



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

### 30 Accountability requires regulator's compliance with Parliament's laws

30 March 2023

This is the thirtieth and last 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. When 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> they also said "that public confidence and trust in the CRTC has waned in recent years".

The 21<sup>st</sup> to 30<sup>th</sup> commentaries in this series have been discussing the 'accountability' of the CRTC, focussing on the degree to which the CRTC accounts for its performance. These commentaries are related to the overall question of how the Commission demonstrates its implementation of Parliament's laws when it regulates broadcasters and telecommunications companies. Today's comment focusses instead on the CRTC's compliance with (to quote the Ministers' letter slightly out of context) "the laws and regulations set forth by Parliament in the public interest".

The question of the CRTC's own compliance with Parliament's laws arises because of the idea of "rule of law". In 2018 the Federal Court of Appeal explained this concept in [Canada \(Citizenship and Immigration\) v. Tennant](#) at paragraphs 21 and 22 pointing out that, in the case of judges, disregard for law could permit decisions based on whim, idiosyncratic feelings or ideology:

... "rule of law" does not mean whatever counsel can decry as egregious or unfair .... Rather, it is a limited concept illustrated by the very rare cases that have successfully applied it in this context. ... the rule of law takes its flavour from the ills sought to be prevented by this exception. If this exception did not exist, a judge of the Federal Court could always blatantly disregard binding law and do whatever he or she wants in a case based on her or his own ideology, whim or personal idiosyncratic feelings, and then decline to certify a question. The effect? Immunization from any accountability or review.

In 2019 the Supreme Court went further, noting in [Canada \(Minister of Citizenship and Immigration\) v. Vavilov](#) that the rule of law breaks down "where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision-maker" (paragraphs 71 and 72).

One way that administrative agencies follow the rule of law is to abide by Parliament's wishes about their purpose and performance. As more than one or two statutes enacted by Parliament apply to the CRTC, this is no light burden. Apart from the [Broadcasting Act](#) the CRTC is required through the [CRTC Act](#) to "exercise the powers and perform the duties vested in the Commission and the Chairperson, respectively,

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



by the [Telecommunications Act](#) ....". Other laws that apply to the Commission indirectly or directly include: the [Accessible Canada Act](#), [Canada Elections Act](#), [CASL](#), [Canadian Multiculturalism Act](#), [Official Languages Act](#), [Personal Information Protection and Electronics Documents Act](#), [Privacy Act](#) and the [Radiocommunications Act](#). (These are Parliament's statutes; as a quasi-judicial agency the Commission is also bound by the Courts' interpretation of Canadian law.)

The focus of this note is on the specific requirements imposed directly on the CRTC by Parliament in one statute – the *Broadcasting Act*. 'Requirements' are for the most part identifiable by their use of the imperative, "shall": the [Interpretation Act](#) requires that "[t]he expression 'shall' is to be construed as imperative and the expression 'may' as permissive" (section 11).

## 1. Regulate and supervise so as to implement broadcasting policy

Section 3(2) of the *Broadcasting Act* states that the CRTC "***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)". The powers that Parliament assigned the Commission to fulfill this role include the ability to set the terms and conditions of broadcasters' licences to give effect to the broadcasting policy (section 9) and to enact regulations requiring licensees "to submit to the Commission such information regarding their programs and financial affairs ... as the regulations make specify" (section 10).

What should one then make of the CRTC's statement in 2022 that – after a renewal process that began in mid-2019 – the Commission "could not conclude with certainty that CBC exceeded its requirements relating to the broadcasting of Canadian music and to FVM [French-language vocal music] for its French-language stations, throughout the licence term" ([Decision CRTC 2022-165](#), paragraph 394)? Does this statement effectively acknowledge the CRTC's inability to regulate and supervise Canada's national public broadcaster?

## 2. Report CBC non-compliance

Section 25(1) of the *Broadcasting Act* states that the CRTC "***shall*** forward to the Minister a report" about any contravention by the CBC of the CRTC's regulations or CBC's conditions of licence "after a public hearing on the matter". (Section 25(2) then requires the Minister to table the report before the House of Commons and the Senate.)

The CRTC has held three public hearings in which it considered the CBC's performance of the terms and conditions of its licence and after which it concluded that CBC had breached the Commission's regulations or its own conditions of licence. (It has also found CBC to be in non-compliance but without a public hearing: see [Decision CRTC 2001-530](#), for example, in which the CRTC found CBM-FM in breach of a condition of licence regarding the broadcast of Canadian musical selections.) What should one make of the fact that the CRTC has no records of any reports it forwarded to the Minister about the following three occasions when, following a public hearing, it found CBC had contravened its conditions of licence or the CRTC's regulations?



a) CBC's 2000 breach of condition of licence – no report

In May 1999 the CRTC held a public hearing to consider the renewal of CBC's English-language radio and television licences. It concluded in [Decision 2000-1](#) that CBC Radio One had breached its condition of licence requiring that 50% of the popular music selections it broadcast each week be Canadian (paragraph 92).

The CRTC has no record of any report it forwarded to the Minister about CBC's contravention: Figure 1.

**Figure 1 A-2022-00001**

This is to acknowledge your request was received in this office on June 10, 2022.

We note that, pursuant to the *Access to Information Act* (ATIA), you wish to obtain the following information:

*“S. 25(1) of the 1991 Broadcasting Act states that the CRTC “shall forward to the Minister a report” with respect to any contravention of the CBC's conditions of license. In Decision 2000-1 at paragraph 92 the CRTC determined that CBC's Radio One radio network had breached its condition of license for Canadian content. Please provide a copy of the report submitted by the CRTC to the Minister about this breach.”*

We regret to inform you that a search of the records under the control of the Canadian Radio-television and Telecommunications Commission has revealed none relating to the subject of your request under the ATIA.

b) CBC's 2004 breach of regulation – no report

Section 8(4) of the [CRTC's radio regulations](#) requires radio stations to keep accurate program logs of their broadcasts. In 2004 the CRTC held a public hearing at which it heard CBC's application to renew CBVT Québec and found in [Decision CRTC 2004-531](#) that the its program logs contained “errors and raise numerous interpretation difficulties” (paragraph 12).

The CRTC has no record of any report it forwarded to the Minister about CBC's contravention: Figure 2.

**Figure 2 A-2021-00077**

This is to acknowledge your request was received in this office on June 10, 2022.

We note that, pursuant to the *Access to Information Act* (ATIA), you wish to obtain the following information:

*“S. 25(1) of the 1991 Broadcasting Act states that the CRTC “shall forward to the Minister a report,” with respect to the CBC's contravention of a CRTC regulation. Section 10(3) of the CRTC's Television Broadcasting Regulations, 1987 requires the submission of program logs along with an attestation by the licensee of the logs' accuracy. In Decision 2004-531 at paragraphs 11 and 12 the CRTC determined that the original and corrected program logs submitted by the CBVT-TV Quebec contained errors. Please provide a copy of the report submitted to the Minister about this breach by CBC of the requirement of the CRTC's Television Regulations that logs submitted to the CRTC be accurate.”*



c) CBC's breach of condition of licence in 2013 – no report

In 2012 the CRTC held a public hearing to consider the renewal of CBC's radio and television licences. It concluded in [Decision CRTC 2013-263](#) that the CBC's French-language television service had breached its condition of licence for original children's programming for several years.

The CRTC has no record of any report it forwarded to the Minister about CBC's contravention: Figure 3.

**Figure 3 A-2020-00055**

This letter is further to your request of December 22, 2020 to obtain:

**“Hello, The CRTC held a public hearing beginning 19 Nov/12 to consider renewing CBC's radio and television licences. In Broadcasting Decision 2013-263 the CRTC noted at para. 83 that CBC's "French-language television service was subject to a condition of licence requiring the broadcast of four hours of original children's programming per week, averaged over the broadcast year, and the CBC has acknowledged non-compliance with this condition for certain years." Section 25(1) of the 1991 Broadcasting Act states that, "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 the in the schedule ... the Commission shall forward to the Minister a report setting out the circumstances of the alleged contravention or failure, the findings of the Commission and any observations or recommendations of the Commission in connection therewith."**

**Please provide a copy of any report forwarded by the CRTC to the Minister either in the year before or the 18 months after the CRTC issued BD 2013-263, regarding the CBC's non-compliance with the contravention of the children's programming condition of licence, any other condition of CBC's licences and/or any contravention of the CRTC's regulations. ”**

I regret to inform you that a search of the records under the control of the Canadian Radio-television and Telecommunications Commission has revealed none relating to the subject of your request under the *Access to Information Act* (ATIA).

On the chance that the Department of Canadian Heritage had received a report on CBC's non-compliance from the CRTC that the CRTC had not retained, the Department was also asked for a copy of such reports. It said it had none: Figure 4.

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Figure 4

Canadian Heritage received the following access to information request:

***all documents submitted by the CRTC to the Minister, from 1 January 1999 to 31 July 2022, under section 25 of the Broadcasting Act.***

The present notice is a/an:

- Final response.
- Interim response (you will receive a second notice when we complete the processing of your request).

Pursuant to [subsection 7\(a\) of the Access to Information Act](#), the records are:

- Disclosed entirely.
- Disclosed partially.
- Withheld entirely.

Pursuant to [subsection 10\(1\) of the Access to information Act](#):

- No records exist.
- Reason(s) for refusal to give access:
  - [Section 13](#) (Information obtained in confidence)
  - [Section 14](#) (Federal-provincial affairs)
  - [Section 15](#) (International affairs and defence)
  - [Section 16](#) (Law enforcement and investigations)
  - [Section 17](#) (Safety of individuals)

Is it concerning that at least three mandatory CRTC reports to the Minister of Canadian Heritage regarding CBC's regulatory non-compliance were not submitted as required – leaving the Minister unable to lay them before Parliament?

### 3. Exemptions when no 'material contribution' to Parliament's broadcasting policy

Section 9(4) of the *Broadcasting Act* states that the CRTC “shall ... exempt persons who carry on broadcasting undertakings ... from ... 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 CRTC has exempted many broadcasting undertakings from regulation and lists 42 current [exemption orders](#) on its website.

Under one of these – the 2012 [Exemption order for digital media undertakings](#) – the CRTC states that it will not regulate undertakings that provide broadcasting services “delivered and accessed over the Internet” or ‘delivered by point-to-point technology and received by mobile devices’. The CRTC first exempted Internet broadcasters from regulation in 1999, appearing to agree with interveners who agreed “that regulation of these undertakings would not contribute” materially to Parliament’s broadcasting policy.





What should one make of the CRTC’s [adamant refusal for years](#) to consider any amendment to its exemption order for digital media broadcasters when one of the larger Internet broadcasters – Netflix – had already committed [in 2017](#) to spend \$100 million/year for 5 years on Canadian programming, surely a ‘material’ contribution?

#### 4. Hold a hearing

Section 18(1) of the *Broadcasting Act* requires the CRTC to hold a public hearing before it makes an order under section 12(2):

##### Where public hearing required

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

...

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

##### Mandatory orders

12(2) The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part, under any regulation, licence, decision or order made or issued by the Commission under this Part or under any of sections 42 to 44 of the *Accessible Canada Act* ....

In 2022 the CRTC [ordered](#) (most) cable and satellite TV distributors to distribute a programming service from March 2023 to August 2026 – with an [administrative process](#) and without a public hearing. The CRTC similarly issued mandatory orders after “non-appearing public hearings”, “[without the appearance of the parties](#)” or the public, in Decisions [2018-110](#), [-168](#), [-172](#) and [-468](#).

#### 5. Register petitions

[Section 29\(3\)](#) of the *Broadcasting Act* requires the CRTC to “establish and maintain a public register in which shall be kept a copy of each petition” that has been sent to Cabinet (‘Governor in Council’) and received by the CRTC.

A search of the CRTC’s website including its [A-Z Index](#) for ‘cabinet petitions’ brought up links to CRTC telecommunications documents, but not to a page listing the petitions it received about its broadcasting decisions (such as the [dozen or more](#) submitted to Cabinet about the CRTC’s renewal of CBC’s licences in 2022).

The screenshot shows a search interface with the following elements:

- Search bar:** Contains the text "cabinet petitions".
- Filters:** Four dropdown menus for filtering results by type, subject, and year.
- Results:** A list of search results, including "Study on accessibility and affordability of telecommunications services | CRTC", "Telecom Decision CRTC 2021-181 | CRTC", and "Telecom Notice of Consultation CRTC 2020-131 | CRTC".



Parliament may enact new laws this year which give the CRTC new responsibilities: Figure 5.

Figure 5

## From the Minister

Each year, organizations within the Canadian Heritage Portfolio make arts and culture shine, preserve our heritage and strive to listen to Canadians in order to best respond to their needs. In 2021-22, these organizations, including the Canadian Radio-television and Telecommunications Commission (CRTC), fulfilled their mandate despite challenges brought on by the COVID-19 pandemic. They also contributed to the Government of Canada's efforts in promoting the cherished values of equity, diversity and inclusion in Canadian society.



During the last fiscal year, the CRTC focused on the proceeding for the Canadian Broadcasting Corporation/Société Radio-Canada's broadcasting licences. The CRTC assessed Canadians' comments and the evidence submitted by interested parties on how the national public broadcaster should continue to fulfill its mandate across all its services and platforms in the coming years. After the publication of the CRTC's licence renewal decision, an order from the Governor in Council was issued, referring the decision back to the Commission for its reconsideration on how to ensure that the Corporation continues to make important contributions to local news, children's programming, original French-language programming and programming produced by independent producers.

The CRTC has also been working towards introducing a three-digit number for mental health and suicide prevention services. Implementing this in Canada would have many benefits, including directing a caller to the appropriate mental health or suicide prevention service in their area. This initiative could help someone receive the support they urgently need.

Finally, the CRTC has been actively working to prepare for its new responsibilities under Bill C-11 and Bill C-18. As the media ecosystem changes, we must rethink the way we regulate online content and digital platforms. **The CRTC will have an important role in establishing how online broadcasters will support Canadian content and in ensuring that there is fairness across the digital news market.**

As Minister of Canadian Heritage, I invite you to have a look at the 2021–22 Departmental Results Report for the CRTC to get a better idea of its accomplishments in service to Canadians.

These new statutes and the laws that already set responsibilities for the CRTC are neither simple to understand nor easy to administer. Their common goal, though, is straightforward: to enable Canadians to communicate with each other, to share news about Canada with the world and to promote Canada's values beyond its borders. To meet these goals the Commission bears a duty – even if not spelled out in statute or caselaw – to be open, transparent and accountable to Canadians. Meeting this duty sporadically cannot inspire Canadians' trust in its integrity and fairness: intermittent accountability instead leaves the impression of arbitrariness by the CRTC's decision-makers – surely not what Parliament intended 55 years ago when it created the Commission.



## Recommendations

The CRTC should clearly describe its actions to comply with statutes' mandated activities in its annual reports to Parliament and on its website. It should re-instate a site plan for its online presence which includes clear links to activities mandated by Parliament – including a section 25(1) list of reports to Parliament about CBC contraventions and a section 29(3) public registry for Cabinet petitions.

Maintaining the *status quo* in which, as the CRTC does not make public the steps it takes to comply with the mandatory requirements imposed on it by law, the CRTC's own adherence to Parliament's laws cannot be evaluated, betrays the trust granted to the Commission by Parliament and Canadians.

~ 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](#)
- 22 March 2023: [Accountability means more access without the Access to Information Act](#)
- 23 March 2023: [Accountability means an Information-Highway approach to due process](#)
- 24 March 2023: [Accountability means transparency about dispute-resolution outcomes](#)
- 25 March 2023: [Accountability means well-designed data collection to evaluate policy](#)
- 26 March 2023: [Accountability means public performance evaluations showing whether Parliament's communications laws are being implemented](#)
- 27 March 2023: [Accountability means signing and publishing decisions](#)
- 28 March 2023: [Accountability means data about outcomes](#)
- 29 March 2023: Accountability means using valid and reliable 'metrics' to measure performance