act* does not define “determination” and does not explain what it means by “any form”. It says, however, that a written revocation of a delegate’s powers “is deemed not to be a decision of the Commission”,¹⁰³ establishing that written revocations might otherwise be considered to be decisions of the Commission. In telecommunications, therefore, decisions include determinations and written documents revoking a grant of authority.

Section 31 of the *Broadcasting Act* permits “a decision or order” of the Commission to be appealed to the Federal Court of Appeal,¹⁰⁴ but does not define broadcasting decisions or orders, or describe what these terms include or exclude. The statutory interpretation presumption of consistent expression¹⁰⁵ implies that orders are not the same as decisions. Then, under the *Interpretation Act*, ‘orders’ are defined as a type of ‘regulation’:

regulation includes an order, regulation, rule, ... form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(a) in the execution of a power conferred by or under the authority of an *Act*, or

(b) by or under the authority of the Governor in Council; (règlement)¹⁰⁶

Does Parliament’s use of the term, ‘order’, in the *Broadcasting Act* therefore encompass the broader concept of ‘regulation’? If so, why did it use the more limited concept of ‘order’ in section 31 instead of ‘regulation’? If orders include CRTC By-laws, are those By-Laws subject to any requirements of public process or appellate review?

As for the matter of form, section 31(4) of the *Broadcasting Act* says that CRTC documents about broadcasting licences are deemed to be decisions when they are issued in the form of decisions. The Federal Court of Appeal has noted that it is unclear whether this section is intended to expand the scope of ‘decision’.¹⁰⁷ In fact, this section’s wording may have more to do with where ‘decisions’ are recorded, than their form or appearance: a similar section in the 1968 *Broadcasting Act* said that such

¹⁰¹ *Telecommunications Act* s. 64(1).

¹⁰² *Telecommunications Act*, s. 2(1).

¹⁰³ S. 46.2(4); see also s. 41.3(4).

¹⁰⁴ S. 31(2).

¹⁰⁵ See e.g. *Agriaira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36 (CanLII), per LeBel J., for the Court, at ¶81, explaining the presumption of consistent expression:

... when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings.

¹⁰⁶ S. 2(1).

¹⁰⁷ In *Pachul v. Canadian Radio-Television and Telecommunications Commission*, 2002 FCA 165 (CanLII) Sharlow J.A. commented at ¶16 that “... It is not clear whether subsection 31(4) was enacted for greater certainty or is intended to expand the scope of the phrase “decision or order”, but that is not a question that arises in this case. ...”

In addressing complaints dealt with by a committee of a provincial law society, *Dragun v. Law Society of Manitoba*, 1998 CanLII 4253 (MB CA) at ¶128 points out that the form in which a matter goes to an inquiry may be relevant because “the evidence or information gathered ... may not be in writing.” S. 34(2) deals with decisions, however, not investigations.

determinations might be set out in a “minute or other record of the Commission”.¹⁰⁸ In the CRTC’s early years, therefore, Parliament may have wanted to ensure that licensing determinations in internal documents such as Commission minutes were still reviewable by the FCA. Section 31(4)’s role in the 1991 Act is, however, at present unclear.

2. *How the CRTC announces its ‘decisions’*

Even if the CRTC’s process for publishing its decisions were clear and transparent – and it is not, the CRTC’s own descriptions of its decisions establish that ‘decisions’ of the CRTC are not always issued as “CRTC Decisions”.

The CRTC announces a number of its important documents on its “[Today’s Releases](#)” page - except for decisions on broadcasting administrative applications (released on a page entitled “[Broadcasting Applications Report](#)”) and several types of telecom applications (see [Telecom Applications Report](#)).

While the *Broadcasting Act* and *Telecommunications Act* each permits the CRTC to issue decisions and orders, as well as guidelines and statements (see Table 14, above), the CRTC’s website does not clearly identify these four activities. Its [A-Z website](#) page refers to ‘Decisions’, ‘CRTC Decisions and determinations’ and ‘Orders’, as well as ‘Circulars’, but not to ‘guidelines’ or ‘statements’. Clicking on the included terms leads to the “Decisions, Notices and Orders” [indices](#) shown in Figure 3, below, and includes links to years of Decisions, Information Bulletins, Notices of Consultation, Orders and Regulatory Policies:

- Decisions from 1995-2018
- Information Bulletins from 1996 to 2017
- Notices of Consultations from 1996 to 2018
- Orders from 1997 to 2018, and
- Regulatory Policies from 2009 to 2018.

Presenting decisions, notices, orders, information bulletins, consultation notices and policies on a single page may leave the impression that notices, bulletins and policies have the same stature as decisions and orders. Somewhat puzzlingly, other CRTC decisions are not mentioned at all: neither the CRTC’s A-Z page nor its “Decisions, Notices and Orders – Indexes” page refers to the “Citations, Penalties, Undertakings and Violations”, administrative monetary penalties and alternative case resolutions (<https://crtc.gc.ca/eng/DNCL/dnclce.htm>) that the CRTC issues as part of its responsibilities for the Unsolicited Telecommunications Rules, Canada’s Anti-Spam Law and the Voter Contact Registry. CRTC Letters do not appear on the CRTC’s ‘decisions, notices and orders’ page either; while these often

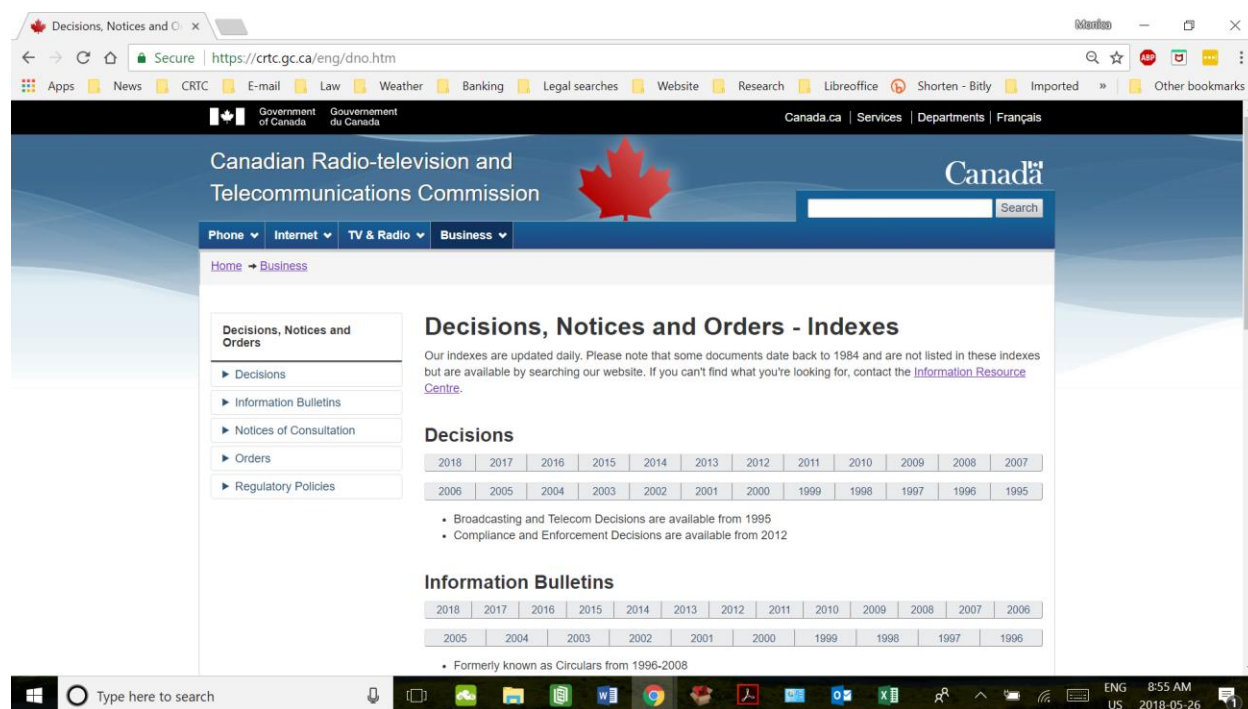
¹⁰⁸

Broadcasting Act, R.S.C. 1970, c. B-11, s. 26(5):

Any minute or other record of the Commission or any document issued by the Commission in the form of a decision or order shall, if it relates to the issue, amendment, renewal, revocation or suspension of a broadcasting licence, be deemed for the purposes of section 25 and this section to be a decision or order of the Commission.

address procedural issues, they also render substantive decisions (sometimes by the CRTC's staff, and sometimes by the Commission¹⁰⁹).

Figure 3 CRTC Decisions, Notices and Orders - Indexes



The indices page is also somewhat misleading, however, as it says that “Decisions” “are available from 1995”, while “Broadcasting and Telecom Regulatory Policies are available from 2009”. Presumably these statements refer only to the indices, as the CRTC has been issuing decisions and policies since the late 1960s. In 1969, for instance, it issued its first policy on cable television, in *Community Antenna Television*, Public Announcement (Ottawa, 13 May 1969).¹¹⁰ The CRTC continued to announce policies

¹⁰⁹ *Re: Transfer of shares and change of effective control – CHHR-FM Vancouver, Application 2011-1118-7 – Denied*, Letter (Ottawa, 26 September 2011), <https://crtc.gc.ca/eng/archive/2011/lb110926.htm>; *Re: Commission Decision – Téléphone Navigata-Westel Communications – Application to Review and Vary 22 September 2016 Letter Decision Part 1 Application by Téléphone Navigata-Westel Communications Seeking Relief with respect to the Timing of Disconnection of services provided to it by TELUS Communications Company – Commission Decision*, Telecom Commission Letter Addressed to Sandeep Panesar (Téléphone Navigata-Westel Communications Inc.) and Stephen Schmidt (TELUS Communications Company), (Ottawa, 1 November 2016), <https://crtc.gc.ca/eng/archive/2016/lt161101.htm>.

¹¹⁰ The CRTC's website appears to include copies of most (but not all, as notices of consultation and hearing agendas, for example, are typically not available until the late 1990s) CRTC documents from roughly 1983 to the present.

through ‘public announcements’ in the 1970s,¹¹¹ moved to ‘public notices’ and ‘policy statements’ in the early 1980s,¹¹² and began issuing ‘Regulatory Policies’ in 2009.

Adding up the various decisions, notices, orders, bulletins and enforcement actions published by the CRTC on its website shows that in 2017 the CRTC issued 867 determinations using nine different descriptions (**Table 16**). Determinations that the CRTC explicitly identified as “Decisions” made up just over a quarter (27.3%) of its determinations in 2017, while “Orders” made up another fifth (176 orders issued, or 20.3%) of all determinations.

Table 16 Nine types of determinations issued by the CRTC in 2017

Determinations issued by the Commission or its staff in 2017					
Description	Broadcasting	Compliance and Enforcement	Telecommunications	Total	% of total
1. Letter	81		319	400	46.1%
2. Decision	183	5	49	237	27.3%
3. Order	4		172	176	20.3%
4. Notice of violation		21		21	2.4%
5. Policy	9		7	16	1.8%
6. AMP settlement		10		10	1.2%
7. Information bulletin	4			4	0.5%
8. ADR		2		2	0.2%
9. Undertaking		1		1	0.1%
Total	281	39	547	867	100.0%
% of total	32.4%	4.5%	63.1%	100.0%	

While those familiar with the CRTC may be aware that ‘decisions’ are more often than not conveyed in documents with titles other than ‘decision’, people who are less familiar with the CRTC are unlikely to know that it is also reaching determinations in the guise of notices of violation, settlements and undertakings. The CRTC’s approach to publishing its decisions for public review is not transparent.

3. Some CRTC decisions are policies, and vice versa

The lack of transparency in the CRTC’s publication of its decisions is made worse by the fact that the CRTC sometimes issues its decisions as public notices or policies: Telecom Regulatory Policy CRTC 2009-401 denied an application by MTS Allstream to re view and vary a CRTC telecom decision,¹¹³ while

¹¹¹ See e.g. its 4 December 1979 *Public Announcement* that it will designate the specific channels cable systems might carry by regulation, rather than as conditions of licence.

¹¹² See e.g. *Policy Statement on the Review of Radio* (Notice CRTC 83-43), and *Cable Television Service Tiering and Universal Pay Television Service*, Public Notice CRTC 1983-245 (Ottawa, 26 October 1983).

¹¹³ *MTS Allstream Inc. – Application to review and vary certain aspects of Telecom Decision 2008-74 regarding the retail tariff approval process*, Telecom Regulatory Policy 2009-401 (Ottawa, 2 July 2009), <https://crtc.gc.ca/eng/archive/2009/2009-401.htm>.

Broadcasting Regulatory Policy CRTC 2013-372 announced the CRTC's determinations on some two dozen applications for mandatory carriage.¹¹⁴

From time to time it also publishes its policies, as decisions: see e.g. *Regulatory policy Forbearance framework for new non-essential wholesale services* (Ottawa, 11 December 2008), Telecom Decision CRTC 2008-116, <https://crtc.gc.ca/eng/archive/2008/dt2008-116.htm#archived>.

It is not clear why the CRTC uses documents with titles other than 'Decision' to issue decisions, nor is it clear how issuing decisions in the form of letters or regulatory policies increases the transparency of the CRTC's decision-making process. The CRTC's approach to describing its decisions for public review is not transparent.

4. *Decision-making often not transparent*

The CRTC has also issued decisions without any prior public process. In 2003 it announced that it might approve certain ownership applications without issuing a public notice or notice of consultation if it thought there was no significant policy concern about the application and the application's approval would be consistent with its approval of previous applications.¹¹⁵ The CRTC then published decisions authorizing 32 ownership applications from May 2003 to April 2004, in four broadcasting public notices (i.e. not 'Broadcast Decisions') that it issued from September 2003 to May 2004:

Table 17 CRTC public notices announcing decisions about applications

Broadcasting Public Notices	Dates and applications
2003-50 (19 September 2003)	1 May – 31 August 2003: 11 applications approved
2003-60 (7 November 2003)	1 September – 31 October 2003: 7 applications approved
2004-17 (24 March 2004)	1 November 2003 – 29 February 2004: 8 applications approved
2004-34 (20 May 2004)	1 March 2004- 30 April 2004: 6 applications approved

In 2006 the CRTC announced that it would issue "letters of approval" about a number of different matters, and again, subsequently published these in public notices. The matters consisted of applications to amend or change

- deadlines for the implementation of an authority;
- deadlines for responding to a requirement made by the Commission in a decision for the filing of documentation or other information;
- the authorized contours of over-the-air programming undertakings;
- the authorized areas of licensed broadcasting distribution undertakings;
- the programming services that licensed broadcasting distribution undertakings are authorized to carry; and to change

¹¹⁴ *Applications for mandatory distribution on cable and satellite under section 9(1)(h) of the Broadcasting Act*, Broadcasting Regulatory Policy CRTC 2013-372 (Ottawa, 8 August 2013), <https://crtc.gc.ca/eng/archive/2013/2013-372.htm>.

¹¹⁵ *Ownership applications granted approval*, Broadcasting Public Notice CRTC 2003-50 (Ottawa, 19 September 2003), <https://crtc.gc.ca/eng/archive/2003/pb2003-50.htm>, at ¶1.

- the broadcast day of television and specialty service undertakings.¹¹⁶

In 2010, the CRTC moved from using Broadcasting Circulars to announce administrative decisions, to using Information Bulletins¹¹⁷ for the same purpose. It explained that “the administrative approach is an effective way of processing routine applications that do not raise concerns. The streamlined process introduced by the Commission to deal with these applications benefits both the industry and the Commission.”¹¹⁸ Table 2, above, notes that CRTC published four bulletins in 2017: two bulletins dealt with provincial election requirements for broadcasters, one set out a decision of the Federal broadcast arbitrator, and the last clarified the CRTC’s definition of advertising material.

From 12 May 2008 to 20 November 2013, however, the CRTC published 21 Information Bulletins that included administrative decisions about applications to change the effective control of broadcasting undertakings. In 2012, the CRTC used this administrative process to approve a change in the effective control of Vista Radio Ltd from Vista’s Board, to Westerkirk Capital Inc., controlled by Thomson Investments Limited.¹¹⁹ By using the “administrative route” of an information bulletin to announce its approval of the Vista transaction, the CRTC apparently viewed a transaction involving 24 radio stations and 14 rebroadcasting transmitters¹²⁰ which were valued at \$36.4 million,¹²¹ as a ‘routine application that did not raise concerns’ – even though it included six rounds of questions¹²² from the CRTC’s staff (known familiarly in this sector as deficiency questions, to obtain answers to correct deficiencies in applications).

The CRTC also announces decisions in other formats – through ‘letter decisions’, for example. Since 2001 the CRTC has issued at least fifteen ‘decision letters’, that

- approved two applications to distribute a second set of US 4+1 signals¹²³

¹¹⁶ *Streamlined processes for certain broadcasting applications*, Broadcasting Circular CRTC 2006-1 (Ottawa, 24 March 2006), <https://crtc.gc.ca/eng/archive/2006/c2006-1.htm>, at ¶14.

¹¹⁷ *Broadcasting applications that do not require a public process*, Broadcasting Information Bulletin CRTC 2010-960, (Ottawa, 23 December 2010), <https://crtc.gc.ca/eng/archive/2010/2010-960.htm>.

¹¹⁸ *Ibid.*, at ¶4.

¹¹⁹ *Applications processed pursuant to streamlined procedures*, Broadcasting Information Bulletin CRTC 2012-662 (Ottawa, 4 December 2012), <https://crtc.gc.ca/eng/archive/2012/2012-662.htm>, Item 2, “APPROVED – Change to the effective control of Vista Radio Ltd. from a control exercised by its board of directors to a control exercised by Westerkirk Capital Inc., a corporation controlled by Thomson Investments Limited. Vista Radio Ltd. is the licensee of radio programming undertakings located in British Columbia, Alberta and the Northwest Territories.”

¹²⁰ Vista Radio Ltd., *Supplementary Brief*, DM#1674907 – 2012-0182-1 – APPLICATION – Document 3 Westerkirk Vista Application.pdf, at 1.

¹²¹ *Ibid.*, at 4.

¹²² The CRTC sent the applicant requests for information on 7 March 2012, 22 March 2012, 11 April 2012, 13 April 2012, 20 April 2012 and 23 May 2012.

¹²³ *Re: Application # 2001-0717-9: Approval of the Application by Rogers Cable Atlantic Inc. for the Authority to Distribute both a second set of U.S. 4+1 signals and Distant Canadian Signals (CRTC List of Part 3 Eligible Services) on a Digital Discretionary Basis for its cablesystems located in Corner Brook, Gander, Grand Falls and St. John's, Newfoundland*, Decision CRTC 2001-585 (Ottawa, 14 September 2001), <https://crtc.gc.ca/eng/archive/2001/DB2001-585.htm>; *Re: Application # 2001-0523-0: Approval of the Application by Regional Cablesystems Inc. for the Authority to Distribute both a second set of U.S. 4+1 signals and Distant Canadian Signals (CRTC List of Part 3 Eligible Services) on a Digital Discretionary Basis for its cablesystems located*

- denied a request by Videotron to review and vary Telecom Decision 2017-105¹²⁴
- denied CTV's request for authority "for an extension in respect of the sale of CTV Inc. (CTV)'s voting interest in CTV SportsNet Inc. (SportsNet)."¹²⁵
- granted conditional approval of a voting trust for CTV Sports Net¹²⁶
- approved a change in the effective control of Grande Prairie Radio¹²⁷
- approved a change in the effective control of CFMB Limited¹²⁸
- approved conditions of licence for CHIK-FM¹²⁹
- granted authority to exercise interim management of CKOD-FM¹³⁰
- addressed five implementations of the *Wholesale Code*,¹³¹ and that

in Sudbury, Timmins, Sturgeon Falls/Jocko Point/Verner, Kirkland Lake/Chaput Hughes/King Kirkland, Elliot Lake, Kapuskasing, and New Liskeard, Ontario, Broadcasting Decision CRTC 2001-398 (Ottawa, 10 July 2001), <https://crtc.gc.ca/eng/archive/2001/DB2001-398.htm>. (Not part of the CRTC's list of broadcasting letters for 2001.)

¹²⁴ RE: Application by Quebecor Media Inc., Videotron Ltd., and Videotron G.P. (collectively, Videotron) to stay, and review and vary, the implementation of Telecom Decision 2017-105 regarding Videotron's Unlimited Music program, Telecom Procedural Letter addressed to Dennis Béland (Quebecor Media Inc.), (Ottawa, 15 June 2017), https://crtc.gc.ca/eng/archive/2017/lt170615.htm?_ga=2.27354873.498168625.1524420018-18065054.1505399347, and included on the CRTC's list of decisions for 2017.

¹²⁵ Re: Application No. 200102236 - Denied by Majority Decision, Request from CTV Inc. for an extension of the sale of its 40% voting interest in CTV SportsNet Inc., a national service, Decision CRTC 2001-111 (Ottawa, 21 February 2001), <https://crtc.gc.ca/eng/archive/2001/DB2001-111.htm>. This letter does not appear on the list of CRTC broadcasting decisions for 2001.

¹²⁶ Re: Application No. 2001-0433-1 - Conditionally Approved, Request for Approval of Voting Trust Arrangements in respect of CTV Inc.'s (CTV) shares in CTV Sports Net Inc. (Sports Net), Decision CRTC 2001-219 (Ottawa, 9 April 2001), <https://crtc.gc.ca/eng/archive/2001/DB2001-219.HTM>, at ¶1 ("Background"), referencing Decision letter CRTC 2001-111, available at: <https://crtc.gc.ca/eng/archive/2001/DB2001-111.htm>.

¹²⁷ See CIGY-FM Grande Prairie and its transmitters CIGY-FM-1 Fort St. John and CIGY-FM-2 Dawson Creek – Acquisition of assets (corporate reorganization), Broadcasting Decision CRTC 2018-64 (Ottawa, 15 February 2018), <https://crtc.gc.ca/eng/archive/2018/2018-64.htm>, at ¶7. The 28 April 2017 letter does not appear on the CRTC's list of letters issued by the CRTC in 2017 (<https://crtc.gc.ca/eng/8045/lc2017.htm>).

¹²⁸ CHRF and CFMB Montréal and CHSV-FM Hudson/Saint-Lazare – Acquisition of assets (corporate reorganization), Broadcasting Decision CRTC 2016-323 (Ottawa, 12 August 2016), <https://crtc.gc.ca/eng/archive/2016/2016-323.htm>, at ¶11.

¹²⁹ CHIK-FM Québec – Licence renewal, Broadcasting Decision CRTC 2014-208 (Ottawa, 2 May 2014), <https://crtc.gc.ca/eng/archive/2014/2014-208.htm#fnb1-ref>, at ¶15. The "administrative decision letter" mentioned has an HTML reference to a letter dated 27 January 2014 to Bell Media, at: https://crtc.gc.ca/eng/archive/2014/lb140127c.htm?_ga=2.31533691.498168625.1524420018-18065054.1505399347; this letter appears on the CRTC's list of broadcasting letters for 2014.

¹³⁰ CKOD-FM Salaberry-de-Valleyfield - Acquisition of assets, Broadcasting Decision CRTC 2015-521 (Ottawa, 24 November 2015), <https://crtc.gc.ca/eng/archive/2015/2015-521.htm>, at ¶3, referring to a decision letter of 8 May 2015 which does not appear on the CRTC's list of broadcasting letters for 2015.

¹³¹ Licence renewal of broadcasting distribution undertakings – Review of practices relating to the small basic service and flexible packaging options and imposition of various requirements, Broadcasting Decision CRTC 2016-458 (Ottawa, 21 November 2016), <https://crtc.gc.ca/eng/archive/2016/2016-458.htm>, at Appendix 2, referring to three decision letters of 5 April 2016 (not listed on the CRTC's list of broadcasting letters for that date), and at footnotes 17 and 18, referring to two other decision letters of 5 April (also not listed on the CRTC's list of broadcasting letters for that date).

- suspended consideration of a wireless service provider's application for final relief.¹³²

Some of the letters were described both as 'procedural' and as 'decisions'; other decision letters were not listed in the CRTC's own lists of its letters.

In brief, the CRTC has published (and may still be publishing) 'decisions' through CRTC policies, letters, letter decisions and information bulletins – this does not make decision-making by the CRTC transparent.

Apart from the lack of transparency in matters requiring a CRTC 'decision', the CRTC's approach raises a question of whether it somehow views these 'decisions' as being different from "Decisions" – does it, for instance, apply the same or different procedural requirements and standards to all applications, regardless of the form in which it publishes its final determination? If public participation in CRTC decision-making is permitted – and at times, encouraged – to increase the quality of its decision-making, why does the CRTC believe that some matters warrant higher-quality decision-making than others?

Another issue raised by the CRTC's practice of using circulars and bulletins to issue decisions is whether the practices are transparent. What does the CRTC's publication of 'decisions' in the form of circulars and bulletins mean with respect to public participation in the CRTC's decision-making process? Does this approach to publication make it easier or more difficult for Canadians and Parliament to understand what the CRTC is doing?

5. *Appellate process is not transparent*

Apart from questions about transparency in publishing its determinations– should decisions to approve changes in effective control be published in Information Bulletins instead of as Decisions? – the CRTC's classification of its determinations affects the rights of parties to seek appellate review. Neither the *Broadcasting Act* nor the *Telecommunications Act* addresses the manner in which CRTC policies may be appealed, but each permits a "decision" of the CRTC to be appealed (Table 18 Levels of appellate review). That said, the CRTC may only review its telecommunications decisions, not its broadcasting decisions.

Table 18 **Levels of appellate review**

Level of review	<i>Broadcasting Act</i>	<i>Telecommunications Act</i>
Review by CRTC	If hearing panel issues an order with respect to non-compliance, persons affected by the order may apply to CRTC to "reconsider any decision or finding made by the panel" (s. 12(3)) => requires panel order to permit decision or finding to be reviewed	The CRTC may be applied to, or may itself decide to, "review and rescind or vary any decision made by it or re-hear a matter before rendering a decision" (s. 62) => requires decision or hearing of a matter

¹³² See Telecom Procedural Letter Addressed to Lawry Trevor-Deutsch (TNW Wireless Inc.), (Ottawa, 23 March 2018), <https://crtc.gc.ca/eng/archive/2018/lt180323.htm>, at ¶13. It refers to and provides an HTML address for a decision letter of 23 October 2017. The 23 October 2017 letter (<https://crtc.gc.ca/eng/archive/2017/lt171023.htm>) is part of the CRTC's list of letters for 2017, but is described as a "Procedural letter", not a "Decision letter".

Review by Cabinet	Any person may petition Cabinet after CRTC “makes a decision to issue, amend or renew a licence” (s. 28(1)) => requires a CRTC decision	Any person may petition Cabinet “after a decision by the CRTC”, to order, vary or rescind the decision, or to reconsider all or part of it (s. 12(1)) => requires a CRTC decision
Review by Federal Court of Appeal (FCA)	Every CRTC decision and order is final, but “... a decision or order of the Commission” may be appealed to the FCA on a question of law or a question of jurisdiction ...” (s. 31(2)) => requires decision or order	The CRTC may determine any question of law or of fact, and its determination on a question of fact is binding and conclusive (s. 52.(1)) but decisions on a question of law or of jurisdiction may be appealed (s. 64(1)) => Requires decision
	<i>Federal Courts Act</i> , s. 18.1 (3) On an application for judicial review, the Federal Court may (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	

The CRTC itself has explained that it is always entitled to review its policies, but not its broadcasting decisions, due to the doctrine of *functus officio* – “a tribunal exercising adjudicative powers may not re-try a matter after it has disposed of that matter in accordance with the *Act*, unless it is expressly authorized to do so by its enabling legislation”.¹³³ It also said that this doctrine does not apply to policy-makers.¹³⁴ In 2003, however, when the CRTC was expressly asked to reconsider and vary a broadcasting decision,¹³⁵ it did so on by finding that the applicant was actually “seeking further orders related to various aspects of Decision 2002-299 and of the Mandatory Order attached thereto to assist it in implementing Decision 2002-299 and the Mandatory Order.”¹³⁶

As for its review-and-vary power in telecommunications, it is noteworthy that Parliament did not specifically permit the CRTC to vary its policies, but only its decisions. The CRTC has ignored this distinction, as recently as May 2018, when it granted an application to review and vary *Next-generation 9-1-1 – Modernizing 9-1-1 networks to meet the public safety needs of Canadians*, Telecom Regulatory

¹³³ Chaudhry v. Canada (Minister of Employment and Immigration) (T.D.), [1995] 1 FC 104, 1994 CanLII 9272 (FCA), <http://canlii.ca/t/4gkc>.

¹³⁴ *Public disclosure of aggregate financial data for owners of large broadcasting distribution undertakings, multi-system operators and conventional television and radio ownership groups*, (Ottawa, 4 September 2009), <https://crtc.gc.ca/eng/archive/2009/2009-560.htm>, at para. 8:

... the Commission notes that the doctrine of *functus officio* governs decision-makers, not policy-makers. In the context of an administrative tribunal, once it has reached a final legally binding decision in respect of the matter that is before it in accordance with its enabling statute, that decision generally cannot be revisited. In the present case, the Commission is dealing with a regulatory policy. Therefore, the Commission had the right to revisit Broadcasting Public Notice 2008-97 with Broadcasting Notice of Consultation 2009-235.

¹³⁵ Application by Vidéotron Ltée for reconsideration of Broadcasting Decision CRTC 2002-299, Broadcasting Decision CRTC 2003-176 (Ottawa, 6 June 2003), <https://crtc.gc.ca/eng/archive/2003/db2003-176.htm>, at para. 7: “On 8 November 2002, the Commission received an application from Vidéotron pursuant to section 12(3) of the *Act* seeking reconsideration and variance of certain aspects of Decision 2002-299.”

¹³⁶ *Ibid.*, para. 33.

Policy 2017-182 (Ottawa, 1 June 2017), <https://crtc.gc.ca/eng/archive/2017/2017-182.htm>. The CRTC's decision¹³⁷ does not consider whether it may review its policy, does not mention its 2009 *functus officio* argument, and simply treats 2017-182 as a decision.

Meanwhile, the Courts have distinguished between CRTC outcomes based on the concept of finality. In 1971 the Federal Court in *National Indian Brotherhood et al. v. Juneau et al.*, [1971] F.C. 66 at page 77. Addressed the difference between final determinations and procedural steps:

Probably the most important question that has to be decided concerning the application of s.28(1) is the question as to the meaning of the words "decision or order". Clearly, those words apply to the decision or order that emanates from a tribunal in response to an application that has been made to it for an exercise of its powers after it has taken such steps as it decides to take for the purpose of reaching a conclusion as to what it ought to do in response to the application.

I should have thought, however, that there is some doubt as to whether those words—i.e., decision or order—apply to the myriad of decisions or orders that the tribunal must make in the course of the decision-making process. I have in mind decisions such as

- (a) decisions as to dates of hearings,
- (b) decisions on requests for adjournments,
- (c) decisions concerning the order in which parties will be heard,
- (d) decisions concerning admissibility of evidence,
- (e) decisions on objections to questions to witnesses, and
- (f) decisions on whether it will permit written or oral arguments.¹³⁸

For its part, the CRTC has also implied that its policies lack the finality that is characteristic of decisions, and that adherence to its policies constitutes an error in law. After Rogers Media cancelled a number of local third-language newscasts on its OMNI television stations in 2015, for example, the CRTC was asked to order the programs' reinstatement on the grounds that their cancellation breached the CRTC's 1999 *Ethnic Broadcasting Policy*. The *Policy* says that "a primary responsibility of over-the-air ethnic radio and television stations should be to serve and reflect their local community."¹³⁹ The CRTC denied the requests for reinstatement in early 2016, on the ground that its policies are not binding and do not have the force of law:

As regards the role of the Ethnic Broadcasting Policy and submissions that Rogers has breached that policy, the Commission notes that such policies are non-binding; in other words, they create

¹³⁷ *New Brunswick 9-1-1 Bureau, on behalf of public safety answering point organizations – Application to review and vary Telecom Regulatory Policy 2017-182 regarding next-generation 9-1-1 services*, Telecom Decision CRTC 2018-188 (Ottawa, 28 May 2018), <https://crtc.gc.ca/eng/archive/2018/2018-188.htm>.

¹³⁸ Incidental orders and decisions made in the process that leads to the ultimate disposition of the matter may, however, now be subject to FCA appeal under the *Federal Courts Act* provided applications for judicial review do not frustrate and delay federal tribunals exercising their statutory jurisdiction properly. See *Canada v. Schnurer Estate*, [1997] 2 FC 545, 1997 CanLII 4807 (FCA) and *R. v. Fraser Papers (Canada) Inc.*, 2006 CanLII 6749 (NB CA), at ¶18, citing *R. v. Appleby* (1974), 21 C.C.C. (2d) 282 (N.B.C.A.).

The *Federal Courts Act* then defines "final judgment" at s. 2(1) as "any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding; (jugement définitif)".

¹³⁹ *Ethnic broadcasting policy*, Public Notice CRTC 1999-117 (Ottawa, 16 July 1999) <https://crtc.gc.ca/eng/archive/1999/pb99-117.htm>, at para. 40.

no obligation in and of themselves. More specifically, **section 6 of the Act provides that the Commission may issue policy statements or guidelines, but that these are not binding on the Commission.** This is a codification of the common law and reflects the Supreme Court of Canada's decision in *Capital Cities Communications Inc. et al. v. CRTC et al.* That decision upheld the Commission's practice of issuing policy statements in light of the broad objectives entrusted to it under the Act, including the supervision of the broadcasting system to implement the broadcasting policy set out at section 3 of the Act. **Accordingly, if the Commission were to treat the Ethnic Broadcasting Policy as binding or as having the force of law, it would be fettering its discretion and this would amount to an error of law.**¹⁴⁰

If the CRTC in 2016 believed that its broadcasting policies cannot bind it, and are therefore not final – unlike decisions, why does it now believe that a telecom policy is so final that it can be reviewed and varied in the same way as a decision? Are the CRTC's policies actually decisions, and vice versa?

On the other hand, assuming the CRTC's policies are not final,¹⁴¹ what is the status of a dozen other types of CRTC actions are not subject to appeal, even if they also result in final determinations?:

- 1 issuing regulations
- 2 issuing guidelines
- 3 issuing statements
- 4 determining non-compliance
- 5 establishing hearing panels
- 6 deciding to deal with matters on behalf of CRTC
- 7 deciding to determine matters on behalf of CRTC
- 8 making recommendations about technical broadcasting matters
- 9 making rules for procedures
- 10 making rules for hearings
- 11 making reports on matters in its jurisdiction, and
- 12 giving approval in connection with complaints or representations

Even determinations described as 'decisions' may not be subject to appellate review. In 2004, the Federal Court of Appeal held that *Provision of telecommunications services to customers in multi-dwelling units*, [CRTC Telecom Decision CRTC 2003-45](#) (Ottawa, 30 June 2003) – a telecom decision labelled as such – was not a decision under the *Telecommunications Act* because it addressed future cases.¹⁴²

¹⁴⁰ *Requests that Rogers Media Inc. reinstate local third-language newscasts on its OMNI stations*, Broadcasting Decision CRTC 2016-8 (Ottawa, 12 January 2016), <https://crtc.gc.ca/eng/archive/2016/2016-8.htm>, para. 32, bold font added.

¹⁴¹ Those seeking to rely on the CRTC's search engine should know that it provides inaccurate results from time to time. A search for "is a policy a decision" – within quotation marks to denote an exact phrase to be searched, as suggested by the CRTC's Search Engine Help page ("Searching by phrase: Put quotes " " on either end of your search to find documents that contain all of the words you typed, in the exact order in which you typed them.") – yielded 51 results, the first ten of which did not include the phrase, "is a policy".

¹⁴² *Canadian Institute of Public and Private Real Estate Co. v. Bell Canada*, 2004 FCA 243 (CanLII), <http://canlii.ca/t/1hfg5>, at para. 5:

... Subsection 64(1) of the [telecom] Act provides a right of appeal from a "decision" of the CRTC on questions of law or jurisdiction with the leave of this Court. In our opinion, this Court does not have the

The Court's view of CRTC policies is equally unclear. In 2013 the Federal Court concluded that policy documents issued by Indian and Northern Affairs Canada are not "law", but

... are the kind of "soft law" discussed by Evans JA in *Canada (Minister of Citizenship and Immigration) v Thamotheam*, 2007 FCA 198 (CanLII). Such documents serve as useful guides for those who administer statutes and regulations, and for the public; but are not in themselves law. They are not legally binding and it may be an error of law to misinterpret or misapply them.¹⁴³

The Federal Court of Appeal agreed with the Federal Court three years later (in the first *simsub* case, *Bell Canada v. Canada (Attorney General)*¹⁴⁴) that policies are not decisions:

Pursuant to subsection 31(2) of the Broadcasting Act, an appeal to this Court lies only from a "decision or order" of the Commission. The Attorney General submits that the two policies, insofar as they pertain to disallow simultaneous substitution for the Super Bowl effective in 2017, are in the nature of statements of intent to exercise statutory powers in the future. As such, it is argued that they do not qualify as decisions or orders within the meaning of subsection 31(2). I agree.¹⁴⁵

The FCA explained that the CRTC's choice of title to describe its conclusions about a matter is less important than "the substance and the effect" of the conclusions: "... it is the substance and the effect of the impugned "decision" that is of relevance, as opposed to the choice of words used by the Commission to refer to it."¹⁴⁶

Unfortunately, when the FCA then addressed the same *simsub* matter in 2017, it did not address the substance and the effect of Broadcasting Regulatory Policy CRTC 2016-334 which might purport to make it a decision; it simply describes it as "Final Decision".¹⁴⁷ It simply said that "[t]he substantive decision of

jurisdiction to hear this appeal because the statements by the CRTC regarding its jurisdiction in future cases do not constitute a "decision" within the meaning of subsection 64(1) of the Act. The CRTC has not imposed any binding conditions or orders affecting the legal rights of private owners of MDUs. See *Rothman's Benson & Hedges Inc. v. Minister of Revenue* (1998), 148 F.T.R. 3 per Richard J.. It has simply stated, that, depending on the circumstances, it would be prepared to make such an order in the future. It did not articulate in which circumstances an order would be appropriate nor the terms that would be included in a particular order.

¹⁴³ *Coldwater First Nation v. Canada (Indian Affairs and Northern Development)*, 2013 FC 1138 (CanLII), <http://canlii.ca/t/g1wr7>, at 42.

¹⁴⁴ 2016 FCA 217 (CanLII), <https://www.canlii.org/en/ca/fca/doc/2016/2016fca217/2016fca217.html>.

¹⁴⁵ *Ibid.*, at para. 22.

¹⁴⁶ *Ibid.*, at para. 24.

¹⁴⁷ *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (CanLII), <http://canlii.ca/t/hpgf1>. In response to Bell's arguments that the "substantive decision to exclude the Super Bowl from the simultaneous substitution regime" as made in Broadcasting Regulatory Policy CRTC 2015-25, rather than in Broadcasting Order CRTC 2016-335, the Court does not explicitly address the 'substance and effect' of the 'Final Decision' that is Broadcasting Regulatory Policy CRTC 2016-334, but says this:

[27] I disagree. The substantive decision of the CRTC regarding the exclusion of the Super Bowl from the simultaneous substitution regime was made in the Final Decision and Final Order and not in the January 2015 policy. Indeed this was determined by this Court in *Bell Canada* where this Court held that the CRTC's January 2015 policy was not a reviewable decision and that the appellants' judicial review application in respect of it and related policies was therefore premature. Thus, the decision to exclude the Super Bowl from the simultaneous substitution regime was made in the Final Decision and Final Order and, as of the date they were rendered, the Sim Sub Regulations were in force. As already noted, subsection 4(3) of the Sim Sub Regulations provides for an exception to the simultaneous

the CRTC regarding the exclusion of the Super Bowl from the simultaneous substitution regime was made in the Final Decision and Final Order and not in the January 2015 policy”.¹⁴⁸

The uncertainty about what is or what is not a CRTC Decision that is subject to appeal may have the effect of insulating CRTC decision-making from appellate and Cabinet review. Any application that deals with a CRTC determination that the CRTC did not label ‘Decision’ would have to begin with a legal analysis demonstrating why it should nevertheless be treated as a decision; applications that deal with CRTC decisions would have to begin with a legal analysis to demonstrate that the ‘Decision’ is in fact final, rather than forward looking. The shifting sands of what the CRTC says is and is not a decision have removed necessary transparency from its decision-making process.

Even if each statute clearly defined the meaning of ‘decisions’, the two statutes’ appeal mechanisms operate differently. Table 18 summarized the appellate reviews possible for different types of CRTC determination, while Table 19, below, points out inconsistencies in the types of appeals possible under the *Broadcasting Act* and *Telecommunications Act*:

Table 19 Inconsistencies in appellate review in broadcasting and telecommunications

Subject and type of decision or order	CRTC	Cabinet	Court
Broadcast order			May be appealed (s. 31(2))
Mandatory broadcast order re non-compliance	CRTC may reconsider any panel decision or finding (s. 12(3))		
Broadcast decision			May be appealed (s. 31(2))
Broadcast licence issuance, amendment, renewal		May be appealed (s. 28(1))	
Any telecommunications matter	CRTC may rehear any matter before rendering decision (s. 62)		
Any telecommunications decision (incl’g any determination)	CRTC may review, rescind, vary any decision (s. 62)	Cabinet may order, vary, rescind, or reconsider all or part of decision (s. 12(1))	May be appealed (s. 64(2))
Any telecommunications decision on law or jurisdiction			May be appealed (s. 64(1))

To summarize, any telecommunications decision may be reviewed by the CRTC itself, Cabinet and the Federal courts – yet the CRTC may not review its broadcasting decisions, Cabinet’s review of broadcasting decisions is limited to licensing matters, and only the courts may review broadcasting “Decisions” in general or with respect to licensing matters.

In the case of ‘orders’, the CRTC may reconsider broadcasting orders related to regulatory non-compliance, Cabinet cannot consider any applications to review broadcast orders, while the courts may

¹⁴⁸ substitution regime where the CRTC decides that the deletion and substitution is not in the public interest under subsection 18(3) of the Broadcasting Act. Thus, the Final Order does not conflict with the applicable regulations. *Ibid.*, at para. 27.

review any broadcast order. Of the three appellate avenues, only that of the Federal Court of Appeal permits CRTC actions and proceedings to be reviewed, as well as decisions and orders.

In brief, the *Broadcasting Act* and *Telecommunications Act* both permit appellate review, but with significantly different scope. While the two statutes set out appellate remedies very clearly (and so, are transparent), what is less transparent is whether the different approaches to appellate review are either necessary or – in today’s era of communications convergence – desirable.

III. Recommendations

This research note was triggered in part by the Federal Court of Appeal’s comment in 2017 regarding the importance of transparency in the CRTC’s decision-making process, and demonstrates that the CRTC decision-making process is, in many ways, not as transparent as its website and its publications suggest. The CRTC says, for example, that its “... operations are subject to the Government of Canada’s policies and guidelines, which aim to ensure management excellence and accountability to Canadians.”¹⁴⁹

Although the CRTC now has eight members, eight members are not required for the CRTC’s committees to make decisions (see Table 20) or for CRTC hearing panels to make decisions. In the committees’ case, as few as two CRTC Commissioners may make decisions on behalf of the Commission. As the members of the CRTC who deal with matters on behalf of the CRTC do not sign the policies, statements, decisions they approve, responsibility for these policies, statements and decisions is unknown (outside the Commission).

Table 20 CRTC Committees and number of CRTC Commissioners required for their decision-making

CRTC committees and their responsibilities	Number of CRTC Commissioners required for decision-making
Broadcasting committee <ul style="list-style-type: none"> Decides whether to <ul style="list-style-type: none"> hold public hearings to renew/amend licences consider complaints, representations Sets agenda for public hearings, initiates proceedings Deals with all broadcasting applications not set for a public hearing Makes all procedural determinations 	3 Commissioners required for quorum - if majority vote principle applies, 2 Commissioners are able to cast deciding votes
Broadcasting Subcommittee <ul style="list-style-type: none"> Approve <ul style="list-style-type: none"> administrative licence renewals notices of consultation for licensing, amendments or renewals matters for which panel has not already been struck Disposes of matters that do not raise new or significant policy considerations 	2 Commissioners required for quorum - unclear what happens when votes tie
Telecommunications Committee <ul style="list-style-type: none"> Decides 	3 Commissioners required for quorum

¹⁴⁹ CRTC, *CRTC Three-Year Plan 2017-2020*, <https://crtc.gc.ca/eng/backgrnd/plan2017/plan2017.htm>, <date modified 2017-04-25>, “What does it mean to be an administrative tribunal?”, at 1.

<ul style="list-style-type: none"> • whether to begin proceedings • all procedural matters under Telecommunications Act (unless reserved to another standing committee or panel named by the Chair) • applications • orders to remove data restrictions • rates, except if set by CRTC-approved tariffs • reporting requirements • Appoints any person to make an inquiry • Makes determinations about <ul style="list-style-type: none"> • depreciation and accounting matters; • costing procedures and practices • costs applications except if panel appointed; • Refers any matter to a meeting of a majority of the members 	<ul style="list-style-type: none"> - if majority vote principle applies, 2 Commissioners are able to cast deciding votes
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How many people in Canada know that **decisions made by the CRTC are sometimes made by as few as two people**, that it sometimes returns applications to applicants without considering them at all, or that – knowing that only decisions can be appealed – it sometimes issues decisions as “Policies”?

How many people in Canada know that the ability of the CRTC Chairperson to appoint the members of CRTC hearing panels may be enabling the Chairperson to determine outcomes of CRTC proceedings – **entirely contrary to the legal principle that ‘those who hear, decide’?**

Indeed, while the CRTC’s website (and many of its annual reports to Parliament) assures visitors of the CRTC’s commitment to transparency, **very little transparency exists with respect to its decision-making structures and processes**, and the boundaries in decision-making authority at the CRTC are not clear:

- 1 Parliament gave the CRTC’s Chairperson the authority to supervise and direct the work and staff of the CRTC and presides over its meetings,¹⁵⁰ but it is not clear how this authority is exercised
- 2 A group of unidentified Commissioners has empowered three committees whose membership is unknown to the public, to decide which matters should or should not be considered by the CRTC
- 3 The specific functions and activities of the CRTC which require decision-making are unclear, leaving it to the discretion of members of the CRTC who are unknown (outside the Commission) to determine what will be treated as a ‘decision’, the degree to which such decision-making processes will be open to the public and under what title (decision, letter decision, policy, bulletin, circular) the CRTC publishes its final determinations.
- 4 Hearing panels of CRTC Commissioners who may or may not have been selected by the CRTC Chairperson issue decisions whose authorship is unknown (outside the Commission)

¹⁵⁰ *Canadian Radio-television and Telecommunications Commission Act*, s. 6(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.”

- 5 It is unknown (outside the Commission how individual Commissioners on CRTC hearing panels are selected, and an analysis of hearing transcripts shows that Commissioners do not have equal opportunities to participate in CRTC hearings
- 6 Responsibility for non-licensing determinations – reports, policies, guidelines, circulars, bulletins – is unknown (outside the Commission), as such documents are not signed
- 7 When the CRTC staff issues final determinations, it is unclear (outside the Commission) whether they are acting at the behest and/or direction of the whole Commission, a quorum of the Commission, a committee of the Commission or the CRTC's Chairperson
- 8 The number of decisions issued by the CRTC each year is unclear (outside the Commission), due to naming conventions that are applied inconsistently, and
- 9 The availability of appellate review of the CRTC's activities is unclear due to inconsistency, as the CRTC may review and vary its telecommunications decisions but not its broadcasting decisions, as only decisions rather than policies, guidelines or statements may be challenged before the courts, and as the courts have reviewed policies as if they were decisions, and have reviewed decisions as if they were policies.

In brief, transparency at the CRTC is at best, superficial – in that the people of Canada are able to learn who has been appointed to the CRTC, but not how the CRTC's decision-making process works, who is making or has made decisions on behalf of the CRTC, what is or is not a decision and what is or is not subject to appellate review. (Note that in the case of hearings, and while this research note has analyzed CRTC transcripts from 1998 to 2017, the transcripts from the previous 30 years of CRTC hearings cannot be analyzed through the CRTC website because they are not posted.)

Superficial transparency threatens procedural fairness in administrative decision-making. As the Supreme Court of Canada explained in 1999 in *Baker v. Canada (Minister of Citizenship and Immigration)*,¹⁵¹

... that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.¹⁵²

Anonymous CRTC decision-makers' ability to set the CRTC's agenda and make its determinations, renders it impossible for those affected by the CRTC's decisions (whether to act, or not to act) to know who is considering their views and evidence. (The related question, of whether views and evidence are in fact, considered fully, is not the subject of this research.)

Some may object to the publication of the CRTC's minutes, in particular if they disclose which CRTC members will hear a specific matter – as this may subject the member(s) to *ex parte* pressure from

¹⁵¹ [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

¹⁵² *Ibid.*, at para 22.

those affected by the matter's outcome. Yet under the current approach to lobbying, such informal contacts either before or after proceedings have commenced may not come to light at all.

Rather than ignore the problem of the regulator being lobbied, Parliament should either prohibit such meetings, or – if it believes the argument that members of the CRTC should meet with those they regulate to gain experience – require that such meetings be recorded and the recordings published.

Reviews of Canada's broadcasting and telecommunications statutes are now underway. The Forum recommends that Parliament change Canada's communications laws to ensure transparent and fair decision-making by decision-making authorities responsible for implementing these laws.

Our specific recommendations for Parliament with respect to decision-making transparency are set out below.

1 Parliament should require the CRTC to ensure that its decision-making process is transparent, by publishing the notices for and minutes of the meetings of the CRTC as well as its Committees (with the exception that personal matters related to CRTC staff should not be disclosed in these documents, to respect privacy rights). Canada's existing communications statutes should be amended, or a new communications statute should be written, to establish that:

"The CRTC shall publish the notices for and minutes of meetings of the CRTC and its committees or sub-committees."

2 Parliament should strengthen the collegial nature of decision-making at the CRTC by permitting members of hearing panels to self select, requiring the CRTC Chairperson to assign Commissioners to specific hearings only if those hearings lack quorum. Canada's existing communications statutes should be amended, or a new communications statute should be written, to establish that:

"Members of panels established to hear matters on behalf of the CRTC shall consist of those members of the CRTC who appoint themselves to the panel, except that the Chairperson shall appoint members to panels that would lack quorum without the Chairperson's appointment."

3 Parliament should require the CRTC to ensure that its decision-making process is transparent, by requiring members to sign the determinations for which they are responsible. Canada's existing communications statutes should be amended, or a new communications statute should be written, to establish that:

"The names of the members of the CRTC who participated in making CRTC documents, including decisions, policies, statements and guidelines, shall be appended to those decisions, policies, statements and guidelines."

4 Parliament should require the CRTC to make its decision-making process transparent, by publishing all determinations on applications it receives – including applications that the CRTC decides not to consider. As 'justice delayed, is justice denied', these determinations should be issued in a reasonable time. Canada's existing communications statutes should be amended, or a new communications statute should be written, to establish that:

"The CRTC shall publish a determination for each application it receives, in a timely manner."

5 Parliament should continue to permit the CRTC to issue guidelines, but should clarify that these guidelines and its policies are also subject to appellate review. Canada's existing communications statutes should be amended, or a new communications statute should be written, to establish that:

"An appeal lies from a policy, decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction"

6 Parliament should permit the CRTC to issue regulations, but should clarify that these regulations include its own by-laws. Canada's existing communications statutes should be amended, or a new communications statute should be written, to establish that:

"A copy of each regulation or by-law that the Commission proposes to make shall be published in the Canada Gazette and a reasonable opportunity shall be given to interested persons to make representations to the Commission with respect thereto."