Preserving, strengthening and expanding Canadian Communications in the Digital Century By regulating in the public interest

Submission to the Federal Consultation on
Canadian Content in a Digital World

Forum for Research and Policy in Communications (FRPC)
www.frpc.net

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Abstract

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications. As the Forum supports a strong Canadian communications system that serves the public interest, we agree with proposals by other parties to strengthen Canada's national public broadcaster, increase support for content created by Canadians and ensure that this content is discoverable. Ensuring that any new policies for Canada's electronic communications system benefit all Canadians also requires, however, the correction of serious gaps in the current legislative framework for the CRTC. Whether it amends the current statutes governing the CRTC (the *CRTC Act*, the *Broadcasting Act* and the *Telecommunications Act*), or introduces new, converged legislation, Parliament must

- Explicitly require that the CRTC exercise its duties in the public interest
- State clearly which policy objectives must be achieved, and which are left to the CRTC's discretion
- Limit concentrated media ownership and separate the function of content (programming), from distribution
- Ensure that the members of the CRTC (*i.e.*, CRTC Commissioners) be representative of Canada's diversity
- Reduce centralized control in the CRTC by permitting its Chairperson to appoint Commissioners to CRTC hearing panels only when such panels lack quorum
- Expressly require the CRTC to base its policies and decisions on evidence, and to state that evidence in its determinations
- Revise the current appeal procedures so that, in addition to decisions and orders, members of the public may also appeal the CRTC's policies, and
- Explicitly require the CRTC to report on the degree to which Parliament's policies and objectives for Canada's electronic communications system are being achieved.

Executive Summary

ES 1 The Forum for Research and Policy in Communications (FRPC) is an independent non-profit and non-partisan organization established at the end of 2013 to undertake research and policy analysis about communications. The Forum supports a strong Canadian communications system that serves the public interest.

ES 2 Many of those making submissions in this process have made strong arguments to strengthen Canada's national public broadcaster and to increase financial and promotional support for content created by Canadians. We support those arguments.

ES 3 The Forum's submission focusses on gaps in the manner in which Parliament's communications policies are implemented through regulation. In our view these gaps – in the CRTC's discretion to ignore Parliament's objectives, in its top-down command structure, in its reliance on theory over evidence, in the absence of a duty to place the public interest first, and in the absence of meaningful appeal mechanisms – have not demonstrably achieved Parliament's policy objectives for Canadian broadcasting and telecommunications.

ES 4 Instead, after 48 years of operation the CRTC has delivered highly concentrated and vertically integrated ownership, high-cost telecommunications services, limited access to high-speed Internet especially in rural and Northern communities, programming exhibition and expenditures that are predominantly foreign, the loss of diversity in broadcast news, and shrinking employment opportunities in broadcasting.

ES 5 Parliament should fix the most important gaps in Canada's current communications statutes, so that if and when any new policies for Canada's electronic communications system are implemented, Parliament's objectives will be implemented to the benefit of all Canadians. Our recommendations are summarized below, and include references to the pages in this submission where the recommendations are made:

I Introduction

1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including telecommunications. The Forum's membership includes individuals who have worked in Canadian private and public broadcasting, and for the Canadian Radio-television and Telecommunications Commission (CRTC).

2 The Forum supports a strong Canadian communications system that serves the public interest. We define the public interest in terms of the legislative objectives set by Parliament for Canadian communications in the 1991 *Broadcasting Act*, the 1993 *Telecommunications Act*, and the 1976 *Canadian Radio-television and Telecommunications Act*.

3 The Forum is taking this opportunity to make concrete suggestions for legislative change to preserve, strengthen and expand Canada's electronic communications system. We are aware that many other parties have made and will be making strong arguments to strengthen Canada's national public broadcaster, and to stabilize or increase financial and promotional support for the production of audio-visual content created by Canadians. The Forum generally agrees with and supports those positions.

4 As any new laws that Parliament enacts will require implementation – likely by an independent quasi-judicial tribunal – our submission focuses instead on a number of current legislative gaps that have enabled the CRTC to ignore or override the objectives currently set out in the 1991 *Broadcasting Act* and the 1993 *Telecommunications Act*. In our view, the CRTC's failure to achieve these policy objectives have seriously weakened Canada's electronic communications system by – among other things – failing to keep telecommunications services affordable and to ensure the availability across Canada of high-speed Internet, by ignoring broadcasters' cuts to local news in radio and television, by condoning broadcasters' predominantly foreign programming expenditures, and by ignoring the steady elimination of employment opportunities in Canadian broadcasting.

5 As our comments focus on the overall approach that Parliament could take to the production and distribution of audio-visual content we will not be examining the property rights of such content, as set out Canada's current copyright legislation, or on Canadians' privacy rights, which are relevant to Canadian telecommunications legislation.

6 Part II sets out our views on the key factors that have weakened Canada's system for electronic communications, which arose due to gaps in Canada's cultural legislation. We make suggestions for closing these gaps in Part III.

II What is wrong with Canada's current cultural toolkit?

7 When it announced these consultations seven months ago the federal government said that Canada's cultural sector "is confronted with new challenges and opportunities in the face of rapid technological advances and changes in how Canadians produce and

consume content."[1] It added that the consultations "will help the Government determine how best to assist the cultural sector in navigating these changes and seizing opportunities to contribute to Canada's economic growth and innovation."[2]

8 The Forum notes that new technologies have challenged existing systems for millennia, and will continue to challenge existing systems in the future. Similarly, new competitors for audience time have launched and flourished, and will continue to launch and flourish. Technological change and competition are constants – what can be altered is the toolkit used by government to moderate – or regulate – the impact of such changes, in the public interest.

9 History shows that regulation of communications is the norm, not the exception. Today every industrialized nation on the planet regulates broadcasting and telecommunications, due to scarcity issues for some media,[3] as well as the risks of harm to individuals,[4] society and the economy by the absence of regulation.

10 Whether Canada changes its legislative framework for electronic communications system or not, the role of the regulatory authority responsible for implementing Parliament's wishes will be key. In addition to any other changes it is considering, the Federal government must therefore also evaluate the structure, responsibilities and impact of the CRTC to ensure that its determinations strengthen Canada's electronic communications system. The available evidence about the performance of the electronic communications system in Canada demonstrates that the CRTC's policies and licensing determinations are not serving the public interest, because they are not implementing Parliament's policy objectives for broadcasting and telecommunications. .

11 Increasing financial support to produce content created by Canadians, enhancing its discoverability, and emphasizing the necessity of global sales will not achieve Parliament's objectives for Canada's electronic communications system as a whole – unless the quasi-judicial tribunal that has taken the reins in policy-making also changes.

12 In terms of distribution, the CRTC's decades-long regulatory approach to wireline and wireless telephone services and to the Internet has left the majority of Canadians with service that is simultaneously inadequate and overpriced. The CRTC has permitted the elimination of all wireline payphones in Canada, a move that harms not just lower-income Canadians in general, tourists arriving in Canada without wireless service, but also the millions of Canadians who every year either lose their wireless service due to travel or to events beyond their control. Canadians pay higher prices for the same level of wireless services than residents of the United States and Europe. High-speed Internet

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1 Department of Canadian Heritage, "Consultations on Canadian Content in a Digital World", News Release (Ottawa, 23 April 2016) http://news.gc.ca/web/article-en.do?nid=1056259.

2 *Ibid*.

3 While anyone may begin a radio or TV channel online, the frequencies available for radio and television broadcasters using over-the-air transmission equipment remain limited.

4 Such risks include the promulgation of hate, leading to violence (see *e.g.* "Hate radio", http://www.rwandanstories.org/genocide/hate_radio.html)

service is not available across Canada, or to the North, while the prices charged for both low- and high-speed Internet are high. TV distribution prices have soared past the rate of inflation for decades.

13 In terms of content, the CRTC's 48 years of its hand on the tiller has left Canadians with a regulated broadcasting system whose content is predominantly foreign. There are no requirements for Canadian spoken-word programming in Canadian private radio, and up to 65% of all musical selections can be foreign. Up to 83.4% of every private TV station's schedule can be foreign, as each is required only to broadcast an average of three hours of content created by Canadians per day.[5] Roughly two-thirds of the programming on most discretionary television services can be foreign. The CRTC has encouraged broadcasters to distribute and promote content created by Canadians online, but – although these very consultations highlight the serious impact of the Internet – the Commission has resolutely dismissed calls to at least reconsider the basis for its current digital media exemption order, granted on the grounds that online broadcasters cannot contribute to the objectives of the *Broadcasting Act*.[6]

14 Canada's unique position – separated by a porous electronic border beside the world's largest content exporter – obviously means that meeting the digital era's challenges will not be easy.

15 But it would be a mistake to meet these challenges without considering the degree to which the regulatory authority now responsible for implementing Parliament's policies for Canada's electronic communications system, is performing its designated role. Revising Canada's 25- and 23-year old broadcasting and telecommunications statutes will accomplish very little – unless the legislative gaps that have placed the public interest at the back of the queue with few or no legal remedies, are mended.

16 Current legislative gaps now

- give too much discretion to the CRTC
- concentrate control over CRTC outcomes in the office of its Chairperson
- permit CRTC decision-makers to be unrepresentative of Canadians
- allow the CRTC to issue policies and decisions based on theory instead of facts or its enabling statutes
- enable the CRTC to place the public interest last, not first, and

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5 *Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86 (Ottawa, 12 March 2015), http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm, at para. 193: "… the Commission will retain exhibition requirements for private conventional television stations but only during the evening broadcast period."

6 *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings*, Broadcasting Order CRTC 2009-660 (Ottawa, 22 October 2009), http://www.crtc.gc.ca/eng/archive/2009/2009-660.htm.

- leave Canadians with few or no legal remedies to challenge the CRTC's determinations.

A CRTC has too much discretion

17 Parliament has delegated its authority over electronic communications system to the CRTC since 1968, defining its role in several statutes. In delegating its authority, however, Parliament did set out its objectives for the electronic communications system in policies included in each of the *Broadcasting* and *Telecommunications Acts.*

18 While it is true that the CRTC is bound as a matter of law to comply with the statutes that govern its existence, the permissive as well as vague language in Parliament's broadcasting and telecommunications policies have enabled the CRTC to pick and choose the objectives it wishes to implement.

19 Parliament's objectives for broadcasting use mandatory and discretionary terms: "should" and "shall". As a matter of law it is generally understood that a discretionary term like 'should' means that the provision it governs is not mandatory; if it were, Parliament would have said 'shall'.

20 In fact, of twenty different goals in the *Broadcasting Act*, only six are mandatory, and of these, three have qualifiers weakening the mandatory language. The *Broadcasting Act* says that Canada's broadcasting system "*shall* be effectively owned and controlled by Canadians"[7] – but only that it "*should*" offer "information and analysis concerning Canada and other countries from a Canadian point of view".[8]

21 The *Broadcasting Act*'s use of 'should' instead of 'shall' with respect to news permitted the CRTC to condone or ignore, decisions to cut original local news by private radio broadcasters beginning in the mid-1990s, and by private TV broadcasters beginning in the mid-2000s. The result is that Canadian broadcast journalism has been thrown into crisis. Parliament knew that broadcast news – local, regional, provincial, and federal – is a critical element in informing the public in a well-functioning democracy. But the policy objective that it established for Canada's broadcasting system to offer news is in peril, because it gave, and the CRTC exercised, discretion in this area.

22 As for the *Telecommunications Act*, the seven objectives set out in its policy statement use vague terms such as 'facilitating' the orderly development of telecommunications in Canada", 'enhancing' efficiency and competitiveness of the sector, 'fostering' reliance on market forces and 'rendering' the accessibility of "reliable and affordable telecommunications services" to Canadians.[9] Is it even possible to determine what Parliament wanted the CRTC to accomplish, with such vaguely worded objectives?

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7 S. 3.(1)(a).
8 S. 3.(1)(d)(ii).
9 *Telecommunications Act*, ss. 7(a), (c), (f) and (b), respectively.

23 Such imprecision means that instead of implementing Parliament's wishes, the CRTC can interpret and implement these objectives as it wishes, or even deny their meaning.[10] However often it deplores the lack of 21st (or in some cases, 20th) century-level telecommunications services to people living in Canada's north, the CRTC has not 'facilitated' the orderly development of telecommunications in their communities, or made 'reliable and affordable telecommunications services available to them. The perverse result is that Canadians living in the north have effectively subsidized Northwestel's financial performance for years: the company does not have to spend money to improve telecommunications services in remote and northern areas – because the *Telecommunications Act* gives the CRTC the choice not to mandate and enforce levels of service equal to those in Southern Canada.

24 Canada's current statutes to govern its electronic communications system are also outdated, in that they provide no guidance to the CRTC about problems now recognized as being serious. This includes highly concentrated media ownership, and vertically integrated ownership in which companies acquire, produce and distribute content across a variety of platforms.

25 However expert the CRTC is held to be, Parliament's sovereignty is being diminished by its failure to determine, so as to protect the public interest, the limits to concentrated ownership in Canada's communications media.

26 Another problem with Canada's communications statutes is that Parliament's objectives often conflict with each other. Section 3(1) of the *Broadcasting Act* focusses almost entirely on programming content (as well as employment opportunities) – in theory requiring the CRTC to use its powers under section 9 to set the terms and conditions of licences. But section 5(2) then also requires the CRTC to be "sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings". The CRTC may therefore regulate – but often chooses not to regulate when broadcasters claim they

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10 During the CRTC's April 2016 public hearing to consider whether it should mandate specific levels of telecommunications service in Canada, the CRTC's Vice-Chair of Telecommunications said that the CRTC's "role is to understand reality", rather than to implement Parliament's objectives for telecommunications:

15886 MS. AUER [FRPC]: The idea that companies can never lose [money] … are we really saying that their profitability must be guaranteed?
15887 COMMISSIONER MENZIES [CRTC Vice-Chairperson, telecommunications]: Yes, when you work at one that's how it works.
…
15889 COMMISSIONER MENZIES: That's just -- that's just how the world works.
…
15891 COMMISSIONER MENZIES: I'm not saying it's right or anything.
…
15893 COMMISSIONER MENZIES: But it is just how the world works.
15894 MS. AUER: All right, but the CRTC is not a company and that's not its role, to defend the profit structures of companies. Its role is to implement the objectives --
15895 COMMISSIONER MENZIES: No, but it is -- it is its role to understand reality.
15896 MS. AUER: -- of parliament.

CRTC public hearing transcript, (Gatineau, 25 April 2016), http://www.crtc.gc.ca/eng/transcripts/2016/tt0425.htm.

might be burdened. Clauses that effectively allow complete deregulation – due to alleged burdens from regulation – entirely defeat the purpose of legislation purporting to regulate in the public interest.

27 Even worse, vaguely stated requirements make it very difficult for Canadians to use the legal tools available to them to enforce their rights. Courts will not issue injunctions to force officials to perform duties that are vaguely described or discretionary.[11] Canadians therefore had no way to force the CRTC to investigate Rogers' cancellation of all ethnic news on its five over-the-air OMNI TV stations in May 2015, just before the most recent Federal election. Two parties filed applications with the CRTC in May 2015, asking it to call Rogers to a public hearing to give an accounting of its decision. Though many pleaded for the CRTC to take swift action,[12] the general absence of any mandatory duties in the *Broadcasting Act* means that the CRTC was able to and did slow-walk its decision. It finally denied both applications and procedural requests for an expedited process eight months later, in January 2016.[13] The CRTC's process and decision served Rogers' interests – but how did it serve the public interest to permit Canada's largest conventional ethnic TV ownership group to deny ethnic communities across Canada the opportunity to hear news about the federal election?

28 In reviewing its legislation for Canada's electronic communications system, therefore, Parliament should clearly state specific objectives that it wishes the CRTC to implement, using mandatory rather than discretionary language. It should ensure that it sets coherent, rather than conflicting, objectives for the CRTC. If these changes are not made, unelected officials will continue to exercise significant discretion without check, and without Parliament's express authorization. Then, any new policies designed to preserve and strengthen Canada's electronic communications system over the air, via satellite or online will fail, as the policies now in place have failed.

B CRTC structure concentrates control over outcomes in the office of the Chairperson

29 A second problem with the current regulatory structure is that while it is called a "Commission", implying more generalized authority and decision-making that is both representative and inclusive, the CRTC operates quite differently.

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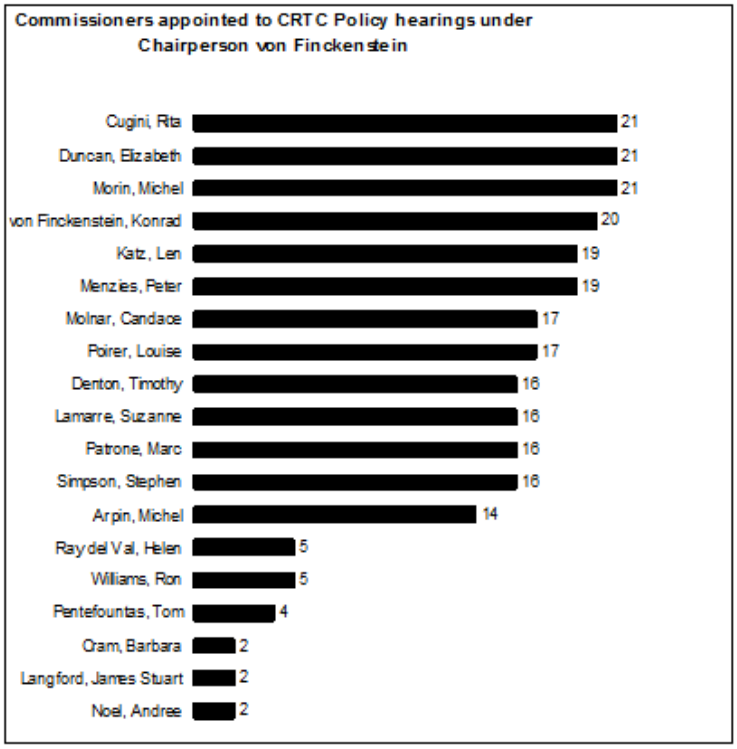
11 *Turmel v. Canadian Radio-television and Telecommunications Commission* (1985), 16 C.R.R. 9 (FC TD 24 April 1985, Dubé J.): "*Mandamus* will lie only when an applicant can firmly establish a clear, legal right to have a duty performed which is actually due and obligatory."

12 Swift action might have resulted in the reinstate of some or all of the OMNI ethnic newscasts – but would also have allowed parties to exercise their legal rights to apply to the courts or the Governor in Council to review a CRTC denial.

13 *Requests that Rogers Media Inc. reinstate local third-language newscasts on its OMNI stations*, Broadcasting Decision CRTC 2016-8 (Ottawa, 12 January 2016), http://www.crtc.gc.ca/eng/archive/2016/2016-8.htm.

30 In broadcasting, decisions and policies were once made by the 'full Commission' – meetings where full-time and part-time Commissioners were briefed on, discussed and voted on matters before the CRTC. The 1991 *Broadcasting Act* replaced this collegial system, with the they-who-hear-decide approach.[14] It allows the CRTC's Chairperson to establish panels of Commissioners who, while they must consult with fellow Commissioners, are then also empowered to "deal with" and decide " … any matter on behalf of the Commission".[15] Broadcasting panels must consist of three or more Commissioners, telecommunications panels of just two or more Commissioners.[16]



31 The fact that the *CRTC Act* allows the Chairperson to decide who hears which matters does not automatically mean that the Chairperson has or will exercise favoritism in choosing Commissioners for CRTC panels.

32 But reviewing the transcripts of CRTC hearings from mid-1998 to the end of 2015[17] shows that some Commissioners

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14 This changed presumably arose due to the introduction of the *Canadian Charter of Rights and Freedoms* (as part of Canada's repatriated *1982 Constitution*); section 11(d) of the *Charter* provides that "Any person charged with an offence has the right … to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" – in other words, the persons making decisions must the persons who have heard the case.

15 S. 20(1)The Chairperson of the Commission may establish panels, each consisting of not fewer than three members of the Commission, to deal with, hear and determine any matter on behalf of the Commission.
(2) A panel that is established under subsection (1) has and may exercise all the powers and may perform all the duties and functions of the Commission in relation to any matter before the panel.
(3) A decision of a majority of the members of a panel established under subsection (1) is a decision of the panel.
(4) The members of a panel established under subsection (1) shall consult with the Commission, and may consult with any officer of the Commission, for the purpose of ensuring a consistency of interpretation of the broadcasting policy set out in subsection 3(1), the regulatory policy set out in subsection 5(2) and the regulations made by the Commission under sections 10 and 11."

16 *Broadcasting Act*, s. 20(1); *Telecommunications Act*, s. 49.

17 We used information from the CRTC's public hearing transcripts to build a database of CRTC hearings, showing which Commissioners attended which hearings, the duration of these

attend more hearings than others. For instance, under Chairperson Charles Dalfen, three Commissioners were never assigned to policy hearings. Under Chairperson Konrad von Finckenstein three Commissioners were assigned to 21 policy hearings – while three other Commissioners attended just two policy hearings each (see chart, previous page).

33 The Chairperson's power to decide which Commissioners will or will not hear specific matters offers tremendous power to influence outcomes, and negates the benefits that Parliament presumably intended the commission structure to provide – namely, individuals with relatively equal influence whose decisions were based on discussion and consensus.

34 If Parliament really wishes to imbue the CRTC's Chairperson with the ability to determine outcomes of every proceeding, it should say so expressly. But if not, new legislation for Canadians electronic communications system should provide all Commissioners with the opportunity to participate in CRTC hearings, with the provision that the Chairperson may appoint Commissioners to panels if they lack quorum.

C As a commission, CRTC is unrepresentative of Canadians

35 Even if all Commissioners had an equal opportunity to influence the CRTC's policies and licensing decisions, the CRTC's members are unrepresentative of Canada. Francophone members are generally in the minority as CRTC Commissioners, as are women.[18] Even fewer Indigenous people and people of colour have been appointed as Commissioners, raising the question of whether their absence explains why, even though the CRTC regularly reviews its policies for commercial radio and television, it has not reviewed its 26-year old *Native Radio Policy* or its 17-year old *Ethnic Broadcasting Policy*.

36 Individuals from the guilds and unions representing those who work in Canada's electronic communications system or from public-interest organizations, are also underrepresented in this key component of Canada's cultural policy toolkit. Many Commissioners are instead drawn from broadcasters and telecommunications companies, which may explain why so many of the CRTC's policies and licensing decisions focus on strengthening companies' revenues, rather than on their achievement of Parliament's legislated objectives.

37 The predominance of Commissioners with experience on the management side of public and private companies may similarly explain why so very few of the CRTC's policies and licensing decisions ever address matters related to employment opportunities in Canada's electronic communications system – a matter of critical importance to

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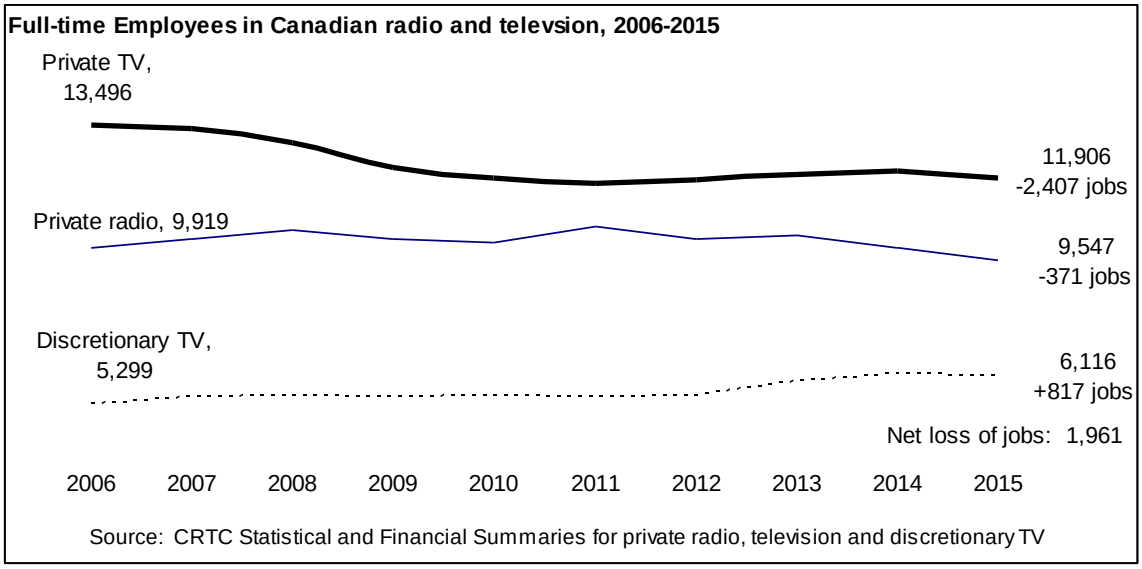
hearings, and the type of hearings (appearing or non-appearing; licensing or policy; broadcasting and/or telecommunications).

18 A FRPC review of all appointments to the CRTC found that of the 104 people appointed to the CRTC from 1968 to the present, 76 were men (73%) and 28 were women (27%). (Research undertaken earlier this year, prior to Vice-Chair LaRoque's appointment, was published on the Forum's website at http://frpc.net/appointments-to-the-crtc/.)

communities across Canada and to the Canadian economy, and which Parliament explicitly referenced in the *Broadcasting Act*.[19] Yet employment in Canadian private radio and conventional television is declining – and while new jobs have been created in discretionary television services, the content-production sector has nevertheless had a net loss of 1,961 jobs in the past decade (see chart next page).



38 (While Internet-based jobs may well replace conventional broadcast and telecommunications jobs, the CRTC does not appear to collect, and therefore does not publish, data on Internet employment opportunities.)

39 In brief, because the *CRTC Act* does not require that Commissioners be representative of Canadians, the result is that the Governor in Council has for decades appointed predominantly white male Commissioners, often from the same companies that the CRTC regulates. This practice raises the obvious concern that CRTC policies and decisions may be more sympathetic towards and reflective of corporate needs, than of the needs of Canadian audiences and telecommunications users.

40 Times have changed – and in the digital era Parliament's approach to delegating authority should also change, to ensure that the exercise of delegated authority is moved from the exclusive purview of a very small set of individuals with similar backgrounds, to a more inclusive and broadly representative group of people who bring many more views to the CRTC's hearing rooms and executive offices. Parliament should ensure that the Commissioners it appoints to implement its policies for Canada's electronic communications system are representative and inclusive of all Canadians.

19 S. 3(1)(d)(iii).

D CRTC policies and decisions are often based on theories – not evidence or the Acts

41 Another structural problem created by Parliament's current laws for Canada's electronic communications system is that they do not require the CRTC's policies and decisions to be based on evidence, where such evidence is available, or to explain how its policies or decisions flow directly from the imperatives of the *Broadcasting Act* or *Telecommunications Act*.

42 Since the 1990s, for example, the CRTC has emphasized the need to reduce regulatory requirements so as to give companies the flexibility they say they need to 'free' market forces, to the benefit of broadcast audiences and telecommunications users. It deregulated cable rates (in 1997), for example, and advertising limits on over-the-air TV (in 2010). It said the invisible hand of the market would protect subscribers' and audience interests.

43 The CRTC also condoned the highest levels of concentrated media ownership in the world. It said that larger domestic communications companies would strengthen Canada's communications system, offering broadcast audiences and telecommunications users more services of higher quality. It said that large telecommunications companies' ownership of large broadcasting companies would provide content created by Canadians with financial strength and stability.

44 The CRTC rejected the arguments of interveners who opposed such plans due to concerns that highly concentrated ownership would reduce diversity in programming, diversity of voices in news and information, employment opportunities and opportunities for independent producers. The CRTC said it was not persuaded by their evidence.

45 At the same time, none of these policies clearly set out the evidence that outweighed that of evidence. The results have not met the CRTC's stated objectives. New competition from telephone companies did not restrain cable rates – they soared. The financial strength of large vertically integrated communications companies did not raise expenditures on Canadian content – these flatlined, while spending on foreign content soared. New employment opportunities did not emerge – they shrank, due to centralcasting[20] employment levels (and employment opportunities) decreased.

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20 In television centralcasting is the establishment of one or a few production centres that package local segments received from local TV stations into complete programs that the centralcasting facility then distributes back to the local stations. Broadcasters benefit from a centralcasting model because they can reduce local TV stations' staffing as these no longer need to maintain their own studios, and often no longer control their own transmitters.
In 2007 the Communications, Energy and Paperworkers union asked the CRTC to review Canwest's decision to implement a centralcasting model; the CRTC slow-walked its decision: first by having a single Commissioner deny the request in a letter (single Commissioners do not represent the full Commission, and cannot issue decisions on the Commission's behalf); then then by deferring any discussion of centralcasting until Canwest's next renewal, by which time

46 Even worse – considering that the core of the *Broadcasting Act* is to ensure that Canadians have access to content created by Canadians – Canadians have been losing access to that content for the past seven years. In 2009 the CRTC reduced its regulatory requirements for content created by Canadians on television, from 60% over the broadcast year, to 55%.[21] In 2015 the CRTC 2015-86 reduced these requirements from 55%, to 17%. In each case the CRTC rejected interveners' pleas to preserve access to content created by Canadians, dismissing all evidence they presented while failing to set out the specific evidence on which it based its determination.

47 Canadian common law may presume that quasi-judicial tribunals like the CRTC have evidence to support their decisions, but parties cannot easily challenge the CRTC's policies unless they understand the case they must meet. The CRTC questions interveners with respect to their evidence – but effectively places the burden of collecting such evidence entirely on their shoulders, even though the CRTC (not interveners) has the legal authority to, and does collect, extensive information about those it regulates. It publishes almost no data about the programming performance in the case of broadcasters, or quality of service performance in the case of telecommunications companies. A review of the Table of Contents in the CRTC's most recent *Communications Monitoring Report* (2016), for instance, shows that of 136 tables, charts and figures presented to describe broadcasting, 60 dealt with the sector's financial performance – and just 2 dealt with programming sources. No information was provided about the total hours of content created by Canadians broadcast in Canadian radio and television, or by individual stations.

48 The absence of such data has several serious implications. Even though the CRTC has made significant efforts to engage Canadians in discussions about the future of broadcasting and telecommunications in Canada, its withholding of key information relevant to Parliament's core objectives in the *Broadcasting Act* and *Telecommunications Act* limits the general public's ability to participate effectively in CRTC proceedings. Those who engage frequently in the CRTC's proceedings may be faced with high costs in time and money to collect new data themselves. Finally, the lack of relevant data about the achievement of Parliament's policy objectives makes it impossible for academics and others to evaluate Canada's electronic communications system over time.

49 Parliament should make regulation of Canada's electronic communications system fully transparent in the 21st century, by amending its electronic communications statutes to include a duty requiring the CRTC to state the evidence on which it is basing its policies and decisions, and to publish annual statistics relevant to Parliament's objectives using the data it collects from those it regulates.

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the complete introduction of centralcasting had made the CRTC's decision moot (presumably because regulating on this matter would impose an undue burden on Canwest).

21 Broadcasting Regulatory Policy CRTC ….

E Absence of duty to serve public interest protects incumbents and harms Canadians

50 A fifth problem created by Canada's current electronic communications system statutes is that they do not expressly require the CRTC to place the public interest before private interests.

51 While some may believe that the Commission bears a common-law duty to serve the public interest (*i.e.* a duty that has emerged from decisions by Canadian courts), the courts have actually upheld the CRTC's authority to put companies' interests first. In broadcasting, the CRTC may set policies and guidelines first "in the interests of prospective licensees", and then, only second, in the interest "of the public".[22] In fact, the Court held that the CRTC need only be 'sensitive to' the concerns of the public – a far cry from requiring the CRTC to regulate in the public interest.

52 Indeed, one court held that one of the purposes of the *Broadcasting Act* is "to strengthen broadcasters".[23] In telecommunications, the courts have held that the *Telecommunications Act* permits the CRTC "to balance the interests of carriers, consumers and competitors" in its decisions (underlining added);[24] again, 'consumers' came second (and we also note, however trite it is to say, that Canadians are first and foremost people, that they are then also members of Canadian society as citizens, and not simply members of an economy as consumers).

53 When the CRTC' balances all these interests, the public interest need not predominate, since the courts have also held that all the CRTC must do is establish that it was not "indifferent to the public interest".[25]

54 The result is that private interests have been very well tended by the CRTC's policies and decisions, while the public interest has generally been pushed to the back of the bus. Numerous interveners ask the CRTC to consider the problems and costs that its

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22 *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al.* , at p. 171, (Chief Justice):
In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the *Act*, objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the *Act*", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.
Side-by-side consideration of the public and licensees' interests is noted as well in *Arthur v. Canada (Attorney General)*, 2001 FCA 223 (CanLII) at ¶27:
… it is inevitable that, in the licence renewal context, **the CRTC will be sensitive to the public's complaints and to the licensee's reaction to those complaints** that allege an abuse of rights. The CRTC would not be playing its role and would be abdicating its responsibilities if it were indifferent to the public interest or to allegations that a licensee is compromising the public interest by its deeds and actions or its excessive passivity or tolerance.
[bold font added]

23 *Whistler Cable Television Ltd. v. Ipec Canada Inc.*, [1993] 3 WWR 247; 75 BCLR (2d) 48; 1992 CanLII 238 (BC SC).

24 *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764 (per Abella J., for the Court) at ¶53.

25 *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 (CanLII).

regulatory frameworks impose on members of the public in the form of inadequate service and high rates, but in the absence of any duty to place the public interest first, members of the Commission publicly reject proposals that might impose costs on those it regulates because 'that is not how the world works.'[26]

55 Changing Canada's electronic communications policies will not benefit the public if the current regulatory approach, permitting the CRTC to place the financial interests of broadcasters and telecommunications companies before the public interest, remains in place. Parliament should amend its statues for the electronic communications system to require the CRTC to give the public interest pride of place.

F Canadians have few or no legal remedies to challenge harmful CRTC policies and decisions

56 A final problem that Parliament must solve if it wants a new and effective policy framework for Canada's electronic communications system is to provide Canadians with avenues of legal appeal when the regulatory authority's determinations harm the public interest.

57 Both the *Broadcasting Act* and the *Telecommunications Act* exclude 'policies' from legal oversight. In telecommunications only "decisions" may be appealed[27] - not regulatory policies. In broadcasting, only decisions and orders may be appealed[28] - again, not regulatory policies.

58 The result is that very important CRTC determinations cannot be appealed. A "Regulatory Policy" by its very name is not a "Decision". Neither are decisions to exclude interveners from hearings,[29] letters from CRTC staff and letters from CRTC Commissioners.[30] Yet all of these determinations significantly affect the manner in which the CRTC implements Parliament's policies.

59 Similarly, the CRTC's approach to the applications it receives is almost immune from legal scrutiny, leading to situations (as previously mentioned) where the CRTC moves swiftly to serve the needs of those it regulates, while slow-walking everyone else. The CRTC uses expedited hearings, for example, "to hasten the resolution of broadcasting

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26 *Supra*, note 10.

27 *Telecommunications Act*, s. 64(1).

28 *Broadcasting Act*, s. 31(1), 31(2).

29 *Saskatchewan Telecommunications v. Canadian Radio-television and Telecommunications Communication et al*., [1980] 1 F.C. 505 (F.C. T.D., 1 May 1979, per Maguire D.J.): SaskTel applied for an order of prohibition after the CRTC denied SaskTel intervener status during a public hearing to consider cable licence renewals; the Federal Court accepted the argument that CRTC had lost jurisdiction when it denied intervener status without giving the company an opportunity to be heard and when it denied it the right of reply. The statement by the CRTC panel Chairman that Sasktel did not have the status of an intervener was not a decision of the Commission within s. 25 of the *Broadcasting Act*, as defined by s. 26(5) (now 31(4) of the 1991 *Broadcasting Act*).

30 *Communications, Energy and Paperworkers Union of Canada v. CanWest MediaWorks Inc*., 2008 FCA 247 (CanLII).

disputes".[31] Yet it routinely tells Canadians with concerns about the quality of their electronic communications services to resubmit those concerns at proceedings it will hold sometime in the future. It also redirects complaints about most telecommunications issues, and most broadcast programming issues, to third parties such as the Commissioner of Complaints for Telecommunications Services, and the Canadian Broadcast Standards Council.

60 The public will not benefit from changes to Canada's electronic communications system, if the federal regulatory tribunal responsible for addressing concerns of the public, can delay its consideration of such concerns indefinitely. Parliament should provide Canadians with more legal remedies to challenge decisions issued by the CRTC in the guise of 'policies', or letters from its staff.

III What legislative changes are needed to fix regulation in Canada's cultural toolkit?

61 In our view strengthening Canada's electronic communications system to ensure that all Canadians benefit from the digital possibilities of the 21st century necessitates changes to the current regulatory structure that now oversees the distribution of and access to content created by Canadians.

62 Canadians need Parliament to build a bridge from the analog era of the 20th century, to the digital world of the 21st century, by setting specific and measureable objectives for Canada's electronic communications system. Canadians also need a federal regulatory authority that will preserve, strengthen and expand Canadian communications, in their interest – in the public interest. They also need Parliament to supervise the authority it has delegated to a body such as the CRTC, to ensure that regulation of the electronic communications system is transparent and accountable.

63 In brief, Parliament must review and change the structure and mandate of the 48-year, pre-digital quasi-judicial tribunal now responsible for regulating broadcasting and telecommunications. Creating a new policy framework for 21st century digital communications will achieve little and will continue to leave millions of Canadians

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31 CRTC, *Expedited Procedure for resolving issues arising under the Broadcasting Act*, Broadcasting Circular CRTC 2005-463 (Ottawa, 18 April 2005) at ¶2.

> 2. As a further means to hasten the resolution of broadcasting disputes, the Commission considers that it would be appropriate at this time to implement procedures for the conduct of expedited public hearings. These hearings would complement the Commission's existing dispute resolution guidelines and tools, and be similar to the procedures that it recently established for resolving disputes arising under the *Telecommunications Act* (see *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004).
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> …
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> 4. In order to expedite decisions on certain issues arising under the *Broadcasting Act*, panels of Commissioners will be struck to conduct brief public hearings to deal with such issues on an accelerated basis. These panels will generally consider matters involving no more than two parties, where the issues to be resolved involve questions of interpretation concerning an existing Commission decision, regulation or other regulatory requirement, or its application to a particular fact situation.

It is worth nothing that while CRTC staff letters may be appealed to the Commission, the latter may take time to consider the appeal – often rendering the outcome moot.

underserved and overcharged, if responsibility for the implementing of this framework is entrusted to the CRTC as it is now designed, and as it now functions.

64 The Forum's suggestions for addressing regulation within the context of a review of Canada's current communications statues follow, in order of importance. Parliament should

Forum recommendation 1	**Replace the CRTC's current duty to be "sensitive to the administrative burden" of regulation, with the requirement that the CRTC exercise its duties in the public interest**
Forum recommendation 2	**Provide coherent objectives for Canada's electronic communications system, stating which are to be achieved (using mandatory language, such as "shall"), and which are left to the CRTC's discretion ("should")**
Forum recommendation 3	**Limit concentrated communications media ownership, and separate ownership of distribution and content functions**
Forum recommendation 4	**Clarify that the members of the CRTC must be representative of Canada's diversity**
Forum recommendation 5	**Specify that the CRTC's Chairperson may only appoint Commissioners to CRTC hearing panels if they lack quorum**
Forum recommendation 6	**Require the CRTC to base its policies and decisions on evidence, and to state the evidence in its policies and decisions**
Forum recommendation 7	**Permit CRTC policies to be appealed to the Federal Court of Appeal and the Governor in Council**
Forum recommendation 8	**Require the CRTC to report on the degree to which Parliament's policies and objectives for Canada's electronic communications system are being achieved**

65 The Forum has appreciated the opportunity to submit comments to the Minister's consultations on the future of content created by Canadians in a digital world. We welcome any questions that our submission may raise.