



14 June 2024

Marc Morin
Secretary General
CRTC
Ottawa, ON K1A 0N2

Filed online

Dear Secretary General,

Re: *The Path Forward – Supporting Canadian and Indigenous content through base contributions*, Broadcasting Regulatory Policy CRTC 2024-121 (Ottawa, 4 June 2024)- (Ottawa, 13 March 2024) – comments by the Forum for Research and Policy in Communications (FRPC) on the CRTC’s proposed orders

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including broadcasting and telecommunications.
- 2 The Forum’s comments about the CRTC’s proposed order follow a brief discursion into procedural fairness.

I. Announcing public consultations within regulatory policies

- 3 Broadcasting Regulatory Policy CRTC 2024-121 presents the CRTC’s decisions regarding the consultation it initiated in May 2023 in Broadcasting Notice of Consultation CRTC 2023-138.
- 4 Regulatory Policy 2024-121 invites comments about the conditions of service it proposes to implement the regulatory policy’s determinations and which are appended to 2024-121. As Table 1 shows, Broadcasting Regulatory Policy CRTC 2024-121 also initiates two other CRTC proceedings and sets initial deadlines for both: a temporary fund to support the production of news by commercial radio stations, and an Indigenous music fund.

Table 1

Proceedings initiated by Broadcasting Regulatory Policy CRTC 2024-121	
Proceeding	Deadlines
Temporary commercial radio news production fund	172. ... the Commission invites the CAB to submit, by no later than 4 July 2024 , an operational plan to administer a temporary fund that will support news production by commercial radio stations outside of the above-noted designated markets. In this plan, the CAB must demonstrate that it has the capacity to administer this fund, indicate the date it expects the fund to be operational, and provide details of the fund, including governance, eligibility criteria, accountability measures,

Proceedings initiated by Broadcasting Regulatory Policy CRTC 2024-121	
Proceeding	Deadlines
	reporting requirements, and the funding allocation method. The plan should also provide details on the proposed outreach initiatives that the CAB intends to implement to promote the fund’s accessibility to all commercial radio stations outside of the designated markets, including stations serving ethnocultural and Indigenous communities. The Commission will launch a public consultation to seek comments on the CAB’s submitted plan.
Indigenous music fund	179. The Commission expects the IMO to first consult with Indigenous music industry players from all regions, with a view to developing a plan to set up an Indigenous music fund. The IMO should file this plan at the earliest opportunity following the completion of its consultation, and by no later than 4 June 2025. The Commission intends to then publish this plan for a short comment period to ensure that the new Indigenous music fund can launch promptly. The plan should include information on its consultation process, governance, structure, eligibility criteria, funding allocation method, accountability measures and reporting requirements.
Orders for base contributions and data collection	187. Consistent with subsections 9.1(4) and 11.1(7) of the Broadcasting Act, parties, including those who would be subject to these conditions of service, may file comments on the proposed orders by no later than 14 June 2024. ... 189. In this regard, members of OLMCs may file comments on the proposed orders by no later than 25 June 2024. 190. Finally, parties, including those who would be subject to these conditions of service, may submit a reply to any comments received, by no later than 2 July 2024.

- 5 Setting out the deadlines for comments on a proposed order in a regulatory policy is unusual because the CRTC’s current [Rules of Practice and Procedure](#) require that a matter initiated by the CRTC itself – such as orders it proposes to make about the financial support for the broadcasting system to be provided by online streaming services – be set out in a notice of consultation published on the CRTC’s website:

21 (1) If a matter is brought before the Commission on the Commission’s own initiative, the Commission must post a notice of consultation on its website.

- 6 When the CRTC issued [Broadcasting Regulatory Policy 2015-86](#), for example, it issued several separate notices inviting comments on changes related to that new policy. Broadcasting Notice of Consultation CRTC [2015-87](#) called for comments on its exemption order for video-on-demand undertakings, Broadcasting Notice of Consultation CRTC [2015-304](#) invited comments on amending its regulations for broadcasting distribution undertakings, Broadcasting Notice of Consultation CRTC [2015-467](#) similarly sought comments on certified independent production funds and

Broadcasting Notice of Consultation CRTC [2016-195](#) solicited comments on standard requirements for television programming services.

- 7 The *Broadcasting Act* and the *Telecommunications Act* empower the CRTC to make regulations about its procedures, however.¹ Consequently, as master of its own procedures the CRTC is free to announce proceedings in whatever manner it wishes and may at any time ignore its past practice of distinguishing between announcements of regulatory policies and announcements of consultations. FRPC respectfully submits, however, that announcing public consultations in regulatory policies lacks transparency and fairness, especially when the CRTC does not offer any reasons for disregarding its own procedural regulations.
- 8 Organizations and people seeking to inform themselves about the CRTC’s broadcasting proceedings may of course always visit the CRTC’s [Open Notices of Consultation / Ouverte – Avis de consultation](#) pages. These pages currently list the notice of consultation for the 2023-138 proceeding (“2023-138”) proceeding issued last year. This initial 2023-138 consultation notice set deadlines for interventions and replies. BNoC 2023-138-1 revised those deadlines and BNoC 2023-138-2 set a final-reply deadline.
- 9 Organizations and people reading the current *Open Notices of Consultation* page to learn of the consultations about which they may currently submit comments would find in the fourth (of five) columns to the right a reference to a new deadline in a different document – “RP 2024-121” / “PR 2024-121”: Figure 1.

[Remainder of page intentionally left blank]

¹ *Broadcasting Act*, s. 21:

The Commission may make rules”

(a) respecting the procedure for making applications for licences, or for the amendment, renewal, suspension or revocation thereof, and for making representations and complaints to the Commission; and

(b) respecting the conduct of hearings and generally respecting the conduct of the business of the Commission in relation to those hearings.

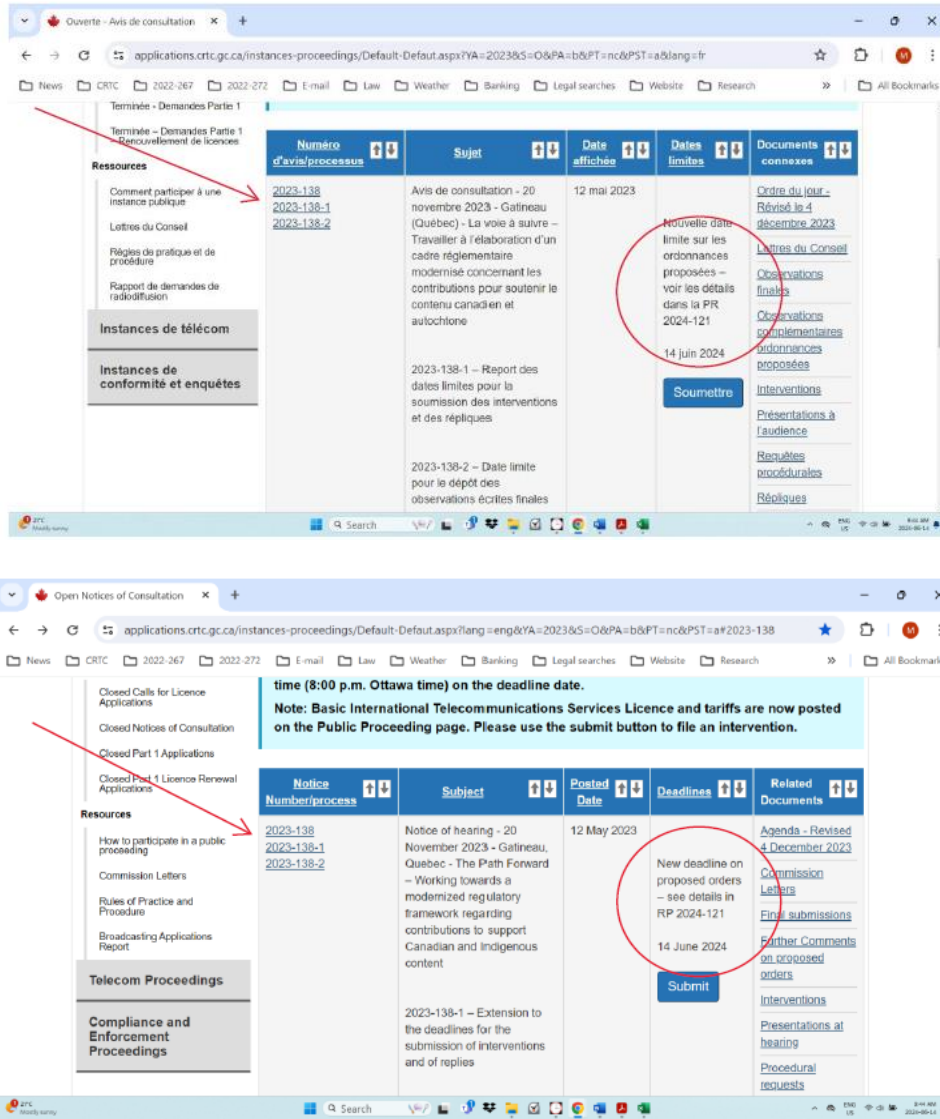
Telecommunications Act, s. 67:

67 (1) The Commission may make regulations

...

(b) establishing rules respecting its practice and procedure;

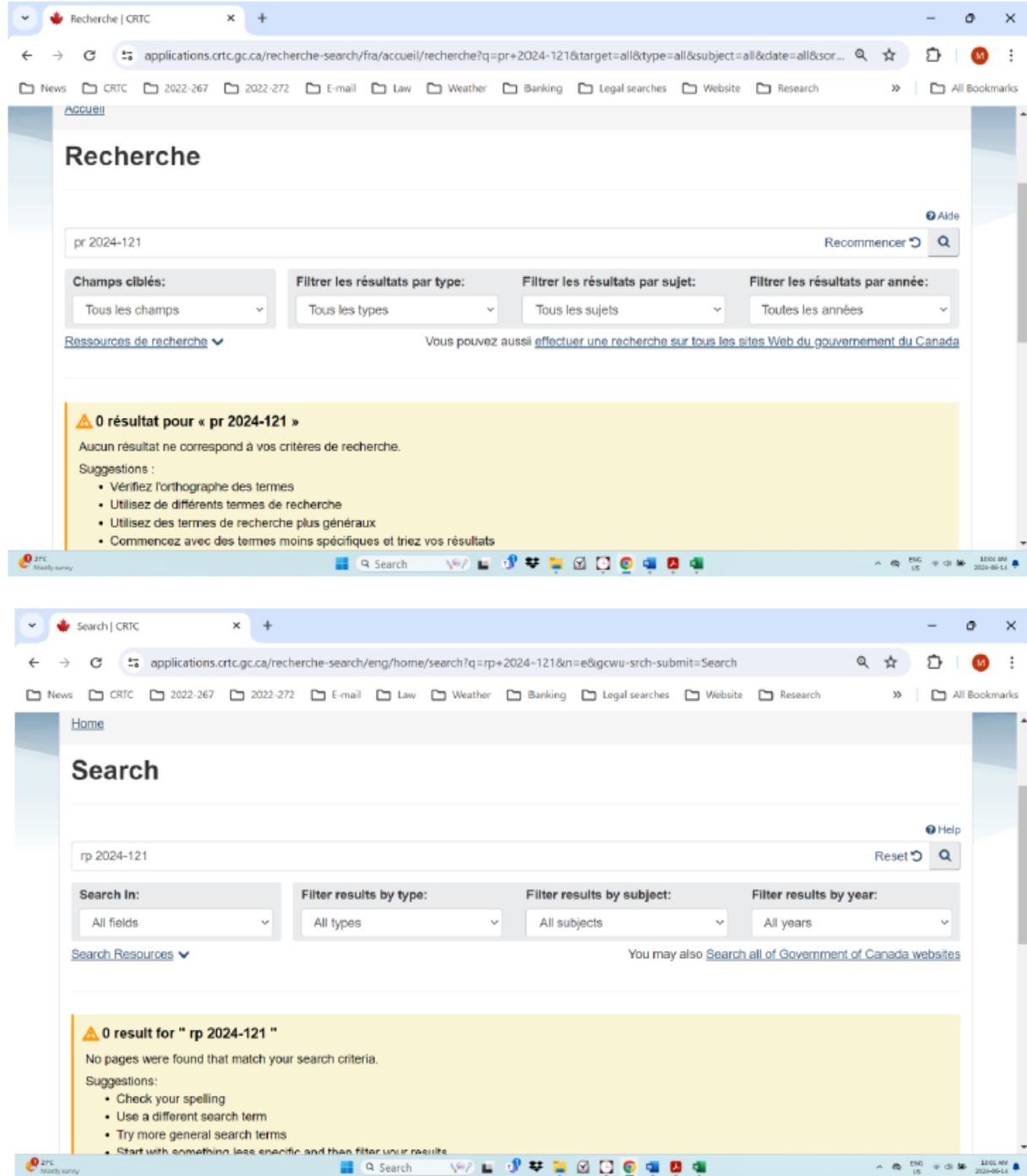
Figure 1



- 10 As the red circles in Figure 1 show, however, no HTML link is set out for either PR 2024-121 or RP 2024-121.
- 11 Parties and organizations would also not find a reference to either PR 2024-121 or RP 2024-121 through the CRTC's search engine: Figure 2.

[Remainder of page intentionally left blank]

Figure 2



- 12 The lack of a clear public notice announcing a consultation about the CRTC’s proposed orders may affect the rights of parties interested in and/or affected by this proceeding that may not realize that the CRTC has only announced this consultation in a regulatory policy and not in a notice of consultation. FRPC submits that if the CRTC considers it necessary to continue to use its regulatory policies to announce calls for

consultation, it should provide guidance within its *Rules of Practice and Procedure* to alert all parties relying on those *Rules* to its change in practice.

II. *Comments on Proposed orders imposing conditions of service and expenditure requirements for carrying on certain online undertakings*

13 FRPC's comments about specific text in the proposed orders follow the sequence of the Appendix to Broadcasting Regulatory Policy CRTC 2024-121.

A. *Application – “proposed conditions of service”*

14 The CRTC's proposed orders setting conditions of service and expenditure requirements in relation to certain online undertakings are set out in the Appendix of BNoC 2024-121. The text following the heading, “Application” – which would apparently introduce the text that the CRTC ultimately publishes as the conditions of service to implement 2024-121, refers to the “proposed conditions of service”:

The **proposed** conditions of service set out herein apply to all operators carrying on online undertakings who are registered with the Commission pursuant to the Online Undertakings Registration Regulations, with the following exceptions:
(underlining and bold font added)

15 FRPC recommends that the adjective, “proposed”, be dropped from this text, as follows:

The ~~proposed~~ conditions of service set out herein apply to all operators carrying on online undertakings who are registered with the Commission pursuant to the Online Undertakings Registration Regulations, with the following exceptions:

16 Assuming the Commission ultimately approves the condition of service as drafted, the entirety of the draft text will become the actual conditions of service. Retaining “proposed” within the actual conditions of service may confuse readers.

B. *Application – “herein”*

17 The Commission uses the adverb, “herein”, in the same sentence introducing its conditions of service:

The ~~proposed~~ conditions of service set out **herein** apply to all operators carrying on online undertakings who are registered with the Commission pursuant to the Online Undertakings Registration Regulations, with the following exceptions:
[bold font and underlining added]

- 18 'Herein' is an old-fashioned word used more often in 19th century contracts than in 21st century regulatory tools such as conditions of service.
- 19 To ensure that the meaning of this sentence is understood by non-lawyers or persons under the age of 65, to avoid repetitive language and to refer correctly to undertakings, FRPC recommends the introductory sentence of the *Application* be rewritten as follows:

The ~~proposed~~ **following** conditions of service ~~set out herein~~ apply to all operators carrying on online undertakings ~~who~~ **that** are registered with the Commission pursuant to the *Online Undertakings Registration Regulations*, with **the exception of** ~~the following exceptions~~:
[bold font and italics indicate proposed change]

C. *Application – “forms” / “does not form”*

- 20 The sentence following *Application* describes four different sets of undertakings that will not be subject to the conditions of service (pending any changes adopted by the CRTC before enacting the conditions):

The ~~proposed~~ **following** conditions of service ~~set out herein~~ apply to all operators carrying on online undertakings ~~who~~ **that** are registered with the Commission pursuant to the *Online Undertakings Registration Regulations*, with **the exception of** ~~following exceptions~~:

- (a) online undertakings whose operator **forms** part of a broadcasting ownership group that has annual contributions revenues of less than \$25 million;
 - (b) online undertakings whose operator **does not form** part of a broadcasting ownership group, that have annual contributions revenues of less than \$25 million; and
 - (c) online undertakings whose operator:
 - (i) is a licensee; or
 - (ii) is affiliated with a licensee; or
- [bold font and underlining added; strikethroughs, bold font and italics show proposed changes]

- 21 Broadcasting Regulatory Policy CRTC 2024-121 notes the importance of consistent terminology at paragraph 60. It writes that “[u]sing consistent definitions across the various regulatory policies resulting from the amended Broadcasting Act would help to provide certainty and clarity to broadcasting ownership groups in assessing their regulatory requirements.” Indeed, one of the principles of statutory drafting is that

each word “in a statutory text must be given meaning”,² and as a corollary, that different words have different meanings.

- 22 Given the importance of consistency in terminology it is therefore unclear why subsections (a) and (b) of the CRTC’s proposed conditions of service use the verb, ‘to form’ while subsections (c)(i) and (ii) use the verb, ‘to be’. The difference in verbs appears to distinguish the formation of operators with respect to a broadcasting group from the specific nature of the relationship between operators and ownership groups: in (a) and (b) operators *form* part of ownership groups, while in (c)(i) and c(ii) operators *are* a licensee or *are* affiliated with a licensee.
- 23 If the Commission does not intend to distinguish between groups of undertakings solely on the basis of the actions of their operators to ‘form’ or ‘not form’ part of a group, FRPC recommends that the Commission replace ‘form’ with “to be” in the present third-person tense, as follows:

The ***following*** ~~proposed~~ conditions of service ~~set out herein~~ apply to all operators carrying on online undertakings ~~who~~ ***that*** are registered with the Commission pursuant to the Online Undertakings Registration Regulations, with the ***exception of following exceptions***:

- (a) online undertakings whose operator ***is forms*** part of a broadcasting ownership group that has annual contributions revenues of less than \$25 million;
- (b) online undertakings whose operator ***is not does not form*** part of a broadcasting ownership group, that have annual contributions revenues of less than \$25 million; and
- (c) online undertakings whose operator:
 - (i) is a licensee; or
 - (ii) is affiliated with a licensee; or....

[strikethroughs, bold font and italics indicate proposed change].

D. Conditions of service

- 24 FRPC has two general concerns with the CRTC’s proposed conditions of service.
- 25 First, as written these direct that specified percentages of online undertakings’ payments be made to a number of identified organizations.
- 26 The Forum disagrees with the Commission’s decision in 2024-121 to neither mention nor specifically address the different proposals made in the 2023-138 proceeding, including that for a Canadian museum of broadcasting (to preserve the limited number of Canadian audiovisual recordings that remain since broadcasting began more than a century ago in Canada, and to preserve new Canadian programming

² Ruth Sullivan, PH.D., *Statutory Interpretation*, Third ed., (Irwin Law Inc., 2016: Toronto), pp. 136-138

going forward). Parties that took the time to set out their proposals for the Commission’s consideration merit clear reasons from the CRTC explaining why it rejected the proposals.

- 27 Second, as currently written it appears that the Commission does not intend that any payments need be made until 31 August 2025. While the conditions appear to suggest that payment will be made “in” the 2024-2025 broadcast year, they only require that the undertakings ‘devote’ the required funding to the identified organizations no later than “31 August of each broadcast year” – in other words, the last day of each broadcast year:

Commencing **in** the 2024-2025 broadcast year, the operator of an online undertaking providing audio-visual services shall, **by 31 August of each broadcast year**, devote not less than 5% of its annual contributions revenues derived from its audio-visual broadcasting activities from the previous broadcast year to the support of Canadian and Indigenous content, to be allocated as follows:

....

Commencing **in** the 2024-2025 broadcast year, the operator of an online undertaking providing audio services shall, **by 31 August of each broadcast year**, devote not less than 5% of its annual contributions revenues derived from its audio broadcasting activities from the previous broadcast year to the support of Canadian and Indigenous content, to be allocated as follows:

....

[underlining and bold font added]

- 28 FRPC is concerned that as written the conditions of service will make the timing of mandated payments uncertain. Existing funds may temporarily allocate some of their financial resources to their new responsibilities until the funds receive the online undertakings’ payments on or just after 31 August 2025 – but what funds will the just-approved “New temporary fund supporting local news production by commercial radio stations outside of the designated markets” have to distribute? Based on 2024-121’s proposed wording it may not receive the funding needed to achieve its purpose until the end of August 2025 - for roughly 13 months. As currently written in condition of service 2(f), meanwhile, the “new fund to support Indigenous music”, may receive funding in five months, or by 31 December 2024.
- 29 The Forum’s position is that flexibility for remitting payments otherwise mandated by conditions of service is very likely to create uncertainty, directly undermining the purposes for which the funds are actually being established. This has been the case, for example, of the BPF-FPR. Given the importance of local news, FRPC is especially concerned about the time it will take for non-metropolitan radio broadcasters to receive financial support to produce new local news programs.
- 30 The CRTC has in other contexts mandated the timing of payments to independent production funds. In *Standard requirements for television stations, discretionary*



services, and on-demand services, [Broadcasting Regulatory Policy CRTC 2016-436](#) (Ottawa, 2 November 2016) at paragraph 56, for example, the CRTC determined that “... contributions must take the form of monthly installments, to be remitted within 45 days of month’s end, and must represent at least 5% of that month’s gross revenues.

- 31 To limit unnecessary proceedings going forward to clarify the timing of mandated payments FRPC recommends that the CRTC’s conditions of service state when payments are to be made – whether every month or every three months (quarters).

E. *Data Collection – critical gap*

- 32 FRPC acknowledges that condition of service 3 requires online undertakings that make expenditures as required by the Commission’s now-proposed conditions of service to submit financial reports to the CRTC.

- 33 What is lacking, however, is any requirement for the organizations or regulated broadcasters that receive any of this funding to report to the Commission on the funding’s empirical impact. As the CRTC may recall, its Local Programming Improvement Fund (LPIF) policy suffered from the same critical flaw.

- 34 If the purpose of the funding distributions set out in 2024-121 is to implement the broadcasting policy for Canada set out in section 3(1) of the *Broadcasting Act*, the CRTC should require broadcasters that receive financial support from the existing and new funds receiving disbursements due to 2024-121, to submit objective data to the CRTC in their annual returns describing the original (first-run) hours of programming and full-time or equivalent employment resulting from the 2024-121 disbursements. These data should then be published in the Commission’s annual reports to the Minister, in the information the CRTC publishes through the federal government’s [Open Data](#) site and in the CRTC’s [Aggregated Financial Summaries](#). As 2024-121 concerns itself with the undertakings that must remit financial payments to funding organizations, the CRTC should initiate another consultation to invite or set out proposals for conditions of service regarding the programming and production information to be provided by disbursement-receiving broadcasters to the CRTC.

FRPC looks forward to the opportunity of reviewing other parties’ comments in this proceeding.

Monica L. Auer, M.A., LL.M. execdir@frpc.net
Executive Director
Forum for Research and Policy in Communications (FRPC)
Ottawa, Ontario