



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

### ***2. Openness means not just describing but explaining the CRTC’s process and proceedings***

2 March 2023

*This is the second of a series of comments about the openness, transparency and accountability of the Canadian Radio-television and Telecommunications Commission (CRTC) that Parliament established on 1 April 1968 and to which it delegated responsibility 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<sup>1</sup> and also to “inform her of the Government’s vision and priorities with respect to Canada’s broadcasting and telecommunications system”.<sup>2</sup> The Ministers referred to “a perception among many that access to CRTC processes is unequal” for the public and civil-society organizations. Among other things the Ministers expressed confidence in the new Chairperson’s ability to see to the CRTC’s “to being more open ...”.*

The CRTC often makes a point of welcoming participation by the public in its proceedings. When it was reviewing the performance of the Commissioner for Complaints for Telecommunications Services (CCTS<sup>3</sup>), for example, the CRTC’s Chairperson said he “... would like to thank all the people who participated in this process either by submitting comments or by appearing before us. We could not fulfill our legislative responsibilities without your views and participation.”<sup>4</sup>

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

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

<sup>3</sup> The CCTS was [established in 2007](#) to facilitate the settling of disputes between telephone, wireless and Internet subscribers and their ‘service providers’ such as Bell and Rogers. In [2016](#) the CRTC required television service providers who deliver programming services to their subscribers by cable, fibre, satellite or wireless means to become participants in the CCTS – its name therefore changed to the Commissioner for Complaints for Television and telecommunications Services.

<sup>4</sup> CRTC Chairperson Jean-Pierre Blais, “Opening remarks by Jean-Pierre Blais at the Public hearing on the CCTS Mandate review” [Speech](#) (Gatineau, 3 November 2015).

Today the CRTC's website explains that people "can participate in public proceedings by sending your ideas, opinions and comments to the CRTC by submitting an intervention."<sup>5</sup> Its "[Consultations and hearings: have your say](#)" page also says that it "works closely with individuals, broadcasters, service providers and businesses to enhance broadcasting and telecommunications (telecom) services in Canada" and that to do so, it depends "on you, Canadians, to tell us what matters to you. What do you want and need? What is working for you? What isn't? We gather these opinions and comments during public proceedings and hearings on specific topics."

In reality, simply sending the CRTC your 'ideas, opinions and comments' as it suggests may be ineffective in persuading the Commission to take whatever steps you would like it to take. This is because, as a specialized quasi-judicial tribunal,<sup>6</sup> the CRTC must adhere to requirements of the rule of law in Canada and the rule of law requires decisions to be made based on evidence. In commenting on how public participation in CRTC proceedings could be supported the CRTC's [2019 submission](#) to the federally-appointed Broadcasting and Telecommunications Legislative Review Panel stated flatly that it "makes its decisions based on the evidence presented on the public record of its proceedings."<sup>7</sup>

The [Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure](#) that apply to all of the CRTC's proceedings (unless, at the CRTC's discretion, they do not), even stipulate applicants and interveners alike must provide the CRTC with facts.<sup>8</sup> Facts matter to the CRTC because its decision-makers base their decisions not just on what they happens to think (as the CRTC is considered an expert tribunal with specialized expertise), but on the evidence of the record of each of its proceedings. This means that even if many people 'participate' in CRTC proceedings by intervening, the CRTC may give relatively little weight to their comments due to the absence of relevant evidence on which the CRTC can then base its decisions.

So today there is a disconnect between the CRTC's frequent and public welcoming of people's ideas, opinions and comments, and its less-visible requirement for formal submissions that provide evidence through facts. The CRTC's easy-to-use, one-click-comment buttons on its ['Open Proceedings' page](#) for broadcasting and telecommunications matters essentially disguise

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<sup>5</sup> CRTC, "[How to Participate in CRTC Public Proceedings](#)" (accessed 2 March 2023).

<sup>6</sup> [Bell Canada v. 7262591 Canada Ltd.](#), 2018 FCA 174 (CanLII), [2019] 2 FCR 414 per Rennie J.A. (dissenting), at paragraph 52: The concept of 'reasonableness' "applies, without differentiation across a wide range of decisions made by a broad spectrum of decision makers: *ad hoc* arbitrators, quasi-judicial tribunals, permit and licensing authorities and large specialized standing quasi-judicial tribunals supported by professional staff, such as the CRTC, the National Energy Board and the Canadian Transportation Agency ...."

<sup>7</sup> CRTC, [CRTC Written Public Submission to the Legislative Review Panel](#), (Ottawa, 2019) at page 19.

<sup>8</sup> Section 22(2)(d) states that applicants' applications must "(e) contain a clear and concise statement of the relevant facts, of the grounds of the application and of the nature of the decision sought"; other interested persons (interveners) must under section 26(2)(d) and (f) "admit or deny the facts alleged in the application" and "contain a clear and concise statement of the relevant facts ... for the person's support for or opposition to the application ...."

the reality that effective participation in its proceedings is limited to parties with professional experience or training and the ability to explain their opinions and knowledge through substantive, evidence-based arguments. In the end, people who have taken the time to share their views with the CRTC may be discouraged from continuing to participate if the CRTC appears to give short shrift to their views – the example of the CBC’s use of sponsored or branded content resembling its own programs being just one<sup>9</sup> of many other decisions where a number of parties set out their concerns about CBC’s sale of branded content only to find that the CRTC was instead focussed on CBC’s financial statements.

A similar disconnect exists between the CRTC’s frequent emphasis on competition – implying new broadcasters are welcome – and its actual requirements of prospective broadcasters without previous experience with the CRTC licensing process. Filling out and filing the CRTC’s 23-page long commercial radio licence application, for example, requires completion of and familiarity with 78 other documents: supplemental application documents (18), Canadian statutes (7), CRTC policies (23), applicable regulations (6), industry codes (12) as well as directions (3), the application for a frequency (1) and additional information (8).

The CRTC has come a long way from the late 1960s and early 1970s when it sent its staff across Canada to visit small cable systems in person to explain and help the systems’ operators apply for new and now-required CRTC licences. Perhaps these days the CRTC fears that frank-and-open exchanges with prospective applicants would taint the integrity of its processes.

### **Recommendation**

The CRTC could review and revise its processes, procedural rules and practices to make it easier for new or prospective broadcasters to understand the requirements they must meet, and to ensure that comments submitted by members of the public are given equivalent weight in its proceedings.

For example, the CRTC could ensure that first- and second-time applicants for broadcast licences are easily able to access the information they need to ensure that they are providing the CRTC with what it needs as a quasi-judicial tribunal. Must applicants really study dozens of documents – some of which read more like university treatises on Canadian cultural identity than simple guides to explain what applicants must do? If it has not already done so, perhaps it could create a ‘virtually separate’ group of staff within the Commission whose role is simply to explain to new applicants how its processes work and who are not involved in any decisions

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<sup>9</sup> During the CRTC’s 2019-2022 renewal process of Canada’s national public broadcaster, the Canadian Broadcasting Corporation, a number of parties including former CBC journalists raised concerns about the “branded content” and product placement known by the CRTC as the Tandem “initiative” and Tandem’s impact on the public broadcaster’s reputation. The CRTC decided that “the revenue-generating activities of the Tandem initiative are onside with the general approach that has been taken with the CBC in the past and consistent with the context in which the CBC currently finances its operations.” *Canadian Broadcasting Corporation – Various audio and audiovisual services – Licence renewals*, [Broadcasting Decision CRTC 2022-165 and Broadcasting Orders CRTC 2022-166 and 2022-167](#), (Ottawa, 22 June 2022), paragraphs 577-593.

taken by the CRTC in licensing matters, and to invite new applicants to meet with these staff at least for an introductory session on how the CRTC works. It could even be that the Commission has already taken such steps to explain to less-experienced applicants any problems with their applications; as the CRTC does not generally publish its correspondence with applicants on the record of its proceedings there is no way of knowing whether it has already taken such steps.

As for public participation in its proceedings, the CRTC could invite public to provide not just their opinions and wishes, but also evidence (although this is something that even lawyers sometimes find difficult to provide). Perhaps it could of its own motion accord more weight to the public's views than it does now (as experienced broadcasters submit far more evidence than the public). Or perhaps it could undertake surveys meeting professional standards for accuracy and enabling error rates to be estimated (ie, telephone rather than Internet-based) to elicit qualitative evidence of Canadians' views about specific matters: such evidence might stand a better chance of being accepted by the courts if decisions based on such surveys are challenged.

Maintaining the *status quo* – inviting comments to which it accords less weight due to lack of evidence as the law understands it, and feigning a desire for new entrants while imposing heavy prerequisites for expertise – would surely contradict the concern raised by the Ministers to whom the CRTC reports.

~ Forum for Research and Policy in Communications (FRPC)

*Other comments in this series*

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