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

19: Transparency means meaningful access to information [=> replaced yellow highlighting with hyperlinks on 20 Mar/20]

19 March 2023

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

The Ministers of Canadian Heritage and Innovation, Science and Economic Development wrote Chairperson Eatrides in early February 2023 to offer congratulations on her appointment to the Commission[1] and also to "inform her of the Government's vision and priorities with respect to Canada's broadcasting and telecommunications system".[2] The Ministers said they had "consistently heard" that the CRTC "falls short in "openness and transparency" and were confident in the new Chairperson's ability to see to the CRTC's "to being more … transparent …."

Transparency can refer to several aspects of the work of an organization like the CRTC, including the degree to which it explains or describes its plans, the 'dealings' it has with other parties, its operations or processes, and the information it makes available about its work. This note deals with the CRTC's approach to making information that is relevant to its proceedings available to the public.

The CRTC's website has a page on "Transparency" introduced as follows:

> We are committed to providing open and transparent information about our operations and resources to the public so that Canadians and Parliament are better able to hold the government and public sector officials accountable.

Taken at face value one might suppose that the information available from the CRTC would enable Canadians and Parliament to hold the CRTC to account with respect to the mandates it has been given by statute. Specifically, section 5(1) of the *Broadcasting Act* requires the CRTC to "regulate and supervise all aspects" of Canada's broadcasting system to implement Parliament's broadcasting policy in section 3, while section 12(2) of the *CRTC Act* and section 47 of the *Telecommunications Act* require the CRTC's Commissioners to implement Parliament's telecommunications policy objectives in section 7.

The CRTC often chooses not to collect certain information, however, such as the telecommunications companies' underlying costs of their international roaming services (see *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 (CanLII), paragraph 75), or the number of companies that offer their subscribers the basic service of television channels (see A-2022-00052).

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1 CRTC, "Meet Vicky"(accessed 1 March 2023).

2 Department of Canadian Heritage, "New CRTC Chair's Leadership Will Help Shape the Future of Canada's Communication System", News release (Gatineau, 6 February 2023).

As for Parliament's broadcasting policy for Canada, none of the 2,058 tables, charts, figures and infographics published in the CRTC's annual *Communications Monitoring Reports* from 2012 to 2019 described what is actually being broadcast in Canada by Canadian radio, television and community-channel programming services. And while the truly committed – or obsessive – parties could devote time (or their lives) to analyzing the monthly television program logs for several hundred television programming services for the past nine years which must be submitted by CRTC regulation and which are now available for downloading three months at a time, should the CRTC itself not be undertaking this analysis?

A similar gap exists for information about broadcast ownership and financial performance regarding Canadian programming because of the CRTC's decision to provide this information to the public in what can only be described as limited-use, clunky and incoherent PDF documents: limited use in that the PDF documents provide no information about these companies' implementation of Parliament's broadcasting policy, and clunky in that none of these forms are convertible into usable data tables – to use these data each PDF must be entered into a dataset manually. And incoherent, in that the PDF documents present different information about radio and television services: BCE's English-language conventional TV services report expenditures by programming category and origin and its English-language conventional radio services do not.

Since the CRTC is the sole repository of programming, ownership and financial information about those it regulates, it is especially odd that the Commission apparently expects members of the public and civil-society organizations to assemble useful evidence for its proceedings out of whole cloth. Last year, for example, the CRTC addressed its ownership policies for commercial radio and commented that "neither parties in favour of relaxing the [Common Ownership Policy] COP limits, nor parties in favour of maintaining the current limits, provided conclusive evidence to substantiate their viewpoints" (paragraph 37). Unlike the broadcast television, broadcast logs for Canadian radio stations are not available: would it not be helpful, if the CRTC expects parties to provide "conclusive evidence", to give them access to the data needed to provide that evidence? Why not, for example, report on radio broadcast ownership groups' expenditures on news, and the hours of original news they broadcast – in the same report?

Adding insult to injury, the CRTC occasionally lets slip that it does know more than it has disclosed to the public. The CRTC casually mentioned in Broadcasting Regulatory Policy CRTC 2022-332, for example, that it had analyzed (radio) broadcasters' expenditures on (radio) news and found that "expenses related to news are more related to a broadcaster's business model than to the number of stations it operates" (paragraph 42). Given the CRTC's reliance on this analysis both the analysis and the data on which it relied were relevant to this proceeding – so why did the CRTC not disclose it either before or during the 15-month-long review proceeding that began on 28 January 2020 and for which the public record closed on 28 April 2021? The drip-by-drip approach to disclosing relevant evidence creates the impression that the regulator may see its public process as a game of bridge – where the goal is to conceal and protect one's trump cards until they can be slapped onto the opponent's cards.

Equally problematic is the CRTC's approach to its responsibilities as a departmental institution subject to the *Access to Information Act*. Its Chairperson must "without regard to the identity of a person" seeking access to documents held by the CRTC, "make every reasonable effort to assist the person …, respond to

the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested" (section 4(2.1))

What then, explains the CRTC's parsimonious approach to access-to-information requests under the *Access to Information* Act? The statute requires these requests to be answered within 30 days of their receipt (section 7): why then, did it take a complaint to the Information Commissioner's office to obtain the information that another requestor had obtained without difficulty? In this case, after the CRTC issued *Complaint against Société Radio-Canada on the use of an offensive word on air*, Broadcasting Decision CRTC 2022-175 (Ottawa, 29 June 2022) FRPC asked the CRTC on 5 July 2022 for a list of the Commissioners who made the decision. On 2 August the CRTC said it needed three months to answer this request because meeting the 30-day requirement "would unreasonably. [*sic*]"and because it needed to "make consultations": Figure 1.

Figure 1

Since, at the present time, meeting the original time limit of 30 days would unreasonably. Since we need to make consultations, an extension pursuant to paragraph 9(1)(b) of the *Access to Information Act* (ATIA) of up to 60 days beyond the 30-day statutory deadline is required to complete your request.

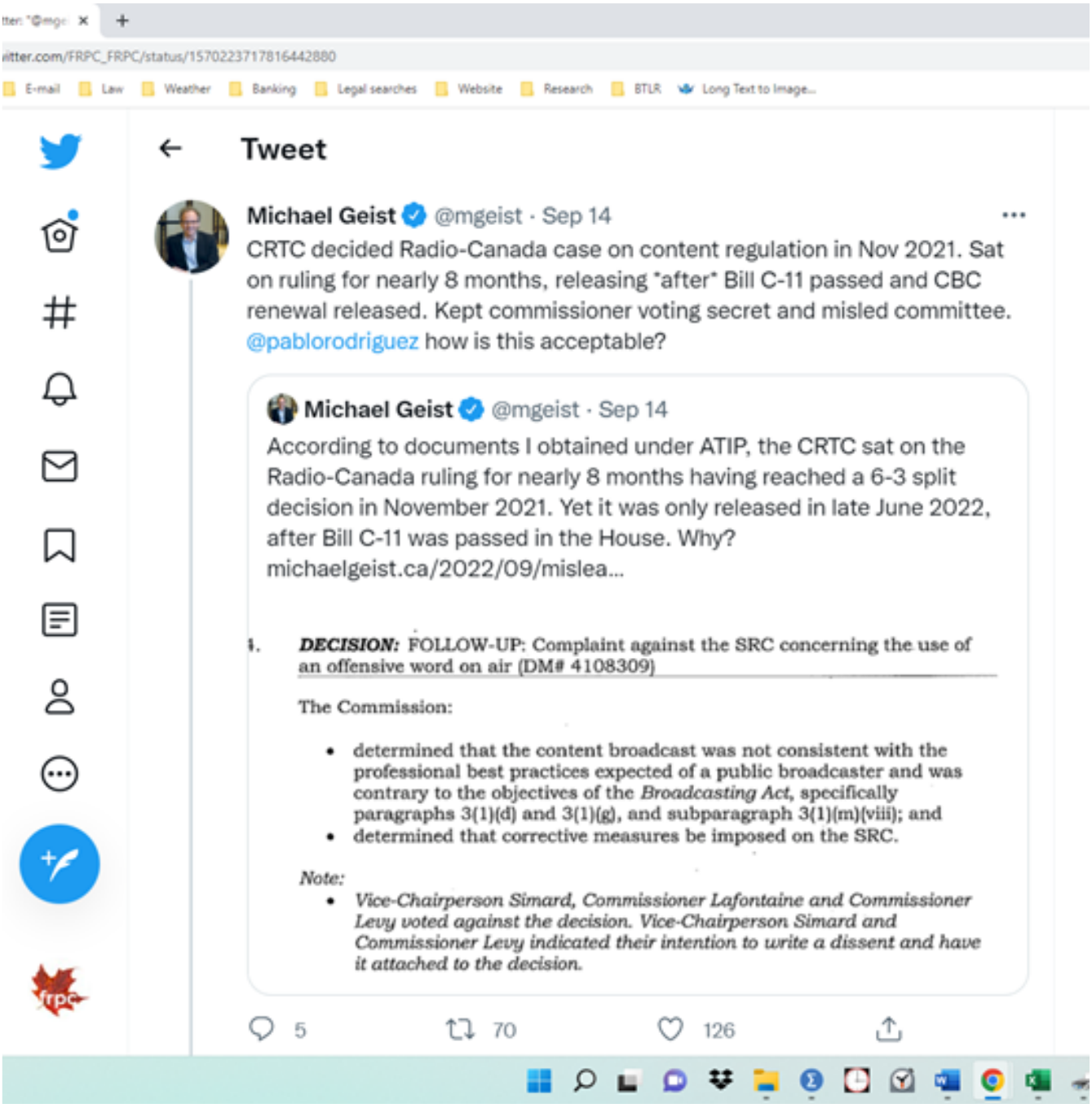
A complaint was submitted the same day (2 August 2022) to the Office of the Information Commissioner about the CRTC's delay and sparse reasons given for the delay. After a month's consideration the Office of the Information Commissioner agreed with the CRTC's need for three months to disclose the names of the Commissioners who made the 2022-175 decision. It accepted the CRTC's statement that it had

> … discussed the matter with the offices of primary interest and determined that the vast majority of the records would require consultations with at one institution. In addition, the records will need to be reviewed by legal counsel. Given the complexity and sensitivity of the records and past experiences with similar records, the OIC is of the view that the 60-day extension pursuant to paragraph 9(1)(b) is valid.

Given the "vast majority of the records", the requirement for "consultations with at one institution" [*sic*], "the complexity and sensitivity" of the records and "past experiences with similar records" involved in disclosing the names of the CRTC Commissioners who made the 2022-175 decision, it was therefore surprising that Professor Michael Geist was able to tweet not just the Commissioners' names but the minutes of the 2022-175 meeting, on 14 September 2022: Figure 2 (next page).

It was only after the Information Commissioner's office was informed of Professor Geist's tweet on 14 September 2022, that the CRTC on 15 September 2022 released a 12-page document answering FRPC' request.

Figure 2



The CRTC's inconsistent approach to implementing the *Access to Information Act* raises concerns that its implementation of the statute's requirements may limit effective participation by some, but not all, parties in the in the CRTC's proceedings.

Economists refer to actions that impose costs on others as externalities and consider how externalities lead to inefficiencies. The CRTC's approach to disclosing information that Parliament has empowered it to gather so as to meet its duties in broadcasting and telecommunications could similarly be said to create administrative externalities: here, the administrative tribunal tasked with implementing Parliament's requirements effectively requires third parties such as civil-society organizations to misallocate their time and resources by searching for

and at times entering data the tribunal already has at its digital fingertips and could have disclosed. The risk is that instead of meaningful public hearings in which members of the public have access to "the fundamental basic facts" relevant to an application before the CRTC, the public's participation is reduced to "an opportunity to 'blow off steam'" – the very outcome that the SCC in the 1976 *London Cable* case wanted to avoid or at least limit (pages 624-625).

Yet the costs of the CRTC's failure to disclose relevant information and evidence extend beyond civil-society organizations and members of the public. Public participation in administrative proceedings has been an important part of regulatory reform initiatives for the last thirty-five years, introducing "a degree of public scrutiny that, arguably, reduces the need for judicial scrutiny" ("From *Delegatus* to the Duty to Make Law", page 84). Unfortunately, since most members of the public and civil-society organizations lack the resources needed to undertake court challenges of the CRTC's failure to disclose key evidence – while the large broadcasting and telecommunications companies have the resources to challenge disclosures – it is more likely than not that the CRTC could in future become even less transparent than it claims to be at present.

Recommendations:

The CRTC should update its administrative processes for the 21st century by meeting annually with interested parties including scholars, civil-society organizations and interested members of the public, disclosing the information it gathers and discussing whether, in light of the CRTC's expected plans for the next three years, that information is relevant and necessary for informed participation in its proceedings.

Maintaining the *status quo* – in which the CRTC obscures the information it has and also that it chooses not to obtain – will only bring the CRTC's administration of its responsibilities into disrepute.

~ Forum for Research and Policy in Communications (FRPC)

Other comments in this series

1 March 2023: Openness means not hiding applications from public view

2 March 2023: Openness means not just describing but explaining the CRTC's process and proceedings

3 March 2023: Openness means 'real' public hearings, published decisions and published meeting schedules

4 March 2023: Openness means publishing information about CRTC meetings with those it regulates

5 March 2023: Openness today means easier access to CRTC programming, ownership and financial data

6 March 2023: Openness means knowing who sets the CRTC's agenda

7 March 2023: Openness means disclosing relevant evidence

8 March 2023: Openness means being open to all, not just to some or most

9 March 2023: Openness means timeliness

10 March 2023: Openness means active efforts by CRTC to engage public

11 March 2023: Transparency means being clear (about being transparent)

12 March 2023: Transparency means clarity about planning processes

13 March 2023: Transparency means disclosing dealings, including meetings

14 March 2023: Transparency means clear process

15 March 2023: Transparency means operational clarity

16 March 2023: Transparency means operational timeliness

17 March 2023: Transparency means clarity about evidence

18 March 2023: Transparency means access to evidence, not selective smokescreening

19 March 2023: Transparency means meaningful access to information