



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

21: Accountability means more meaningful consultation with Canadians

21 March 2023

This is the twenty-first 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 Commission¹ 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 sensed "that public confidence and trust in the CRTC has waned in recent years", pointing to undue delays in its decision-making, unequal access to its processes and the insufficient reasoning, evidence and data in the CRTC's determinations ("decisions").

The final ten commentaries in this series consider the 'accountability' of the CRTC. As noted above, the Heritage and ISED Ministers think that public trust and confidence in the CRTC has been decreasing. At the same time the Ministers emphasize the CRTC's independence: it was referred to nine times in their letter to Chairperson Eatrides. Of course, the CRTC is not entirely independent: the statutes that set out its mandate and powers also empower Cabinet to direct the CRTC to exercise its [telecommunications](#) and [broadcasting](#) duties in specific ways.

What the Ministers' letter elides, however, is the degree to which the CRTC is accountable for its performance, and whether it should be more accountable as it (to quote the Ministers) "implements the laws and regulations set forth by Parliament in the public interest". Canadian society in 2023 is more complex today than it was in either 1906 when Parliament enacted the *Railway Act* (initially used to regulate telecommunications), or in 1936 when Parliament enacted the *Canadian Broadcasting Act*. One way that Parliament has responded to problems of today's complex society is to delegate responsibility and power to administrative agencies such as the CRTC. Yet while elections can hold governments and Parliamentarians to account, fewer tools are available to hold administrative agencies to account: see [Dagg v. Canada \(Minister of Finance\)](#), 1997 CanLII 358 (SCC), [1997] 2 SCR 403, at paragraph 60.

This note deals with the degree to which Canadians are able to hold the CRTC to account through the formal mechanisms set out by Parliament.

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).



Formal accountability mechanisms refer to the ways in which Parliament has enabled parties to have CRTC determinations reviewed and possibly changed or overturned through the *Broadcasting Act* and the *Telecommunications Act*. At present there are three, shown in Table 1, below, and they are available after the CRTC makes decisions or orders (in the case of broadcasting) or determinations (in the case of telecommunications). As Table 1 shows, the CRTC itself can review and change its decisions in telecommunications, but only in a narrow set of circumstances in broadcasting. Cabinet can set aside broadcasting and telecommunications decisions and can also vary telecommunications decisions. The CRTC’s broadcasting “decisions” or “orders” and any telecommunications determination may be challenged before the Federal Court of Appeal on a question of law or jurisdiction.

Table 1 Formal mechanisms of accountability in broadcasting and telecommunications

Broadcasting Act Does not define order or decision	Telecommunications Act Defines ‘decision’: decision includes a determination made by the Commission in any form; (décision)
Commission	
<p>s. 12(3): The CRTC may reconsider, rescind or vary any order or decision made after a panel of CRTC Commissioners established under section 20(1) [by the CRTC’s Chairperson] has inquired into, heard and determined a matter under section 12(1)</p> <p>=> Gap: the CRTC does not have the authority to change broadcasting decisions that were not made by a section 12(1) panel established under section 20(1)</p> <p>=> Gap: the CRTC does not have the authority to rehear a matter decided by a section 12(1) panel established under section 20(1)</p>	<p>s. 46.7: The CRTC may review and rescind or vary a decision it has made under s. 46.5 which requires a telecommunications service provider to contribute to a fund supporting continuing access by Canadians to basic telecommunications services</p> <p>s. 61(1): The CRTC may make an interim decision and then make a final decision later</p> <p>s. 62 The CRTC may review and rescind or vary any decision it has made or re-hear a matter before making a decision, either on its own motion or in response to an application</p> <p>=> the CRTC’s 2019 Practices and procedures for dispute resolution require parties in telecom disputes to agree not to rely on section 62, so as to motivate settlement of the disputes</p>
Cabinet’s authority	
<p>s. 28: Cabinet may set aside a CRTC decision or refer the decision back to the CRTC for “reconsideration and hearing” either “on its own motion” or in response to a petition from anyone which is received within 45 days after the decision’s date</p> <p>Timing: within 45 days of decision’s being made</p> <p>=> Gap: Cabinet cannot vary a CRTC decision</p> <p>=> Gap: no deadline for CRTC to comply with Cabinet</p> <p>=> Ambiguity: what is the difference between a “hearing” in s. 28, and a “public hearing” in s. 18?</p>	<p>s. 12(1) If Cabinet is petitioned within a year of a CRTC decision, Cabinet may vary or rescind, or refer the decision back to the CRTC for reconsideration of all or part of the decision</p> <p>Timing: within 364 days of decision’s being made</p> <p>=> Gap: no deadline for CRTC to comply with Cabinet</p>
Courts’ authority	
<p>s. 31(2): the CRTC’s decisions or orders may be appealed to the Federal Court of Appeal with respect to a question of law or jurisdiction as long as the Court approves the application (made within a month after the decision is made) seeking leave to appeal</p> <p>=> Ambiguity: may ‘regulatory policies’ be appealed?</p>	<p>s. 64(1): a CRTC decision may be appealed to the Federal Court of Appeal on any question of law or jurisdiction if the Court approves the application (made within 30 days after the decision is made) seeking leave to appeal</p>



The main challenge for parties wanting the CRTC or the courts to review one of the Commission's decisions is the formality of the process: more than a simple request is needed. Applicants need to set out their reasons for and the law supporting their request, and if they cannot do this themselves, they need to engage the expertise to do it for them. Large companies have resources and their own internal legal departments; smaller companies, members of the public or civil-society organizations tend to lack resources as well as the in-house expertise.

A second challenge with respect to Court appeals has to do with resources, being time and money. A quick search of CanLII for recent cases involving the CRTC found the seven listed in Table 2, and show an average of 2.7 years from the CRTC outcome being challenged to the final court decision (that in some cases was the Supreme Court's decision on a leave-to-appeal decision). It would be ingenuous to assume that all parties can afford the money and the time involved in such proceedings.

Table 2

Court case	Posting date	CRTC outcome	Court filing	Final court decision
<i>BCE Inc. v. Québecor Média Inc.</i> , 2022 FCA 152	8 Mar/19	19 Dec/19	24 Jan/20	28 Jul/21
<i>Bell Canada v. British Columbia Broadband Association</i> , 2020 FCA 140 (CanLII), [2021] 3 FCR 206,	7 Nov/16	15 Aug/19	10 Dec/19	25 Feb/21
<i>TVA Group Inc. v. Bell Canada</i> , 2021 FCA 153 (CanLII),	8 Apr/19	18 Apr/19	14 Aug/19	12 May/22
<i>3510395 Canada Inc. v. Canada (Attorney General)</i> , 2020 FCA 103 (CanLII), [2021] 1 FCR 615,	5 Mar/15	9 Oct/17	20 Nov/17	4 Mar/21
<i>Bell Canada v. 7262591 Canada Ltd.</i> , 2018 FCA 174 (CanLII), [2019] 2 FCR 414	19 Mar/15	24 Sept/15	9 Feb/16	1 Oct/18
<i>Bell Canada v. Canada (Attorney General)</i> , 2019 SCC 66 (CanLII), [2019] 4 SCR 845	24 Apr/14	9 Jan/15	31 Oct/16	19 Dec/19
<i>2251723 Ontario Inc. (VMedia) v. Rogers Media Inc.</i> , 2017 FCA 186 (CanLII)	5 Oct/16	4 Apr/16	10 Jun/16	15 Sept/17

Appeals to Cabinet may offer some applicants more flexibility. In 1979 the Federal Court commented in [Inuit Tapirisat of Canada v. The Right Honourable Jules Léger](#) that Cabinet plays a supervisory rather than a legalistic role with respect to the CRTC: “[t]he Governor in Council does not concern himself with questions of law or jurisdiction which is in the ambit of judicial responsibility. But he has the power to do what the Courts cannot do which is to substitute his views as to the public interest for that of the Commission” (pages 220-221).

Yet the prospects of success through the Cabinet appeal route are slim. A review of 90 orders in council about applications challenging a CRTC decision shows that from 1991 to now, just 16 (18%) succeeded: 1 of 9 telecom applications, and 15 of 81 broadcasting applications.

The resources needed to challenge CRTC decisions either to the CRTC itself (for telecom matters and rare broadcasting matters), to the Courts and/or to Cabinet may help to explain why relatively few of the thousands of decisions issued by the Commission have actually been challenged – even though, as



suggested in previous commentaries in this series, concerns exist about the degree to which the CRTC's proceedings are actually open and transparent.

The difficulty for members of the public and civil-society organizations that participate in the CRTC's broadcasting and telecom proceedings is that the formal appeal mechanisms are inapplicable: much of what the CRTC does on a day-to-day basis is simply not readily subject to the formal appeal mechanisms in either the *Broadcasting Act* or the *Telecommunications Act*.

Suppose a letter from the CRTC's staff declines to grant several parties' requests for an extension to a deadline in an important policy proceeding (due to overlapping deadlines of other consultations by other organizations). No appeal can be made to Cabinet as that appeal route deals with licensing decisions, not policy matters. Should individuals or civil-society organizations use their time and scarce resources to ask the Commission to overturn its staff – bearing in mind that the CRTC's staff were likely simply implementing a direction from the CRTC's Commissioners? If that attempt fails, should individuals or civil-society organizations then use their limited resources to challenge the CRTC's decision before the Court, or to seek a writ from the Court ordering the CRTC to extend its deadline?

These issues arise more frequently than one might expect, and heighten the frustration in dealing with a regulatory agency whose decisions about process often seem arbitrary rather than designed to serve the public interest.

An interesting development in the government's proposed *Online Streaming Act*, Bill C-11, is that if enacted it would provide some groups with enhanced information before and during and after broadcasting proceedings by adding a new subsection 5.2 to the current *Broadcasting Act*:

Consultation

5.2 (1) The Commission shall consult with official language minority communities in Canada when making decisions that could adversely affect them.

Objectives of consultations

- (2) When engaging in consultations required by subsection (1), the Commission shall
- (a) gather information to test its policies, decisions and initiatives;
 - (b) propose policies, decisions and initiatives that have not been finalized;
 - (c) seek the communities' opinions with regard to the policies, decisions or initiatives that are the subject of the consultations;
 - (d) provide them with all relevant information on which those policies, decisions or initiatives are based;
 - (e) openly and meaningfully consider those opinions;
 - (f) be prepared to alter those policies, decisions or initiatives; and
 - (g) provide the communities with feedback, both during the consultation process and after a decision has been made.

At the same time, because Bill C-11 provides no guidance about the way in which the CRTC should consider new 'conditions of service' it is unclear whether discussions between individual online streaming services will be conducted through public processes, or through private negotiations. If the latter – and assuming such outcomes remain subject to the existing formal appeal mechanisms – will the result be more transparency and openness or less?



Recommendations:

To minimize a sudden surge in appeals to the Courts and Cabinet, the CRTC should revise its *Rules of Practice and Procedure* so that the ‘default setting’, so to speak, of the CRTC is transparency, to facilitate greater accountability. The CRTC should incorporate the ideas set out in proposed section 5.2 in Bill C-11 to apply to all communities in Canada.

Maintaining the *status quo* – in which the formality of the legal review process places appeals out of reach of Canadians in general– has the potential to 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](#)

20 March 2023: [Transparency means comparability of data over time](#)

21 March 2023: Accountability means more meaningful consultation with Canadians