Notes from introductions to the morning and afternoon sessions of the 3 November 2021 PIAC-FRPC law and policy conference, C-10: The Legal Issues

Morning session: Context regarding section 3 of the Broadcasting Act

I. Introduction

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

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

To provide context for the morning session the Forum's Executive Director, Monica Auer, began by asking whether Bill C-10 still matters, given Parliament's dissolution on 15 August 2021 and the results of the Federal election held on 20 September 2021when the Liberal Party was re-elected as the minority government.

II. Does Bill C-10 still matter?

At the time of the conference Parliament had not yet convened (it did so on 22 November 2021) and the status of Bill C-10 was unclear. It was reported in the week before the conference, however, that the Hon. Pablo Rodriguez, the new Minister of Canadian Heritage, had described passage of Bill C-10 as "an absolute priority":

> "Internet Regulations Drafted", Blacklock's Reporter, (27 October 2021):
>
> …
>
> The bill lapsed in the Senate communications committee August 15 though Minister Rodriguez had called its passage "an absolute priority" for cabinet. "You're talking about the Broadcasting Act which was a very, very important bill," he said.
>
> "We made many promises to table important bills in the first 100 days and that includes the broadcasting bill," said Rodriguez. "We need that bill. We have to modernize it." ….

The current government therefore appears committed to new broadcasting legislation – meaning that Bill C-10 or its successor legislation still matters.

III. Why does Canada need new broadcasting legislation?

The most popular reason ascribed to the government's desire to amend the 1991 *Broadcasting Act* is that it is outdated technologically, as many broadcasting services now operate online. Yet it is unclear why legislative change would be required to ensure regulation of online broadcasters when the CRTC declared its jurisdiction over online broadcasting more than two decades ago, in *New Media*, Broadcasting Public Notice CRTC 1999-84 and Telecom PN CRTC 99-14 (Ottawa, 17 May 1999), paras. 38 – 44.

In fact, the CRTC's assertion of its jurisdiction over online broadcasting in 1999 were based explicitly on the 1991 *Act* that remains in force. At that time, the Commission said first, that the statute's definition of broadcasting is technologically neutral and ""includes the transmission of programs, whether or not encrypted, by other means of telecommunication" and added that the delivery of programs by the Internet is still broadcasting. Second, it said that the *Act* 's definition of 'broadcasting receiving apparatus' was sufficiently broad to include personal computers or other "devices". Last, the CRTC said that it was irrelevant that users were activating the delivery of programs, or that programs were not delivered simultaneously to all users.

The CRTC asserted its jurisdiction over online broadcasting in December 1999, and exempted online broadcasters from the licensing and regulatory requirements of Part II of the *Act*. In fact, the then-small scale of online broadcasting in Canada required the CRTC, under subsection 9(4) of the *Act*, to exclude this sector from its regulatory activities:

> 9(4) The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

The Commission decided in 2003 that the order also encompasses Internet retransmitters and, in 2006, that it includes mobile television broadcasting services delivered and accessed online. The CRTC's current exemption order for online broadcasting – the Digital Media Exemption Order or DMEO – was issued in 2012. .

By 2017, however, questions began to be raised about the CRTC's digital-media exemption order, in part because of an agreement between the Federal government and Netflix announced on 28 September 2017 and under which Netflix agreed to spend $500 million over five years on "original productions in Canada":

Government of Canada | Gouvernement du Canada

Canada.ca > Canadian Heritage

Launch of Netflix Canada: a recognition of Canada's creative talent and its strong track record in creating films and television

From: Canadian Heritage

News Release

OTTAWA, September 28, 2017

Today, the Minister of Canadian Heritage and Netflix announced an agreement that will see the company create Netflix Canada – a first of its kind production company for Netflix outside of the United States – and invest a minimum of CAD $500 million in original productions in Canada over the next five years.

Netflix' commitment to spend an average of $100 million per year for five years on programming made in Canada was comparable to other large Canadian broadcasters' Canadian programming expenditures in 2017. Rogers, for example, spent $56 million on Canadian programming for its conventional television services in 2017, Shaw (through Corus) spent $155 million and Quebecor spent $110 million.

The Netflix agreement therefore raised at least two questions - and one problem - with respect to the CRTC's exemption order.

The first question was whether the Federal government's September 2017 announcement sufficed as evidence that Netflix could contribute materially to the implementation of Canada's broadcasting policy in section 3 of the *Act*. If so, the CRTC would presumably have to rescind its exemption order for digital media, or at least tailor it to ensure that online broadcasters were able to contribute to the section 3 objectives in the same way that offline broadcasters contribute. The CRTC's decision not to review its 2012 DMEO since 2012 strongly suggests that it did not consider the September 2017 announcement to be evidence of online broadcasters' capacity to help implement Parliament's broadcasting policy for Canada.

The second question was whether, even if the Commission were to rescind its digital-media exemption order, non-Canadian online broadcasters would be subject to its jurisdiction. At first glance the answer would seem to be 'yes' - the 1991 *Broadcasting Act* stipulates that the CRTC's jurisdiction is based on broadcasters' operations within Canada, even if broadcasters are resident in another country:

> 4(2) This Act applies in respect of broadcasting undertakings carried on in whole or in part within Canada or on Board

(a) any ship, vessel or aircraft …

(b) any spacecraft that is under the direction or control of [Canada, a Canadian citizen/resident or Canadian corporation] …

(c) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

Section 4(2) may seem inconsistent with the stipulation in section 3(1)(a) that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians". In 1998, however, the Federal Court noted in *Rogers Communications Inc. v. Canada (Attorney General)*, 1998 CanLII 7494 (FC) that this section does not require every broadcasting undertaking to be entirely or wholly Canadian owned or controlled. The CRTC therefore has had the authority to license and regulate non-Canadian broadcasting undertakings carrying on in part in Canada.

The problem raised by the September 2017 Netflix announcement is that Cabinet currently prevents the CRTC from licensing any non-Canadian broadcasters, through its *Direction to the CRTC (Ineligibility of Non-Canadians).* Section 2 of the *Direction* states that "no broadcasting licence may be issued, and no amendments or renewals thereof may be granted, to an applicant that is a non-Canadian."


CANADA

CONSOLIDATION

Direction to the CRTC (Ineligibility of Non-Canadians)

SOR/97-192

CODIFICATION

Instructions au CRTC (inadmissibilité de non-Canadiens)

DORS/97-192

By removing the CRTC's authority to license foreign broadcasting services the *Direction* removes its authority not just to regulate non-Canadian online broadcasters, but also to obtain information from them about their business in Canada. Subsections 10(1)(i) and (j) of the *Act* limit the CRTC's power to obtain information to its licensees:

10 (1) The Commission may, in furtherance of its objects, make regulations

…

(i) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify;

(j) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; …..

[underlining added]

Therefore, since the *Direction* prohibits the CRTC from issuing a licence to Netflix, the Commission cannot require Netflix or any other foreign online broadcaster to submit information about its programming and finances to the Commission – effectively creating a Catch 22. The CRTC must exempt broadcasters that cannot contribute to implementing section

3, but as long as the *Direction* remains in force, it cannot obtain the evidence required to determine the capacity of those broadcasters to contribute to section 3's implementation.

Moreover, even if the CRTC amended the DMEO to enable it to license and regulate large online broadcasters, the *Direction* would mean that the Commission could only do so with large online Canadian broadcasters. Their foreign competitors would remain unregulated and unlicensed.

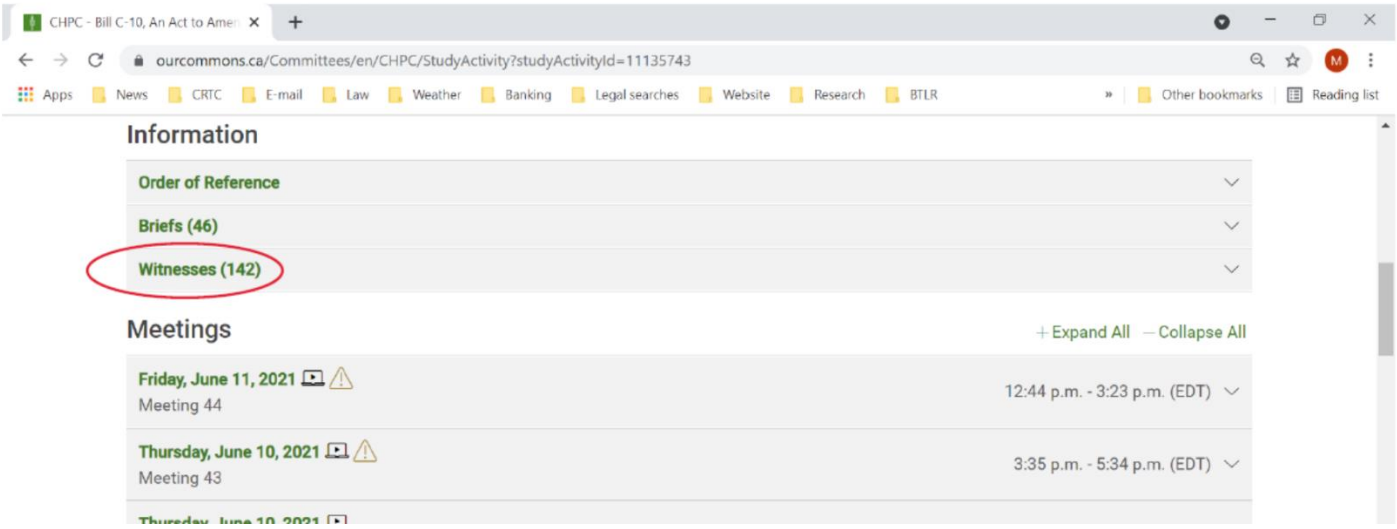
It is unknown why Cabinet has retained the *Direction* without amendments, since Parliament clearly intended in 1991 to give the CRTC authority over Canadian and non-Canadian broadcasters operating in Canada. Nothing prevents Cabinet from amending the *Direction* – for example, to permit the CRTC to license non-Canadian online broadcasters with Canadian subscription revenues above a threshold amount. By maintaining a *Direction* that fetters the CRTC's ability to implement Parliament's broadcasting policy for the country, Cabinet is arguably forcing Parliament to revise the *Broadcasting Act*.

From this issue, we move to the question of what Canada's Parlementarians – being the Members of the House of Commons and the Senate – may expect from new broadcasting legislation, and specifically what they want in a new version of section 3.

IV. Parliament's consideration of Bill C-10

The Canadian Heritage Standing Committee of the House of Commons began to think about Bill C-10 at the beginning of February 2021 and delivered the bill back to the House four and a half months later on 14 June 2021.

According to its website, the Committee held 30 meetings and heard from 142 witnesses about Bill C-10: (see chart next page).

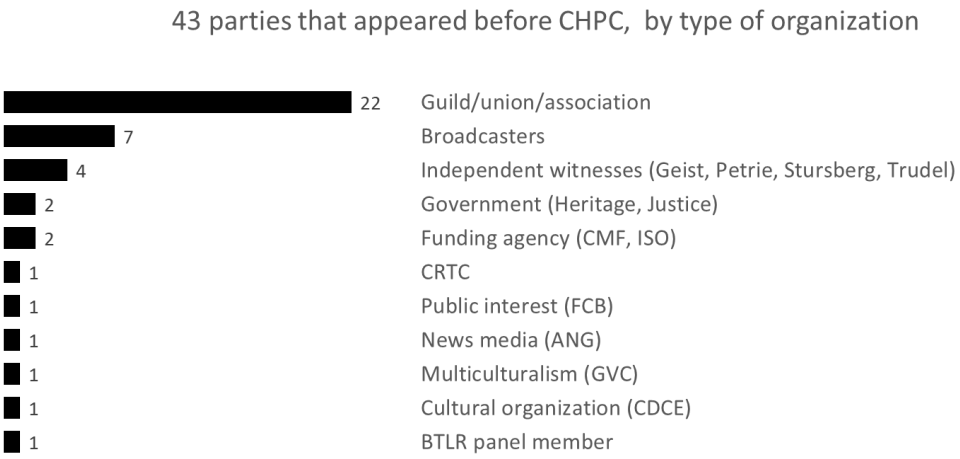


Source: https://www.ourcommons.ca/Committees/en/CHPC/StudyActivity?studyActivityId=11135743

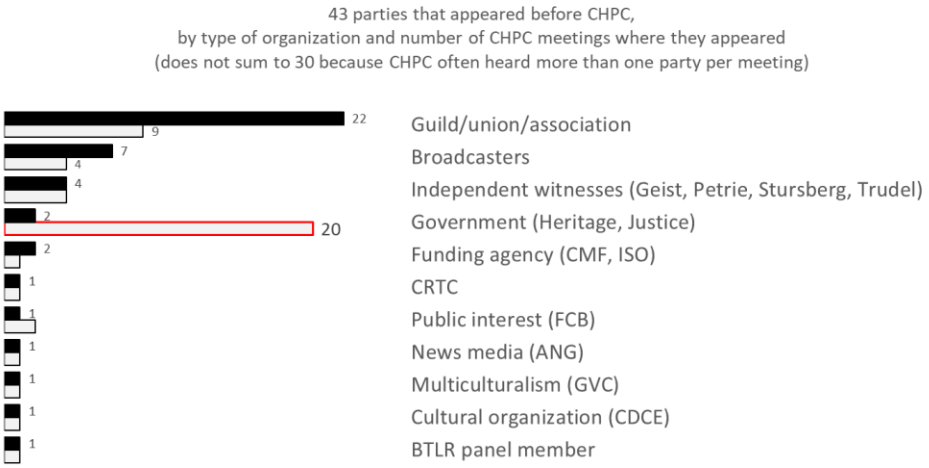
However, these 142 witnesses actually represented only 42 separate parties – including two Federal departments and the CRTC – and only 4 individuals appeared on their own behalf (as independent witnesses). Of these, one (Mr. Trudel) was a former member of the federally-appointed BTLR panel.

Broadcaster	1. BCE 2. CORUS 3. IBG 4. Netflix 5. Quebecor 6. Rogers	Guild/union/ association	21. ACTRA 22. ADISQ 23. APFC 24. AQPM 25. ARRQ 26. CAB 27. CABJ 28. CACTUS 29. CCSA 30. CIMA 31. CMPA 32. CSN 33. FCCF 34. FNC 35. FTCQ 36. MPA - Canada 37. PMPA 38. QEPC 39. REMC 40. SOCAN 41. UDA 42. Unifor
BTLR panel member	7. BTLR		
Cultural organization	8. CDCE		
Funding agency	9. CMF 10. ISO		
Government	11. Heritage 12. Justice		
Regulator	13. CRTC		
Independent witness	14. Stursberg 15. Trudel 16. Geist 17. Petrie		
Multiculturalism News media	18. GVC 19. ANG		
Programming service	20. APTN	Public interest	43. Friends

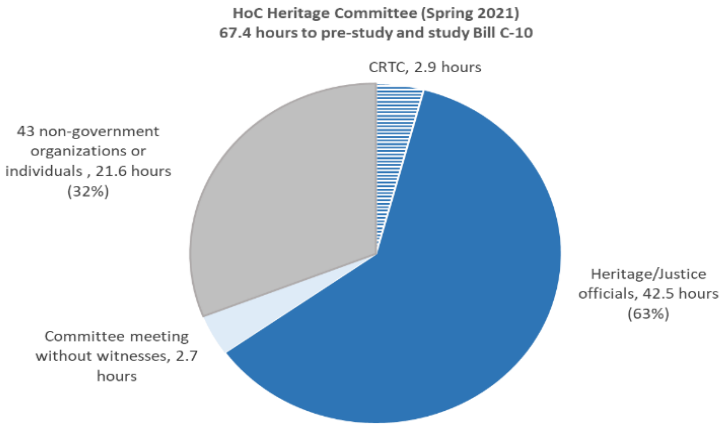
More than half (22) of the 43 parties that appeared before CHPC consisted of guilds, unions or professional associations:

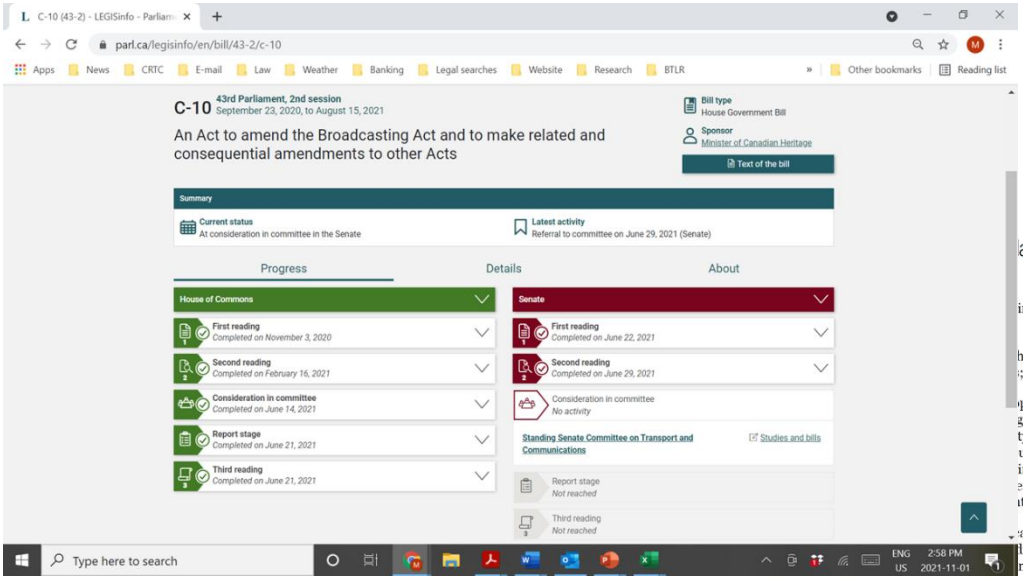


When parties' time or appearances before the Heritage Committee is considered, however, it becomes clear that witnesses from the Heritage and Justice departments appeared more frequently than any other party except relevant guilds, unions and industry associations – 20 appearances for the departments, compared to single-digit appearances by public-interest, news media and cultural organizations:

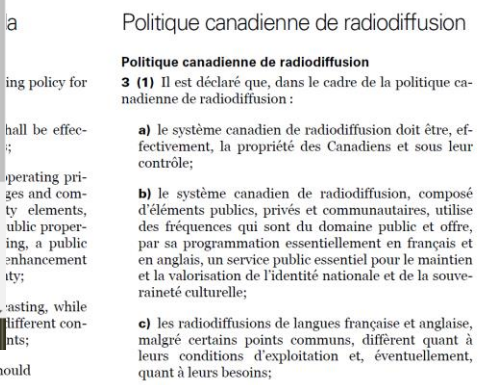


When the actual time – hours – allocated to witnesses by the Heritage Committee is calculated, it becomes apparent that government witnesses occupied nearly two-thirds (62%) of the CHPC members' time.





The House passed Bill C-10 on 29 June 2021 (196 in favour; 112 against).



Politique canadienne de radiodiffusion

Politique canadienne de radiodiffusion

3 (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

a) le système canadien de radiodiffusion doit être, effectivement, la propriété des Canadiens et sous leur contrôle;

b) le système canadien de radiodiffusion, composé d'éléments publics, privés et communautaires, utilise des fréquences qui sont du domaine public et offre, par sa programmation essentiellement en français et en anglais, un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle;

c) les radiodiffusions de langues française et anglaise, malgré certains points communs, diffèrent quant à leurs conditions d'exploitation et, éventuellement, quant à leurs besoins;

V. What do members of Parliament want from Canada's broadcasting system?

Section 3 sets out the "broadcasting policy for Canada".

A. Importance of section 3

Section 3 matters not just because it describes in apparent detail what Parliament wants Canada's broadcasting system to accomplish – a road map towards the future, so to speak – but also because Canadian courts have relied on this section to delineate the limits of the CRTC's regulatory authority in cases from the late 1970s onwards:

> *CKOY Ltd. v. R.*, **1978 CanLII 40 (SCC)** (p. 11):
>
> … the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute ….
>
> *CRTC v. CTV Television Network Ltd. et al.*, **1982 CanLII 175 (SCC)** (p. 539):
>
> … nothing in the Act precludes the Executive Committee from imposing the kind of condition of licence renewal that it imposed here when it was authorized under s. 17(1) to further the objects of CRTC set out in s. 15 and to implement the broadcasting policy enunciated in s. 3.
>
> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, **2012 SCC 68** (CanLII), at ¶22:
>
> Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the Broadcasting Act, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body. ….
>
> *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, at ¶49:

> …. the extent of the CRTC's powers under … section [10] of the Broadcasting Act means that a narrow reading of s. 9(1)(h) will not hamper its efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1).
>
> *TVA Group Inc. v. Bell Canada*, 2021 FCA 153, at ¶¶31-51:
>
> [31] …This appeal therefore raises questions of law that directly concern the limits of the CRTC's power.
>
> [35] … section 3 and section 5 of the Act are not attributive of jurisdiction and are not sufficient in and of themselves to justify the validity of the impugned regulatory provisions. … the Court must analyze the issue of whether the CRTC has the jurisdiction to adopt the impugned regulatory provisions, particularly in light of section 10 of the Act, which grants the CRTC its delegated authority to make regulations ….
>
> [36] … the Court must follow the modern approach to statutory interpretation .... I will therefore examine (i) the wording of paragraph 10(1)(h) of the Act, (ii) the purpose of the Act and finally (iii) its legislative history, all with a view to determining whether the impugned regulatory provisions are ultra vires the powers conferred on the CRTC under the Act.
>
> [50] …The importance TVA gives to Reference re Broadcasting Policy in this case is exaggerated given the issue that was before the Supreme Court. … it does not mean that every regulatory measure adopted by the CRTC that has economic consequences is de facto ultra vires the Act. Reference re Broadcasting Policy cannot … be seen as a prohibition against or elimination of any power of the CRTC to exert economic control over a programming undertaking and a distribution undertaking within the Canadian broadcasting system.
>
> [51] …it should also be noted that …. in Bell 2019, the Supreme Court of Canada clearly indicated that a narrow reading of paragraph 9(1)(h) "will not hamper [the CRTC's] efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1)" (Bell 2019, para. 49).

In other words, section 3 matters not just as an expression of Parliament's objectives but also as a brake on the CRTC's exercise of its authority.

B. Historical context of the broadcasting policy for Canada

The broadcasting policy set out in the 1991 *Act* took decades to develop.

While experimental radio licences were first granted by the Department of Nava Service in 1919, the first broadcasting statute was not passed until 1932, just after the case of *In re Regulation and Control of Radio Communication in Canada*, [1932] when A.C. 304 determined that Canada's Parliament had jurisdiction over broadcasting in Canada, rather than the provinces.

Calls for specific broadcasting legislation emerged in the late 1920s, due to the controversy raised by the Federal government's decision in 1928 to revoke several broadcasting licences held by the Bible Students Association (linked to the Jehovah's Witnesses) after the Association criticized the government's social welfare policies.

Following the 1929 Aird Royal Commission's recommendations, with the 1932 *Canadian Radio Broadcasting Act* Parliament created and empowered a Canadian Radio Broadcasting Commission "to regulate and control broadcasting in Canada" (s. 8), to set "the proportion of time …devoted … to national and local programmes" and to "prescribe the character" of advertising (ss. 8 and 8(b)).

Although the Aird Commission had emphasized Canadians' desire for Canadian programming, the 1932 *Act* did not address in detail Parliament's objectives for Canadian broadcasting.

1932 *Canadian Radio Broadcasting Act* – licensing controversy

1928 Federal government revokes the broadcasting licences issued to the Bible Students Association (linked to the Jehovah's Witnesses)
1929 Royal Commission on Radio Broadcasting (Aird)
1932 *Canadian Radio Broadcasting Act*, S.C. 1932, c. 51

A few years after passage of the 1932 *Act* political controversy arose because of the 1935 broadcast of a series of 15 minute dramatized political "soap opera" shows called 'Mr. Sage'" which attacked the government just before a Federal election. Following the government's re-election, the House of Commons appointed a special committee to study broadcasting and, in 1936 enacted the *Canadian Broadcasting Act.* This statute largely incorporated the 1932 *Act*'s provisions but replaced the Canadian Radio Broadcast Commission with the Canadian Broadcasting Corporation – which operated its own radio stations while simultaneously regulating private radio broadcasters. Like its predecessor, the 1936 *Act* did not include a statement of purpose or objects, leaving the CBC to set its own course.

1936 *Canadian Broadcasting Act* – programming controversy

1935 "Mr. Sage" broadcast
1936 Special Committee on the Canadian Radio Commission appointed in the 18th Parliament, 1st Session, on 19 March 1936 "to inquire into the operations of the Canadian Radio Commission and its administration of the Canadian Radio Broadcasting *Act* of 1932 and Amendments, and the regulations made under authority thereof; to advise what, if any, changes shall be effected in the existing system of radio broadcasting; and whether the said statutes and regulations should be amended in whole or in part, and what, if any additions should be made thereto; also to inquire into the extent to which there has been any abuse off broadcasting privileges, either for political or advertising purposes, and to advise as to what principles should govern the regulations or control thereof…." The Special Committee consisted of 23 members of the House of Commons, with a quorum of 9: Messrs Beaubien, Beaubier, Bertrand, Bouchard, Campbell, Cardin, Cochrane, Dupuis, Edwards, Grant, Hanson, Howard, Howe, Johnston, MacKenzie, Mackenzie, McIntosh, Martin, Massy, Plunkett, Ryan, Slaght and Woodsworth
1936 The Special Committee's First Report of 23 April 1936 consisted of a request to be allowed to sit while the House was sitting
1936 The Special Committee's Second Report of 4 May 1936 consisted of a request to reduce its quorum from 12 to 9 members
1936 After 25 meetings in which 37 witnesses were heard, the Special Committee submitted its "Third and Final Report" on 26 May 1936. It concluded that "during the last election there was serious abuse of broadcasting for political purposes and that lack of a proper control by the [radio] Commission was apparent. The most glaring instance brought before the committee relates to the 'Mr. Sage' broadcasts in which offensive personal references were frequent and to which no proper or adequate political sponsorship was given. Some of these offensive broadcasts originated in the Toronto studios of the Radio Commission." The Committee's main recommendations were to establish a new 'Canadian Broadcasting Corporation' and to replace the 3-person Canadian Radio Commission with a general manager appointed by Cabinet and an assistant manager responsible to a 9-member Board of Governors.

1936 *Canadian Broadcasting Act*, *1936*, 1 Edw. 8, c. 24

Television began to spread in Canada and the United States of America after World War II. In 1949, Canadian interest led the government to appoint a Royal Commission on the arts and sciences. The Massey Commission's 1951 report concluded that broadcasting in Canada "is a public service directed and controlled in the public interest by a body responsible to Parliament" and recommended continuation of the CBC's regulation of private broadcasting (ch. 18, paras. 30 and 41). Within a few years, however, the growth of border TV stations and revenue from TV advertising led to a demand for for more than one TV station per city, while the growing costs of TV program production and distribution raised concerns about the financing of Canadian programming.

The 1957 Fowler Royal Commission recommended shifting regulatory responsibility from the CBC's Board of Governors to a new 'Board of Broadcast Governors' (BBG). In 1958 Parliament passed the *Broadcasting Act*, establishing the BBG and for the first time setting out the statute's "Objects and Purposes":

> 10. The Board shall, for the purpose o ensuring the continued existence and efficient operation of a national g system and the provision of a varied and comprehensive broadcasting service o a high standard that is basically Canadian in content and character, regulate the establishment operation of networks of broadcasting stations, the activities of public and private broadcasting stations in Canada and the relationship between them and provide for the final determination of all matters and questions in relation thereto.

1958 Act – licensing and financial controversies

1951 Royal Commission on National Development in the Arts, Letters and Sciences (Massey Commission)
1955 Fowler Royal Commission on Broadcasting appointed to study the funding of Canada's broadcasting system and the roles of public and private broadcasting
1957 Royal Commission on Broadcasting, *Report* (Fowler)
1958 *Broadcasting Act*, 7 Eliz. 2, c. 22

Within a few years of its creation, the BBG's authority was challenged. In 1962, the CTV group of stations acquired the rights to the annual Grey Cup game but, because it lacked the national coverage desired by advertisers, the BBG ordered CBC to broadcast the games on behalf of CTV.[1] CBC refused, bringing the BBG's authority into question. The next year CBC's competence was in turn questioned by the Glassco Royal Commission on Government organization when it reported that the absence of a clear mandate for the CBC had left the Corporation to develop its own. After two more reports and a white paper, the government brought forward new broadcasting legislation that set out the first "Broadcasting Policy for Canada" and also established the Canadian Radio-Television Commission (now the Canadian Radio-television and Telecommunications Commission or CRTC). The 1968 *Act* also granted the CRTC jurisdiction over broadcast redistribution undertakings (then cable systems) and the specific authority to issue broadcasting licences. The broadcasting policy for Canada had expanded from a single sentence in the 1958 *Act*, to 11 subsections in section 2 of the 1968 *Act*.

1968 *Broadcasting Act* - Public vs private broadcasting controversy

1963 Royal Commission on Government Organization, Volume 4 – includes chapter on CBC

[1] Roger Bird, ed. *Documents of Canadian Broadcasting*, See at 307.

1964 Special consultative committee on broadcasting policy, *Combined Statement*, *Sessional Papers* No. 132B (2d sess., 26th Parl.), 4-10.
1965 Advisory Committee on Broadcasting (Fowler)
1966 *White Paper on Broadcasting*
1968 *Broadcasting Act*, 16&17 Eliz. 2, c. 25

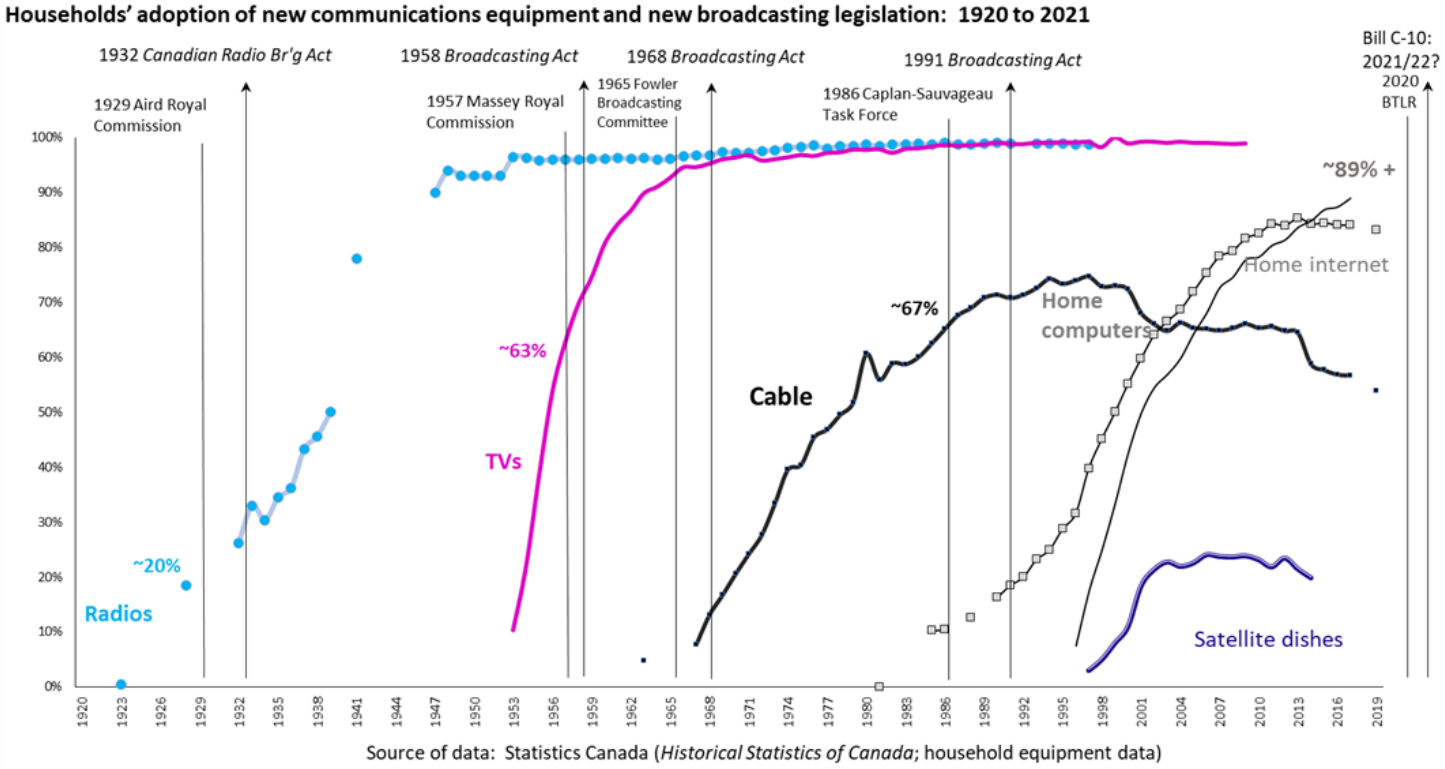
From the early 1920s to the 1960s the two main broadcast forms of regulated broadcasting consisted of radio and television; cable system delivery of television services still made up a very small share of broadcast revenues. From the 1970s, however, technological advances led to the emergece of new means of distribution: geostationary satellites, a forerunner of the Internet (ARPANET), desktop computers, a rudimentary e-mail system, computer discs (CDs) and cellular telephones. The Federal government sought guidance on the impact of technology on Canadian sovereignty and its cultural policy and, in 1991, Parliament enacted a new broadcasting statute that provided more definition of the regulatory approach and powers of the CRTC. The broadcasting policy doubled from the 10 subsections in the 1968 *Act*, to 20 subsections in section 3 of the 1991 *Act*.

1991 Act – addressing the impact of technology on electronic culture

1978 Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty (Clyne Committee)
1979 Advisory Commission on Cultural Policy
1982 Federal Cultural Policy Review Committee (Applebaum-Hébert)
1983 DoC: *Towards a New National Broadcasting Policy*
1986 Caplan-Sauvageau *Task Force on Broadcasting Policy*
1988 House of Commons Standing Committee on Communications and Culture
1991 *Broadcasting Act*, S.C 1991, c.11

Continuing developments in Internet technology now enable Canadians to access programming that was previously only available using radio and television receivers, using a combination of computing devices and mobile telephones. These developments have significantly expanded the quantity and range of content available to Canadian audiences as well as the revenues earned from such content and its distribution – and it has taken far longer to address their impact in new legislation, as the following chart shows.

Households' adoption of new communications equipment and new broadcasting legislation: 1920 to 2021



Source of data: Statistics Canada (*Historical Statistics of Canada*; household equipment data)

In the intervening decades, rather than changing legislation, Parliament and the CRTC have studied the issues affecting the broadcasting system. More than a dozen studies of Canada's broadcasting system and the impact of online content have been published since the 1991 *Act*'s passage. One result is that the broadcasting policy in Bill C-10 grew from the 20 subsections in the 1991 *Act*, to 22 subsections in the amended bill passed by the House of Commons in mid-2021.

Bill C-10 – addressing the shift from offline to online broadcasting

1993 ISED. *The Electronic Connection: An Essential key to Canadians' Survival*

1995 Information Highway Advisory Council. *Connection, Community and Content: The Challenge of the Information Highway*. (Supply and Services Canada, Ottawa, Canada, September 1995)

1999 *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197 (Ottawa, 17 December 1999)

2003 House of Commons Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian* Broadcasting, (Ottawa, June 2003)

2005 Department of Canadian Heritage, *Reinforcing Our Cultural Sovereignty – Setting Priorities for the Canadian Broadcasting System*, Second Response to the Report of the Standing Committee on Canadian Heritage (Ottawa, April 2005)

2006 CRTC, *The Future Environment Facing the Canadian Broadcasting System: a report prepared pursuant to section 15 of the Broadcasting Act* (Ottawa, 14 December 2006

2008 CRTC, *Perspectives on Canadian Broadcasting in New Media - a compilation of research and stakeholder views* (Ottawa, May 2008) Revised June 2008

2010	Convergence Policy, Policy Development and Research, CRTC, *Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications*, (Ottawa, February 2010)
2011	CRTC, *Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications*, (Ottawa, 2011)
2011	House of Commons Standing Committee on Canadian Heritage, *EMERGING AND DIGITAL MEDIA: OPPORTUNITIES AND CHALLENGES* (Ottawa, February, 2011)
2011	House of Commons Standing Committee on Canadian Heritage, *IMPACTS OF PRIVATE TELEVISION OWNERSHIP CHANGES AND THE MOVE TOWARDS NEW VIEWING PLATFORMS*, (Ottawa, March 2011)
2016	Canadian Heritage in June appoints Expert Advisory Group on Canadian content in a digital world, and in September launches public consultation
2017	Federal budget proposes to review and modernize *Broadcasting* and *Telecommunication Acts*
2017	House of Commons, Standing Committee on Canadian Heritage, *DISRUPTION: CHANGE AND CHURNING IN CANADA'S MEDIA LANDSCAPE*, 42nd Parl., 1st Sess., (Ottawa, June 2017); Canadian Heritage publishes *Creative Canada* in September and re-announces review/modernization of Broadcasting Act
2018	Broadcasting and Telecommunications Legislative Review panel appointed
2020	BTLR Panel reports on 29 January 2020
2020	Government introduces Bill C-10 to the House of Commons on 3 November 2020
2021	The Heritage Committee begins a pre-study of Bill C-10 on 1 February 2021; Bill C-10 receives second reading in the House of Commons and is referred to the Heritage Committee on 16 February 2021; the House passes Bill C-10 on 21 June 2021. It receives first reading in the Senate on 22 June 2021 and second reading on 23 June 2021; and is referred to the Standing Senate Committee on Transport and Communications on 29 June 2021
2021	Parliament is dissolved on 15 August 2021 when a Federal election is announced or 20 September 2021; Parliament convenes on 22 November 2021 and the 23 November 2021 Speech from the Throne announces that the government will "reintroduce legislation to reform the Broadcasting Act and ensure web giants pay their fair share for the creation and promotion of Canadian content"

VI. A new broadcasting policy for Canada?

One way of assessing the purpose of Bill C-10 is to consider how the broadcasting policy for Canada has changed over time – from a total of 18 identifiable objectives in the 1968 *Act*, to 74 in Bill C-10:

	1968 Act	1991 Act	Bill C-10 – Jun/21	% change ('91 – '21)
Sections:				
# declaratory sections	3	4	4	0%
# mandatory sections	1 (10%)	5 (25%)	8 (36%)	60%
# discretionary sections	6 (60%)	11 (55%)	10 (45%)	- 9%
Total sections	10 (100%)	20 (100%)	22 (incl'g e.1, f.1) (100%)	10%
Objectives (acts/verbs):				
# mandatory objectives	2 (11%)	8 (14%)	14 (19%)	75%
# discretionary objectives	16 (89%)	51 (86%)	60 (81%)	22%
Total objectives	18 (100%)	59 (100%)	74 (100%)	**29%**

Apart from considering the number of policy objectives that Bill C-10 is now expected to achieve, one may also consider the objectives identified as mandatory – objectives using non-discretionary language such as "shall". The main difference between the 1991 *Act* and Bill C-10 is that new broadcasting legislation would require foreign online undertakings to make the "greatest practicable use of Canadian" resources – although, of course, a clear definition and measurement of 'greatest practicable use' may prove elusive:

Section 3(1) – "shall"	1991 Act	Bill C-10
(a) Effective Canadian ownership & control	X	X
(e) Contribute to creation & presentation of Canadian programming	X	X
(f) Make maximum use of Canadian resources to create & present programming	X	X
New (f.1) "Greatest practicable use of Canadian" resources by foreign online undertakings		X
(k) Extend range of English- and French-language services across Canada ("progressively")	X	X
(n) Resolve conflicts between CBC and others in public interest	X	X

Insofar as non-mandatory or discretionary objectives of Canada's broadcasting policy are concerned, Bill C-10 does not add to but subtracts from the 1991 *Act*'s discretionary objectives, dropping the former reference to alternative programming services:

Section 3(1) – "should"	1991 Act	Bill C-10
(d) Cultural values, employment opportunities, multiculturalism, multiracial society, technological change	X	X
(g) High-standard programming	X	X
(i) Varied and comprehensive programming (inform, enlighten, entertain)	X	X
(l) CBC should provide broadcasting services (inform, enlighten, entertain)	X (radio/TV)	X (broadcasting)
(m) CBC programming characteristics	X	X
(o) Programming that reflects Indigenous cultures	X	X
(p) Barrier-free access to programming	X	X
Old (q) Alternative television programming services	X	
New (q) Online undertakings – discoverability, terms of carriage		X
(s) Creation, presentation of Canadian programming by private services	X	X
(t) Priority of Canadian programming services by distribution undertakings	X	X

The dozens of objectives in Bill C-10 tend to leave the impression that Parliament wants many specific things from the broadcasting system. In reality, though, few of the objectives are required – meaning the CRTC may (and does) ignore pursuit of section 3's discretionary objectives. Consider, for example, the statement in section 3(1)(d)(iii) of the *Act* that the broadcasting system "should … through its … employment opportunities … serve the needs and interests" of Canadians: full-time employment (or the equivalent) in Canadian public and private radio and television decreased by 18% (4,967 positions) between 2000 and 2018 – but of 22,054 CRTC decisions issued between 2000 and 2018, just 67 (0.3%) even mentioned "employment opportunities" and then often in the context of an expectation that broadcasters "reflect the presence in Canada of ethnocultural minorities, Aboriginal peoples and persons with disabilities" rather than in the context of evaluating individual broadcasters' achievement of Parliament's section 3(1)(d)(iii) objective.

The graphic below describes the objectives of section 3 using green font to denote discretionary and black font for mandatory goals. Of the 74 objectives that the House set out in Bill C-10's section 3, it appears to demand that the CRTC implement only six; implementation o the remaining objectives presumably lies within the CRTC's discretion:

Bill C-10 is also silent about several other unwritten yet apparently mandatory objectives that the CRTC itself appears to have devised, requiring it to

- "balance the needs of other players in the broadcasting system" (Decision CRTC 2021-140, para. 34)
- consider whether adhering to its policies/regulations imposes 'undue financial burdens' on licensees (Decision CRTC 2014-399, para. 148)
- address needs of Canadians and those of "consumers"
    - Decision CRTC 84-300 - community radio advertising must not attempt to persuade "consumers to purchase" goods or services
    - Broadcasting Decision CRTC 2021-341 – the Standstill Rule exists "to maintain the status quo for consumers …."

Bearing all this in mind, FRPC and PIAC were very pleased that four of Canada's legal experts on broadcasting – Doug Barrett, Tim Denton, Peter Grant and Phil Palmer – agreed to participate in a discussion off whether Bill C-10's section 3 hits the mark as a 21st century broadcasting policy for Canada, moderated by doctoral candidate Ben Klass.