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Directions of General Application on Broad Policy Matters

A Review of the Governor in Council's General Power of Direction Under the *Broadcasting Act* and the *Telecommunications Act*

November 2026

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EXECUTIVE SUMMARY

This paper examines the history of an important limitation on the federal government's power to direct the Canadian Radio-television and Telecommunications Commission ("CRTC"). Section 7 of the *Broadcasting Act* authorizes the Governor in Council to issue directions to the Commission "of general application on broad policy matters". Section 8 of the *Telecommunications Act* contains substantially the same limitation.

The words have assumed renewed significance. Governments have increasingly used policy directions to influence the regulatory framework administered by the CRTC, while questions have arisen about how detailed those directions may become before they cease to concern matters that are sufficiently "general" or "broad". The issue has arisen in recent telecommunications directions, during Parliament's consideration of the *Online Streaming Act*, in the 2023 Online Streaming Direction and, under section 8 of the *Telecommunications Act*, in litigation involving SaskTel.

This paper does not attempt to prescribe a definitive legal boundary between permissible policy direction and impermissible regulatory intervention. Its purpose is historical: to recover the origins of the statutory language, examine the concerns that produced it, and trace how the power has subsequently been understood and used. That history identifies recurring distinctions—between general policy and particular decisions, between broad objectives and detailed implementation, and between a direction's subject matter and its application—but it does not reduce them to a single legal test. The significance to be attached to those distinctions, particularly in applying sections 7 and 8 today, is ultimately a matter on which different readers may reach different conclusions.

The Historical Origins

The problem long predates the present statutory language.

Beginning with the broadcasting reports of the 1950s and 1960s, successive studies wrestled with the appropriate division between governmental responsibility for public policy and the independence of bodies entrusted with administering broadcasting policy. The terminology changed, as did the institutions involved, but the recurring concern was recognizable: elected governments could properly establish policy, while day-to-day administration and particular decisions required some degree of institutional independence.

The issue became much more explicit during the development of integrated broadcasting and telecommunications legislation in the 1970s. In 1976, the CRTC accepted that government might appropriately determine classes of licence eligibility but objected to a power permitting Cabinet to determine which particular applicant should receive a licence. It summarized its preferred approach in the proposition that Cabinet directions should be "Negative, Rather than Positive".

Bill C-43 in 1977 proposed a broad power of governmental direction while separately excluding particular licence applicants and other specified matters. The Lambert Commission in 1979 recommended that governmental directives concern "broad policy matters" and "not pertain to specific individual cases". The Economic Council of Canada similarly distinguished "general policy matters" from intervention after proceedings had begun in a specific case.

The Applebaum-Hébert Committee brought the distinction directly into broadcasting in 1982. It recommended a governmental power to issue "general policy directions" while criticizing a system that allowed government to challenge individual licensing decisions. The government's 1983 broadcasting policy similarly proposed directives limited to "broad policy matters" while excluding particular applicants, licences and services.

By the early 1980s, therefore, two related concerns were well established. One concerned the subject matter of governmental direction: it should operate at the level of broad or general policy. The other concerned its application: government should not use the direction power to determine particular regulatory cases. The eventual statutory formulation had not yet appeared.

The 1984–88 Drafting Process

The most revealing period begins with Bill C-20 in 1984.

The original Bill would have authorized Cabinet to issue a direction concerning "any matter" within the CRTC's jurisdiction. The breadth of that formulation produced considerable concern. In 1985, André Bureau, Chairman of the CRTC, warned that it could permit governmental involvement in the "most trivial and minute details" of regulation. He proposed instead directions having "general orientation and broad application".

Other participants approached the same problem in somewhat different language. Government witnesses emphasized general or major policy rather than detail. An unsuccessful parliamentary amendment would have confined directions to general policy applying to a class of issues so that Cabinet could not use the power to deal with a specific case. The Law Reform Commission of Canada likewise recommended that policy directions address "general policy issues in advance of specific cases".

The Caplan-Sauvageau Task Force in 1986 proposed directives "formulated in general terms, like regulations", leaving their interpretation and application to the CRTC. In 1987, the CRTC itself proposed that governmental directions deal with "broad policy" but not affect a "specific application". The House of Commons Standing Committee recommended that binding directions be "expressly restricted to broad policy matters".

These formulations are not identical, and the documentary record does not establish a simple line of drafting descent from one to another. But they demonstrate the persistence of the same institutional problem.

Bill C-136, introduced on June 23, 1988, initially authorized Cabinet simply to issue "policy directions". The government's accompanying policy documents nevertheless described the intended power as one concerning broad policy matters.

The parliamentary hearings sharpened the issue.

The Canadian Association of Broadcasters proposed directions "of a general nature" and linked that formulation to restricting the power to broad policy. Bureau proposed "broad policy directions of general orientation". More significantly, he warned that protection for particular licence applications alone did not solve the problem: sufficiently clever drafting could convert

what was effectively intervention in an individual situation into an apparently general statement of policy.

CTV's August 18, 1988 written submission proposed inserting the words "of general application" after "policy directions" in clause 7(1). The proposal was subsequently recorded in the Library of Parliament's August 26 clause-by-clause summary and reiterated in CTV's supplementary responses of August 29. Although the evidence does not establish that CTV originated the phrase or that the government adopted it from CTV, this is the earliest material presently located in which the precise words "of general application" appear as part of the proposed statutory direction power.

On August 30, 1988, the government amended Bill C-136. Roger Clinch, Parliamentary Secretary to the Minister of Communications, moved the amendment that replaced the power to issue "policy directions" with the power to issue "directions of general application on broad policy matters". The amendment carried.

The parliamentary discussion described the amendment principally as clarifying that the government's power was confined to broad policy. It did not separately explain why both "general application" and "broad policy matters" were required or assign a distinct legal function to each expression.

That limitation is important. The history supports an inference that the formulation brought together two concerns that had repeatedly appeared in the preceding record: the breadth of the policy matter and the generality of the direction's application. But the 1988 record does not expressly say that this was the intended grammatical or legal division of labour between the two phrases.

The amendment was adopted against a broader political and institutional backdrop. By the summer of 1988, broadcasting reform had already been under sustained review for several years and the parliamentary window was narrowing. Bill C-136 was still at report stage in September, shortly before Parliament was dissolved. At the same time, the Canada–United States Free Trade Agreement had brought questions about Canadian cultural industries and the continuing capacity to pursue distinct Canadian cultural policies into the wider political debate. These circumstances do not explain why the particular six-word formulation was chosen, but they form part of the setting in which the government was attempting to complete the legislation.

Bill C-136 did not complete the legislative process before dissolution. The formulation survived. It reappeared unchanged in Bill C-40 and became section 7 of the new *Broadcasting Act* in 1991.

Telecommunications Adopts the Broadcasting Formulation

The telecommunications history is intertwined with the broadcasting history but does not appear to be the source of the six-word formulation.

When Bill C-62 was introduced in 1992, its proposed telecommunications direction power already used the words "directions of general application on broad policy matters". Departmental explanatory material expressly pointed to the recently enacted *Broadcasting Act* as containing a similar governmental power.

The parliamentary explanation of the telecommunications provision is particularly useful. Perrin Beatty, Minister of Communications, distinguished decisions of fundamental public policy, which belonged to government, from specific regulatory proceedings. A departmental witness subsequently described section 8 as a "global power" dealing with broad policy issues of general application and said it could not be used to direct the CRTC on a matter as specific as a particular case.

The *Telecommunications Act* was enacted in 1993 with the same six-word limitation. Broadcasting and telecommunications thereafter provide parallel histories of the same statutory formulation.

1995: The First Practical Test

The 1995 Direct-to-Home ("DTH") satellite controversy provided the first major test of how much specificity section 7 could accommodate.

The CRTC objected that the government's proposed directions were "too specific and narrow, instead of general and broad as contemplated under the Act". Its concern was not simply that Cabinet might expressly award a licence. A direction could leave the formal licensing decision with the Commission while prescribing the regulatory framework so closely that little meaningful discretion remained.

The government and members of its DTH Policy Review Panel took a different view. Gordon Ritchie defended detailed provisions as necessary to make a general policy framework effective. Roger Tassé argued that the directions should be considered "as a whole": they constituted a general policy, and section 7 did not prevent government from expressing that policy in precise and understandable language.

Parliamentary committees examined the legislative history and received competing legal interpretations. Contemporary outside legal commentary described the apparent statutory intention as requiring directions to be "general rather than specific and broad rather than narrow". The Senate sought the legal basis for the proposed directions and preserved the competing positions in its report.

The government proceeded.

The final July 1995 Directions were modified in significant respects from the proposed versions. Some detailed prescriptions were softened or recast, while other highly specific requirements - including timing requirements - remained. The CRTC subsequently conducted the licensing proceedings and made the ultimate regulatory decisions.

No court determined whether the Directions crossed the section 7 boundary.

The episode is important precisely because it did not produce a definitive answer. It exposed a question that would recur: a direction may apply generally to a class rather than to an identified person and nevertheless contain detailed instructions governing how the Commission is to regulate that class. Whether such a direction remains one on a "broad policy matter" cannot necessarily be answered simply by asking whether it is "of general application".

The Telecommunications Experience After 1993

The telecommunications direction power remained largely unused until 2006.

The Telecommunications Policy Review Panel ("TPRP") expressly recognized that section 8 directions were limited in both "subject matter and their specificity". Yet its own proposed Direction was far from merely aspirational. It would have directed maximum feasible reliance on market forces, imposed tests governing when regulation was justified, made significant market power a prerequisite for specified forms of economic regulation, and prescribed principles governing wholesale access and other regulatory matters.

That proposal formed part of a broader institutional model. The TPRP simultaneously recommended repeal of Cabinet's section 12 power to review individual CRTC telecommunications decisions. Its model therefore contemplated a potentially strong prospective governmental policy-direction power coupled with the removal of political review of particular Commission decisions.

The government adopted only part of that model. Its 2006 Direction drew heavily on the TPRP proposal, although important provisions changed. The significant-market-power prerequisite disappeared, while the government added or retained more operational instructions governing regulatory methods. Cabinet also retained section 12 and used it during the same period.

The 2006 experience therefore does not produce a simple equation between detail and invalid specificity. Both the Panel and government contemplated consequential and sometimes mandatory prospective directions while describing the statutory power as one confined to broad policy matters of general application.

The 2019 Telecommunications Direction was different in character. It directed the CRTC to consider competition, affordability, consumer interests and innovation across its telecommunications decisions but generally left the Commission to determine how those considerations should affect individual proceedings. The final Direction actually broadened the range of Commission decisions to which the policy considerations applied without becoming materially more prescriptive about the regulatory mechanisms the Commission should employ.

2022–23: Specificity Returns to the Telecommunications Debate

The proposed 2022 Telecommunications Direction reopened the issue much more directly.

Some provisions resembled conventional high-level policy guidance. Others told the Commission that it "must" maintain particular regulatory frameworks or mechanisms, including mandated wholesale access for fixed Internet services and aggregated wholesale high-speed access until specified competitive conditions existed.

The government expressly acknowledged that section 8 authorized only directions of general application on broad policy matters. Its Regulatory Impact Analysis Statement nevertheless described the proposed approach as "outcome-based regulation": the measures could be direct while leaving the Commission considerable discretion to elaborate the regulatory and compliance measures necessary to implement them.

That understanding was contested.

TELUS argued that several provisions were "narrow, specific and prescriptive" and amounted to directions of specific rather than general application on narrow rather than broad policy matters. Professor Richard Schultz traced the legislative history and argued that the proposed provisions intruded unusually far into matters historically left to the regulator. Other participants raised related objections concerning the proper relationship between sections 8 and 12.

The government disagreed with those objections and issued the final Direction in February 2023. Its central mandatory wholesale provisions survived.

The disagreement has since reached the courts. SaskTel's challenge to the CRTC's implementation of the 2023 Direction argues, among other things, that section 10 is neither of general application nor concerned with a sufficiently broad policy matter and that it effectively substitutes Cabinet's decision for that of the Commission. The CRTC, by contrast, has subsequently characterized the Direction as one of general application on broad policy matters while emphasizing the implementation discretion left to the Commission.

At the time of writing, the litigation has not produced an authoritative judicial interpretation of the six-word limitation.

Broadcasting Returns to the Same Question

At almost the same time, Parliament revisited section 7 in the legislation that became the *Online Streaming Act*.

Bill C-10 would have added a provision expressly confirming that Cabinet could use the section 7 direction power in relation to the CRTC's new order and regulation-making powers. Government officials maintained that the existing limitation would remain: any such direction would still have to be of general application on broad policy matters and could not target a specific company or regulatory decision.

Bill C-10 died on the Order Paper. Bill C-11 revived the proposal.

The CRTC objected. Ian Scott, Chair and CEO of the CRTC, emphasized the importance of preserving the Commission's status as an arm's-length regulator. In discussing how far the proposed amendment might shorten that distance between government and regulator, he asked, memorably, "How long are the arms?" The Commission's written submission argued that regulations and orders could be highly specific and detailed and warned against governmental involvement in regulatory "minutiae".

Government officials disagreed. They maintained that the existing statutory limitation would continue to govern any direction made under the proposed provision.

The Senate ultimately deleted the provision. The *Online Streaming Act* received Royal Assent in April 2023 without it. Parliament did not, however, amend the existing words "of general application on broad policy matters" or define them more precisely.

The disagreement therefore remained unresolved.

The 2023 Online Streaming Direction

The government's 2023 Online Streaming Direction provides the most recent practical illustration of its understanding of the unchanged section 7 power.

The government described the instrument as providing "high-level directions". At the same time, its Regulatory Impact Analysis Statement acknowledged that several regulatory approaches otherwise available to the CRTC were incompatible with the Direction, that in multiple instances the Direction instructed the Commission to take "specific actions", and that the Commission's flexibility to pursue other avenues was consequently reduced.

The individual provisions occupy different points on a spectrum.

Some identify broad objectives and considerations. Others prescribe regulatory methodology. The discoverability provision, for example, directs the Commission to prioritize outcome-based regulation and minimize the need for changes to algorithms affecting program presentation.

Still others prescribe particular results. Section 10 directs the Commission not to impose regulatory requirements in respect of specified categories involving social-media creators and video games. That provision applies generally to defined categories rather than to a named undertaking or individual proceeding, but the regulatory result itself is specific.

Other provisions direct the exercise of particular statutory powers while leaving important implementation choices to the CRTC. Expenditure requirements are addressed in considerable detail without Cabinet itself setting the ultimate rates, formulas, classes or recipients.

The final Direction therefore demonstrates the breadth of the government's practical interpretation of section 7. In its view, the unchanged provision permits directions that can require regulatory action, foreclose some regulatory approaches, prescribe methodology and reduce Commission discretion, provided the direction remains sufficiently general and leaves meaningful implementation to the regulator.

That practice does not itself establish the legal meaning of section 7.

What the History Shows - and Does Not Show

Several features of the history stand out.

First, the six-word formulation did not appear fully formed at the beginning of the debate over governmental direction. It emerged after years of attempts to distinguish legitimate governmental policy-making from intervention in the work entrusted to an independent regulator.

Second, "broad policy matters" has a longer documentary history than "of general application". The latter expression entered the drafting record comparatively late. Its addition in August 1988 followed a parliamentary record increasingly concerned not merely with whether a direction

could expressly decide a particular licence application, but with whether a formally general direction could in substance determine a particular regulatory situation.

Third, the historical record repeatedly distinguishes the level at which government establishes policy from the application of that policy by the regulator. That distinction appears in different forms over several decades and in both broadcasting and telecommunications.

Fourth, the history provides some support for treating "general application" and "broad policy matters" as related but potentially distinct limitations. A direction can apply generally to a class while containing quite specific regulatory instructions. Conversely, a broad policy objective may be capable of application in a particular proceeding without becoming a direction to decide that proceeding in a prescribed way.

But this should not be overstated. The August 1988 parliamentary record does not expressly assign separate meanings to the two phrases. The inference arises from the broader legislative history and from the apparent need to give effect to both expressions.

Fifth, subsequent practice has not produced a stable consensus about permissible specificity. The 1995 controversy produced competing interpretations. The 2006 Direction demonstrated acceptance of substantial prospective prescription. The 2019 Direction adopted a more conventionally general form. The 2022–23 telecommunications process generated direct objections that Cabinet had crossed the statutory boundary. The Bill C-11 proceedings exposed a similar disagreement in broadcasting. The final 2023 Online Streaming Direction demonstrates a governmental interpretation capable of accommodating both broad policy guidance and quite specific mandatory instructions within the same instrument.

Finally, the principal documentary gaps should be acknowledged. The research has not uncovered a contemporaneous drafting document expressly explaining why the government chose those words or what separate work they were intended to perform alongside "broad policy matters". The legislative history is unusually rich, but it does not contain a single authoritative explanation of the completed formulation.

That may itself help explain the history that followed.

For more than three decades, governments, the CRTC, parliamentary committees, practitioners, academics and interested parties have returned to essentially the same questions in different regulatory settings. They have not always answered them in the same way. The statutory language has accommodated directions ranging from high-level statements of policy to instruments containing detailed and mandatory regulatory instructions.

The history assembled in this paper provides a fuller record against which those differing interpretations can be assessed. It does not anticipate that all readers will draw the same conclusion from it.

A) Introduction

On May 21, 2026, the Canadian Radio-television and Telecommunications Commission issued two decisions imposing new requirements on Canadian broadcasters and large foreign streaming services. Among other things, the Commission increased the expenditure requirements applicable to certain online streaming services and imposed new requirements intended to make Canadian and Indigenous programming more prominent and discoverable.[1]

The decisions immediately produced calls for the government to intervene. On May 28, the Conservative opposition called on Cabinet in the House of Commons to use its powers under the *Broadcasting Act* to reject the CRTC's decision. During Question Period, Rachael Thomas, the Conservative member for Lethbridge, argued that "in section 7 of the *Broadcasting Act*, the Liberals actually have the power to reject this levy". Earlier that day, the government had taken the opposite position. Kevin Lamoureux, Parliamentary Secretary to the Leader of the government in the House of Commons, stated:

> "The Conservatives are calling on the cabinet to do this, but the cabinet does not have the authority to do what the Conservative Party is asking the cabinet to do…"[2]

Less than a week later, however, the government announced that it would intervene. On June 3, the Department of Canadian Heritage announced that the CRTC would be asked to review its May 21 decision and that the government would develop new policy directions to adjust the implementation of the *Online Streaming Act*. Those directions would address such matters as affordability, consumer choice, flexibility for online streamers and Canadian broadcasters, and support for Canadian programming.[3]

The government subsequently made clear that it had not necessarily settled upon a single direction or a single intervention. In an interview published by The Globe and Mail on June 16, 2026, the Minister of Canadian Identity and Culture, Marc Miller, rejected suggestions that the government intended simply to eliminate the contribution requirement. "My colleagues in the Bloc Québécois assume that it will go down to zero. That isn't the case", he said. "It may be a staggered process of policy directions."[4]

There is no necessary inconsistency between the government's two positions. Section 7 does not confer unrestricted authority to direct the CRTC. It authorizes the Governor in Council to issue only "directions of general application on broad policy matters" relating to the statutory broadcasting and regulatory policy objectives. Section 7 does not provide the Governor in Council with a direct power to reverse a particular CRTC broadcasting decision. It does,

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[1] CRTC, Broadcasting Regulatory Policy CRTC 2026-95, May 21, 2026; CRTC, Broadcasting Regulatory Policy CRTC 2026-96, May 21, 2026.

[2] House of Commons Debates, 45th Parl., 1st Sess., No. 124, 28 May 2026 at 1050, 1430.

[3] Canadian Heritage, "Government of Canada announces immediate support to strengthen Canadian culture and ensure Canadian content remains affordable", News Release, 3 June 2026.

[4] Barry Hertz, "Miller rejects claims that Ottawa 'has sold out Canadian culture' over *Online Streaming Act*", *The Globe and Mail*, 16 June 2026.

however, authorize broader policy directions that may affect the Commission's future implementation of the legislation.[5]

But that distinction immediately raises another question: what constitutes a direction "of general application on broad policy matters"?

The question is not confined to broadcasting. Section 8 of the *Telecommunications Act* contains substantially the same limitation. It authorizes the Governor in Council to issue to the CRTC "directions of general application on broad policy matters" with respect to the Canadian telecommunications policy objectives.[6]

And in telecommunications the question is no longer hypothetical. SaskTel has brought a proceeding in the Federal Court of Appeal challenging a provision of the 2023 Telecommunications Policy Direction on the ground that it exceeds the authority conferred by section 8. The litigation squarely raises the permissible scope of a direction "of general application on broad policy matters".[7]

Thus, in 2026, the same six words have assumed immediate significance in both areas of the CRTC's jurisdiction.

Yet the phrase itself is more than thirty years old and has received remarkably little substantive judicial consideration. The words first entered the *Broadcasting Act*, enacted in 1991, and, shortly afterwards, the *Telecommunications Act*, enacted in 1993. What did Parliament mean when it confined the Governor in Council's powers of direction under both statutes to directions "of general application on broad policy matters"?

That question is the subject of this paper.

The answer cannot be found simply by parsing the six words in isolation. They were the product of a much longer debate about the relationship between elected government and an independent regulatory agency. The underlying problem was straightforward to state but considerably harder to resolve. Government has legitimate responsibility for national broadcasting and telecommunications policy. The CRTC, however, is an independent arm's-length quasi-judicial regulator to which Parliament has assigned responsibility for applying the governing statutes, conducting public proceedings and making regulatory decisions. If Cabinet is given a binding power of policy direction, how broad may that power be before government ceases to establish policy and begins instead to exercise functions Parliament assigned to the regulator?

Ian Scott, then Chair of the CRTC, put the institutional problem more memorably when he appeared before the Senate Standing Committee on Transport and Communications during its consideration of Bill C-11 in November 2022. "This commission is arm's length", he observed.

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[5] *Broadcasting Act*, S.C. 1991, c. 11, ss. 7(1) – (2).

[6] *Telecommunications Act*, S.C. 1993, c. 38, s. 8.

[7] Saskatchewan Telecommunications v. Beanfield Technologies Inc. et al., Federal Court of Appeal File No. A-284-24; Telecom Regulatory Policy CRTC 2024-180, August 13, 2024; Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy, SOR/2023-23, s. 10.

"I guess you can put it as, 'How long are the arms?' I prefer as the regulator to have them as long as possible."[8]

The statutory history reveals a long history of attempts to define that boundary, and this paper traces that history.

It does not attempt to derive from the legislative record a mechanical test for determining the validity of every direction. Nor does it express a view on the merits of the pending SaskTel proceeding or of any future broadcasting direction arising from the government's June 2026 announcement. Its purpose is more fundamental: to examine where the statutory formulation came from, why Parliament adopted it, how governments, regulators and others have subsequently understood and applied it, and what that history may tell us about the boundary between legitimate governmental policy direction and regulatory decision-making entrusted to the CRTC.

B) 1957–65: Institutional Prehistory - Policy, Direction and Particular Decisions

Long before Parliament enacted an express governmental power of direction to the broadcasting regulator, Canadian broadcasting policy had confronted the institutional problem that such a power would eventually have to address: how to preserve governmental and parliamentary responsibility for broadcasting policy without permitting political involvement in the administration of the broadcasting system.

The 1957 Royal Commission on Broadcasting, chaired by Robert Fowler, described the problem as a dilemma between the danger of political interference in an agency responsible for public information and communications and the need for public accountability. The Commission considered that the broadcasting system could not be administered directly by Parliament, except in relation to "general policy and supervision", and that day-to-day authority therefore had to be delegated to a broadcasting agency. The delegation, however, was not intended to remove broadcasting policy from parliamentary control. Fowler described it as a delegation of "administrative day-to-day detail", rather than the creation of an independent authority beyond "effective policy control by Parliament".

The distinction was not yet the one that would eventually be reflected in section 7. In particular, Fowler considered the grant of a new broadcasting licence to be "essentially a political act" and recommended that final authority over individual licensing decisions remain with the Governor in Council. Nevertheless, the report articulated an institutional principle that would recur repeatedly: Parliament should establish and supervise broadcasting policy while detailed administration should ordinarily be left to the body to which Parliament had delegated that responsibility. Fowler accordingly urged Parliament to supervise whether the Board was properly

[8] Senate, Standing Committee on Transport and Communications, *Evidence*, 44th Parl., 1st Sess., 16 November 2022 (Ian Scott, Chair and Chief Executive Officer, CRTC).

discharging its statutory duties rather than involve itself in particular programmes or activities, while retaining its ultimate authority over Canadian broadcasting.[9]

The 1963 Glassco Commission carried the distinction further. In considering the relationship between government and the CBC, Glassco emphasized the need for substantial independence from the political process in the Corporation's day-to-day activities. At the same time, it distinguished "matters of broad policy", in relation to which government had an inescapable responsibility to provide guidance. It recommended that the responsible minister be given a formal and publicly exercised power of direction.[10] Glassco was concerned with governmental direction of the CBC rather than direction of an independent broadcasting regulator. Its significance for present purposes is therefore conceptual rather than genealogical. It nevertheless brought together, at an early date, three elements that would remain important: governmental responsibility for broad policy, a formal power of direction, and independence in day-to-day administration.

A different aspect of the problem appeared in the 1964 report of the Special Consultative Committee on Broadcasting Policy - the "Troika" comprising Andrew Stewart of the Board of Broadcast Governors, Alphonse Ouimet of the CBC and Don Jamieson of the Canadian Association of Broadcasters. In discussing the administration of a national policy for the extension of television service, the Committee stated that the orderly use and development of scarce broadcasting resources required "procedures of general application". It explained that a person affected by the administration of a national policy should be able to expect that decisions made elsewhere would, under similar conditions, be applied in his case. The object was to avoid the administration of public policy through exceptions fashioned for particular situations.[11]

The Troika passage is noteworthy because it demonstrates that the expression "general application" was already part of Canadian broadcasting-policy vocabulary more than two decades before Bill C-136. But its significance should not be overstated. The Committee was discussing the consistent administration of national broadcasting policy, not the scope of a governmental power to direct the regulator. There is no evidence that this passage was a source of the language ultimately adopted in 1988.

The second Fowler Committee returned to the broader institutional problem in 1965. Its report sought to reduce the occasions on which disputes within the broadcasting system would draw government into particular broadcasting controversies and expose both government and the system to allegations of political interference. It proposed that Parliament delegate substantial authority over broadcasting to a single independent agency, which would establish policy and provide the "broad direction" required for the broadcasting system while leaving particular programmes, production techniques and other operational details to broadcasters.[12] The precise

[9] Royal Commission on Broadcasting, Report (Ottawa, 1957), pp. 88–91; Committee on Broadcasting, Report (Ottawa, 1965), pp. 97–98.

[10] Royal Commission on Government Organization (Glassco Commission), Report, vol. 4, Report 19, Canadian Broadcasting Corporation (Ottawa, 1963), p. 30.

[11] Special Consultative Committee on Broadcasting Policy, "Combined Statement", Sessional Papers No. 132B, 2nd Sess., 26th Parl. (1964), p. 8; reproduced in Roger Bird, ed., Documents of Canadian Broadcasting (Ottawa: Carleton University Press, 1988), p. 324.

[12] Committee on Broadcasting, Report (Ottawa, 1965), pp. 97–98.

institutional arrangement differed from the one ultimately enacted, but the underlying distinction was becoming familiar: responsibility for policy and broad direction could be separated from responsibility for particular decisions made in administering that policy.

These early materials do not establish a textual genealogy for the language eventually enacted as section 7. None proposed a governmental power to issue "directions of general application on broad policy matters" to the broadcasting regulator, and there is presently no evidence that the drafters of Bill C-136 drew the eventual formulation from any of them. Their significance is instead institutional and conceptual. By the mid-1960s, Canadian broadcasting policy had already confronted the problem to which the later limiting language would respond: government and Parliament had a legitimate responsibility for broadcasting policy, but the exercise of that responsibility had to be reconciled with the independence of those charged with administering the broadcasting system.

The subsequent history is therefore not the creation of that institutional distinction from nothing. It is the gradual development of mechanisms - and eventually statutory language - for defining the boundary between governmental policy responsibility and regulatory decision-making.[13]

C) The 1967 White Paper and the 1968 *Broadcasting Act*

The institutional problem which eventually produced the modern power of direction was older than the power itself. Canadian broadcasting policy had long confronted the question of how an elected government could retain responsibility for national broadcasting policy while preserving the independence of the body responsible for administering that policy and deciding individual regulatory matters.

That distinction was particularly evident in the debate preceding the *Broadcasting Act* of 1968. The government's 1967 White Paper, *Broadcasting*, contemplated a regulatory structure in which Parliament and government would remain responsible for establishing national broadcasting policy, while its administration would be entrusted to an independent regulatory authority.[14] The parliamentary committee which examined the White Paper similarly distinguished between the determination of broadcasting policy, for which Parliament ultimately remained responsible, and the day-to-day administration of the broadcasting system, from which government and Parliament should remain removed.[15]

The solution adopted in the *Broadcasting Act* of 1968 was strikingly different from the general power of policy direction that would eventually be enacted in 1991. The new Act created the CRTC and declared the broadcasting policy for Canada, but it gave the Governor in Council no general authority to direct the Commission concerning the interpretation or implementation of that policy.

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[13] See discussion below.

[14] Canada, Secretary of State, *Broadcasting: A White Paper on Broadcasting Policy* (Ottawa, 1967).

[15] House of Commons, Standing Committee on Broadcasting, Films and Assistance to the Arts, Eleventh Report, March 21, 1967, p. 1303.

Instead, section 18(1) provided:

> "The Governor in Council may, by order, from time to time issue directions to the Commission as provided for by subsection 9(2) and paragraph 13(1)(a)."[16]

Those incorporated provisions authorized directions only in specifically defined circumstances. Under subsection 9(2), Cabinet could direct the Commission to require broadcasters to carry a program considered to be of "urgent importance to Canadians generally", or to residents of a specified area. Paragraph 13(1)(a) permitted directions concerning the maximum number of channels or frequencies for which licences might be issued in a designated area, the reservation of channels or frequencies for the CBC or another specified purpose, and classes of applicants to whom licences could not be issued, amended or renewed.[17]

The structure is important. Parliament did not give Cabinet a residual authority to instruct the CRTC whenever the government considered an issue to involve broadcasting policy. It identified particular subjects on which Cabinet could give binding directions and otherwise left the Commission to administer the statutory broadcasting policy.

The 1968 Act therefore provides the statutory baseline for the history that follows. The later debate was not about whether government should have *any* capacity to direct the regulator; Parliament had already accepted that proposition in limited circumstances. The question was whether the existing arrangement left government with too little ability to establish policy as the broadcasting and communications systems evolved - and, if the power were broadened, how government could be prevented from using it to intervene in matters properly left to the Commission.

D) The 1973 Green Paper and the 1975 Grey Paper

The next significant development came in the 1970s. By then, the question was no longer simply whether government should be able to direct the regulator in a few expressly enumerated circumstances. The government began considering a substantially broader power to establish communications policy through binding directions.

The 1973 Green Paper proposed that the Governor in Council be given authority to issue directions concerning "the policies to be followed in pursuing national objectives".[18] The rationale was practical as well as constitutional. Legislation could establish national objectives, but it could not anticipate every social, economic, cultural or technological development that might subsequently affect their implementation. A mechanism was therefore required through which the elected government could provide continuing policy guidance to the regulator without repeatedly returning to Parliament for legislative amendments.

Significantly, however, the proposed power was not unlimited. The Green Paper identified matters in which government direction would be inappropriate. These included directing that a

[16] *Broadcasting Act*, S.C. 1967-68, c. 25, s. 18(1).

[17] *Ibid*., ss. 9(2), 13(1)(a).

[18] Government of Canada, Proposals for a Communications Policy for Canada [1973 Green Paper], p. 25.

licence or franchise be awarded to "an identifiable person"; determining the nature of broadcast programming or qualitative programming standards; restricting freedom of expression; determining the rate for a particular service; and requiring the extension of service at the expense of particular providers or subscribers.[19]

The reference to an "identifiable person" is particularly noteworthy. More than fifteen years before Parliament adopted the words "general application", the Green Paper was already distinguishing between government responsibility for policy and governmental intervention affecting an identifiable regulated party. The eventual statutory terminology had not yet emerged, but the underlying problem plainly had.

The proposal also represented an important change in statutory architecture. Under the 1968 Act, Cabinet could give directions only on subjects that Parliament had specifically identified. The Green Paper contemplated something approaching the reverse: a broader governmental authority to give policy directions, accompanied by statutory identification of subjects that would remain beyond the reach of that authority.

The government developed the proposal further in its 1975 Grey Paper. It proposed that the Governor in Council be authorized to give formal directions to the CRTC concerning "the interpretation of statutory objectives and the means for their implementation".[20] The purpose of the provision was stated explicitly:

> "The purpose of this provision would be to ensure that the development of policy would be, and would be clearly seen to be, under the control of the elected representatives of the people…"[21]

At the same time, the Grey Paper preserved an important sphere of regulatory independence. Matters immune from government direction would be specified by statute, with broadcast programming being of particular importance. The paper drew an especially useful distinction between governmental responsibility for the "structure and balance of the broadcasting system" and the regulator's responsibility for the "balance and quality of the programming carried by the system".[22]

The 1973 and 1975 proposals therefore contain several elements of the structure eventually enacted in 1991, although not its ultimate language. Policy was ultimately to remain the responsibility of elected government. The independent regulator was to retain substantial autonomy in applying that policy. Government required a formal mechanism through which it could respond to changing circumstances without legislative amendment. But that mechanism required boundaries if it was not to become a means of governmental intervention in regulatory matters - particularly matters affecting identifiable parties.

What the Green and Grey Papers did not yet provide was the formulation Parliament would ultimately use to express that boundary. There was no requirement that a direction be "of general

[19] *Ibid*., p. 25.

[20] Government of Canada, Communications: Some Federal Proposals [1975 Grey Paper], pp. 11, 13–14.

[21] *Ibid*., pp. 11, 13–14.

[22] *Ibid*., pp. 11, 13–14.

application" or concern a "broad policy matter". The importance of these documents lies instead in showing that the distinction which those words would later embody was already becoming visible: a power to direct policy was thought necessary, but a power to decide particular regulatory matters was not.

E) 1976: The CRTC Responds - Directions Should Be "Negative, Rather Than Positive"

By 1976, the government's communications reform project had moved into its second phase. The first stage had been completed on April 1, 1976, when responsibility for federal telecommunications regulation was transferred to the CRTC, creating a single regulator for broadcasting and telecommunications. The contemplated second stage was legislative: a new statutory framework would replace the existing patchwork of broadcasting and telecommunications legislation and redefine the relationship between the government and the newly combined regulator.

As part of that process, officials prepared a draft Telecommunications Bill and provided it to the CRTC for comment before introduction in Parliament. The Commission described the proposed legislation as an extensive bill and responded in February 1976 in a document entitled Towards Phase Two: Comments of the CRTC on a New *Telecommunications Act*.[23]

The draft legislation contemplated a substantially broader governmental power of direction than existed under the *Broadcasting Act*. Instead of permitting Cabinet to issue directions only on particular subjects expressly identified by Parliament, the proposed legislation would give the Governor in Council a general power to issue directions concerning the implementation of statutory telecommunications policy, subject to specified exclusions.

The CRTC did not oppose governmental responsibility for communications policy. It did, however, object strongly to a power that could permit Cabinet to direct the Commission affirmatively in the exercise of its regulatory responsibilities.

The Commission's preferred distinction was expressed succinctly:

> "Directions from Cabinet should be Negative, Rather than Positive."[24]

The distinction was important. In the Commission's view, government might legitimately identify policies or results that the regulator should not pursue. A positive power to tell the Commission what it must do presented a different problem. Such a power could allow the government to move beyond establishing policy and into the actual exercise of regulatory authority.

The Commission warned that the proposed arrangement could leave it "totally captive" to governmental direction.[25] Its concern was not merely institutional independence in the abstract.

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[23] CRTC, Towards Phase Two: Comments of the CRTC on a New Telecommunications Act (February 1976), pp. 265–69.

[24] *Ibid.*, p. 266.

[25] *Ibid.*, p. 267.

The breadth of the proposed power could permit Cabinet to tell the Commission "precisely what to do" in the exercise of discretionary regulatory powers.[26] That concern extended beyond a direction expressly naming a particular licensee or applicant. It went to the substance of the relationship between policy-making and regulatory decision-making: if Cabinet could prescribe the exercise of the Commission's discretion in a particular regulatory context, the distinction between governmental policy and independent regulation could become largely formal.

The Commission illustrated the concern more concretely in relation to licensing. It accepted that government might properly establish policy concerning the classes of persons eligible to hold licences, but stated that:

> "…the Governor in Council should not be permitted to direct the Commission as to which particular applicant it should issue such a licence to."[27]

This is important for the genealogy. The 1973 Green Paper had already identified as impermissible a governmental direction awarding a licence or franchise to an "identifiable person". The 1976 CRTC response expresses essentially the same concern in terms of a "particular applicant". Well before the eventual words "directions of general application" appeared, the documentary record was therefore distinguishing between governmental responsibility for policy and governmental direction concerning the regulatory treatment of an identifiable individual party.

The CRTC's proposed solution was not the one Parliament ultimately adopted. Rather than accept the new general direction power subject to exclusions, the Commission suggested that a better approach would be to draft the power "in a similar format to that contained in section 22 of the *Broadcasting Act*" - that is, by retaining a model under which Parliament itself identified the particular areas in which Cabinet could issue binding directions.[28]

The 1976 comments are therefore significant in two respects. First, they show that the government was already attempting to replace the narrow, enumerated direction powers of the existing broadcasting legislation with a substantially broader policy-direction power for the newly combined communications regulator. Second, they show the CRTC resisting that architecture because of the risk that a broadly drafted power could permit Cabinet to determine how the Commission exercised its regulatory discretion in particular matters.

The progression by 1976 can therefore be stated quite clearly. The 1968 *Broadcasting Act* had confined Cabinet to narrow, specifically enumerated direction powers. The 1973 Green Paper proposed a broader governmental policy-direction power coupled with areas into which Cabinet should not intrude. The 1975 Grey Paper carried that model forward and emphasized that policy should be, and should clearly be seen to be, under the control of elected representatives. The CRTC's 1976 response accepted the importance of governmental policy responsibility but

[26] *Ibid*., p. 267.

[27] *Ibid*., p. 268.

[28] *Ibid*., p. 269.

warned that the proposed mechanism could make the independent regulator "totally captive" to Cabinet.

The central problem had thus become sharply defined: how could Cabinet be given sufficient authority to establish government policy without acquiring the ability to dictate how the Commission exercised its regulatory discretion in particular matters?

The eventual formulation "directions of general application on broad policy matters" would provide one answer to that problem. But there is no evidence that, in 1976, anyone had yet proposed that particular solution.

F) 1977: Bill C-43 and the Attempt to Create an Integrated Communications Statute

Bill C-43, introduced by Communications Minister Jeanne Sauvé on March 22, 1977, was the government's first legislative attempt to implement the second phase of a two-stage communications reform. Phase One had been institutional: the 1975 *Canadian Radio-television and Telecommunications Commission Act* brought federally regulated telecommunications carriers and broadcasting under the same regulator, effective April 1, 1976. Phase Two was legislative: a new *Telecommunications Act* would create a common statutory policy and regulatory framework for the newly combined CRTC.

The proposed consolidation was ambitious. Bill C-43 was intended to replace the *Broadcasting Act*, the *Radio Act*, the *Telegraphs Act* and the *Canadian Radio-television and Telecommunications Commission Act*, together with relevant portions of the *Railway Act* and the *National Transportation Act*, with a single body of national telecommunications law. In that sense, the proposed *Telecommunications Act* was not simply a modernization of carrier regulation; it was an attempt to integrate the federal statutory framework for both broadcasting and telecommunications.[29]

The importance of this for the present history should not be overlooked. Broadcasting and telecommunications were not, at this point, developing along entirely separate legislative tracks. The government had transferred responsibility for both fields to the same regulatory agency and was attempting to construct a common statutory framework for them. The debate over governmental policy directions in telecommunications therefore formed part of the same institutional exercise that necessarily involved the future of the direction powers contained in the *Broadcasting Act*.

[29] Bill C-43, An Act Respecting Telecommunications in Canada, 30th Parl., 2nd Sess., first reading, March 22, 1977; Department of Communications, Annual Report 1976–77, p. 6.

Bill C-43 proposed a substantially broader power of direction than the narrow, enumerated powers contained in the 1968 *Broadcasting Act*. Section 9(1) provided:

> "Subject to subsection (2), the Governor in Council may, by order, issue directions to the Commission from time to time respecting the implementation of the telecommunications policy for Canada enunciated in section 3."[30]

The general power was then made subject to specified exclusions. Cabinet could not issue directions concerning the issuance of a broadcasting licence to a particular applicant or its amendment or renewal; the content of broadcasting programming; the application of qualitative standards to programming; the restriction of freedom of expression; or the charges to be levied for particular telecommunications services or facilities.[31]

At the same time, the Bill preserved Cabinet's ability to give directions concerning matters familiar from the 1968 *Broadcasting Act*, including the maximum number of channels or frequencies available for licensing in a designated area, the reservation of channels or frequencies for the CBC or another specified purpose, and classes of applicants to whom licences could not be issued, amended or renewed.[32]

The architecture was therefore essentially the one contemplated in the 1973 Green Paper and 1975 Grey Paper and criticized by the CRTC in 1976. The existing *Broadcasting Act* identified the particular subjects on which Cabinet could direct the Commission. Bill C-43 would instead have given Cabinet a general power concerning the implementation of statutory policy and then identified particular areas into which that power could not extend.

Contemporary Department of Communications material is especially interesting for present purposes. In describing Bill C-43, the Department stated that the proposed legislation would empower the government to issue "broad policy directions" to the CRTC concerning national telecommunications policy.[33]

The words require some care. Bill C-43 itself did not say "broad policy directions", nor did it limit directions to "broad policy matters". Its statutory language was considerably more expansive: directions could be issued "respecting the implementation of the telecommunications policy for Canada", subject to the specified exclusions. Nevertheless, the Department's description demonstrates that the language of broad policy direction was already being used within the federal communications-policy environment in 1977.

Two contemporary episodes help illustrate the problem that a prospective power of policy direction was intended to address. In Manitoba Cable, Cabinet intervened after CRTC licensing decisions had brought the Commission's cable-ownership policy into conflict with an agreement between the federal and Manitoba governments. The issue arose again, more directly, in the Telesat/TCTS case. After the CRTC declined to approve Telesat Canada's proposed agreement with the Trans-Canada Telephone System, Cabinet varied the Commission's decision and

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[30] Bill C-43, s. 9(1).

[31] *Ibid*., s. 9(2)(a)–(e).

[32] *Ibid*., s. 9(2)(f)–(h).

[33] Department of Communications, Annual Report 1976–77, p. 6.

approved the agreement. In explaining the decision, Minister of Communications Jeanne Sauvé referred to broad issues of public policy beyond the reasonable purview of the CRTC and stated that adequate statutory mechanisms through which the government could provide clear policy guidance to the Commission were not yet available. C.C. Johnston understood the Minister to be referring to the proposed power of direction in the telecommunications legislation. He used Manitoba Cable and Telesat/TCTS to make a broader institutional point: if government could establish policy principles in advance through directions, there should be less need for Cabinet to intervene in individual regulatory decisions after the fact.[34]

Bill C-43 encountered substantial opposition and did not proceed. Opposition came from a number of sources and concerned matters extending well beyond the power of direction, including the proposed distribution of federal and provincial regulatory authority and the position of existing telecommunications carriers. The Bill ultimately died on the Order Paper.[35]

Its failure did not end the Phase Two project. The government returned with successor telecommunications legislation, including Bills C-24 and C-16 in 1978. Those attempts also failed, and telecommunications legislation would not be enacted for many years.

Bill C-43 nevertheless marks an important stage in the genealogy of the power of direction. By 1977, the government had moved beyond policy papers and placed before Parliament a statutory model under which Cabinet would possess a general authority to direct the CRTC concerning the implementation of communications policy, while remaining prohibited from directing the regulatory treatment of specified matters, including the licensing of a "particular applicant".

The eventual formulation - "directions of general application on broad policy matters" - had still not appeared. But two elements of the later history were becoming increasingly visible: governmental directions were being conceived as instruments of broad policy, while the legislation continued to recognize a boundary between governmental policy direction and intervention affecting particular regulatory parties or matters.

G) 1978: Bills C-24 and C-16 - The Phase Two Proposal Continues

Bills C-24, introduced on January 26, 1978, and C-16, introduced on November 9, 1978, continued the approach to governmental policy direction taken in Bill C-43.[36] Indeed, a contemporary Department of Justice study subsequently described the three bills as not differing significantly from one another.[37] Bill C-16 continued to authorize the Governor in Council,

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[34] C.C. Johnston, *The Canadian Radio-Television and Telecommunications Commission: A Study of Administrative Procedure in the CRTC* (Law Reform Commission of Canada, 1980), pp. 7–9. See also C.C. Johnston, *Political Control of Independent Administrative Agencies: A Study of the "Cabinet Appeals" under the Canadian Radio-Television and Telecommunications Commission Act* (Law Reform Commission of Canada, 1979), pp. 93–97.

[35] C.C. Johnston, *The Canadian Radio-Television and Telecommunications Commission: A Study of Administrative Procedure in the CRTC* (Law Reform Commission of Canada, 1980), p. 9; Western Premiers' Task Force on Constitutional Trends, *Second Report* (April 1978), pp. 14, 40.

[36] Bill C-24, introduced January 26, 1978; Bill C-16, introduced November 9, 1978.

[37] C.C. Johnston, *The Canadian Radio-Television and Telecommunications Commission: A Study of Administrative Procedure in the CRTC* (Law Reform Commission of Canada, Administrative Law Series, 1980), p. 9.

subject to specified restrictions, to issue directions to the CRTC "respecting the implementation of the telecommunications policy for Canada enunciated in section 3".[38]

The restrictions also continued the distinction already apparent in the earlier proposals. Cabinet could establish policy, but the direction power could not be used with respect to such matters as particular broadcasting licence applications, carrier rates, programming content or standards, or the restriction of freedom of expression.[39]

Neither Bill C-24 nor Bill C-16 became law. Their importance for present purposes lies principally in continuity. Between 1977 and 1978, three successive attempts to enact the Phase Two legislation maintained essentially the same model: a broad governmental authority to direct the newly combined communications regulator concerning national policy, accompanied by restrictions intended to protect particular regulatory matters from governmental intervention.

The repeated failure of the legislation also had an important institutional consequence. The legislative consolidation contemplated by Phase Two was not achieved. Broadcasting and telecommunications would eventually return to separate legislative tracks, although the same regulator - and many of the same questions concerning governmental policy direction and regulatory independence - remained common to both.

The terminology had still not reached the eventual statutory formulation. The Department was speaking of "broad policy directions," while the proposed statutory language concerned directions respecting implementation of national telecommunications policy. Neither "broad policy matters" nor "general application" appeared in the operative provision.

The next development is therefore particularly significant. In 1979, outside the immediate communications reform process, a Royal Commission examining governmental accountability proposed a general approach to independent regulatory bodies that used language strikingly closer to the eventual formulation.

H) 1979: The Lambert Commission - "Broad Policy Matters" and "Specific Individual Cases"

The problem of governmental policy direction and regulatory independence was not confined to communications regulation. In 1979, the Royal Commission on Financial Management and Accountability, chaired by Allan Lambert, considered the relationship between government and independent decision-making bodies as part of its broader examination of accountability within the federal government.[40]

The Lambert Commission accepted that independent agencies could not be insulated entirely from governmental policy. Where government wished fundamentally to alter the statutory policy

[38] Bill C-16, s. 9(1).

[39] Bill C-16, s. 9(2); C. C. Johnston, The Canadian Radio-television and Telecommunications Commission: A Study of Administrative Procedure in the CRTC (Law Reform Commission of Canada, Administrative Law Series, 1980), p. 9.

[40] Royal Commission on Financial Management and Accountability, Final Report (Ottawa: Minister of Supply and Services, 1979), pp. 316–17.

governing an agency, amendment of the governing legislation would ordinarily be the preferable course. But legislation was not always a practical means of responding to changing governmental policy.

The Commission therefore concluded that the constituent statutes of independent agencies should provide a mechanism by which governments could issue directives to them "on broad policy matters".[41]

That recommendation was accompanied by safeguards intended to preserve the independence of the decision-making body. Most importantly for present purposes, Lambert stated that directives should:

> "…not pertain to specific individual cases before deciding bodies but to broad policy matters."[42]

This is the closest formulation yet encountered in the chronology to the distinction eventually embodied in section 7 of the *Broadcasting Act*.

For the first time in the materials considered thus far, the two ideas appear together in a single formulation:

> "specific individual cases"

as contrasted with

> "…broad policy matters."

Lambert did not use the expression "general application". Nor is there presently evidence that the eventual drafting of section 7 was derived from the Lambert Report. The significance of the Report should therefore not be overstated. But by 1979 both the terminology of "broad policy matters" and the contrasting concept that governmental directions should not extend to "specific individual cases" were plainly present in contemporary federal thinking about the relationship between government and independent regulatory bodies.

The Commission's reasoning also helps explain why those two limitations belonged together. Lambert rejected the proposition that independent decision-making bodies were simply extensions of the executive government. A governmental power of policy direction was not necessarily inconsistent with their independence: elected governments could legitimately establish policy for which they would be politically accountable. But governmental intervention in individual cases raised a fundamentally different concern because it could compromise the integrity of the independent decision-making process.

Lambert therefore represents an important waypoint in the genealogy. The formulations used in the preceding years had repeatedly approached the problem from the standpoint of specificity:

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[41] *Ibid*., pp. 316–17.

[42] Royal Commission on Financial Management and Accountability, Final Report (Ottawa: Minister of Supply and Services, 1979), pp. 316–17.

the 1973 Green Paper referred to an "identifiable person"; the CRTC in 1976 to a "particular applicant"; and Bill C-43 in 1977 to a "particular matter before the Commission". Lambert now expressed the other side of the distinction affirmatively. Governmental directives should concern "broad policy matters", not "specific individual cases".

The eventual statutory language was still almost a decade away. But one half of its precise terminology - "broad policy matters" - had now appeared, coupled with a concept strikingly similar to what "general application" would eventually express.

I) 1979: Responsible Regulation - "General Policy Matters" and Specific Proceedings

Later in 1979, the Economic Council of Canada published Responsible Regulation, an interim report in a broader study of government regulation and its economic effects. The study was principally concerned with government intervention and economic regulation of the private marketplace, rather than broadcasting or telecommunications policy as such. In considering the accountability of regulatory agencies, however, the Council addressed the appropriate relationship between those agencies and elected governments.[43]

The Council accepted that government should be able to establish policy for regulatory agencies but distinguished such policy direction from intervention in particular regulatory proceedings. It proposed that policy directives should apply only to "general policy matters" and should not be introduced after proceedings had begun in a specific case to which the directive would apply.[44]

The significance for present purposes is narrow but important. Lambert had spoken of "broad policy matters" as distinct from "specific individual cases". Responsible Regulation expressed substantially the same distinction in slightly different language: "general policy matters" on the one hand and a specific case on the other.

Neither formulation used the expression "general application". But by the end of 1979, two closely related contemporary federal studies had articulated a distinction between governmental direction concerning broad or general policy and governmental intervention in specific regulatory cases.

That distinction would become still clearer when the Federal Cultural Policy Review Committee considered the CRTC and broadcasting directly three years later.

J) 1982: Applebaum-Hébert - Policy Direction and Individual Licensing Decisions

The distinction between governmental policy responsibility and independent regulatory decision-making returned directly to broadcasting in 1982. The Federal Cultural Policy Review

[43] Economic Council of Canada, Responsible Regulation: An Interim Report (Ottawa: Minister of Supply and Services Canada, November 1979), pp. 61–67.

[44] *Ibid*., p. 67.

Committee, co-chaired by Louis Applebaum and Jacques Hébert, had been established following the Minister of Communications' 1980 review of federal cultural policy and reported in November 1982.[45]

The Committee approached the question from the premise that elected governments necessarily bear responsibility for important questions of public policy. At the same time, it recognized the concern of cultural agencies that governmental direction could compromise the independence required for the exercise of their functions. The problem, once again, was where governmental policy responsibility should end and institutional independence should begin.[46]

For the CRTC, the Committee considered that question particularly important. It described the Commission as being "in a class by itself" among the cultural agencies because it exercised regulatory functions. That led the Committee to draw a sharp distinction between two aspects of the Commission's role:

> "In its general supervisory role, the Commission might be considered to be an instrument of government policy and consequently properly subject to policy direction. But as an adjudicative body, in the licensing of broadcasters, it must be and be seen to be free of political control."[47]

The distinction closely resembles the one that had been developing throughout the preceding decade. Government could legitimately establish policy governing the broadcasting system. The Commission, however, had to remain independent when applying the legislation in individual licensing proceedings.

Indeed, Applebaum-Hébert considered that the existing *Broadcasting Act* had the balance substantially backwards. The Act contained no general governmental power of policy direction but did permit Cabinet to intervene after the Commission had made certain individual licensing decisions. The Committee stated:

> "We disagree with that aspect of the present *Broadcasting Act* which disallows policy direction while enabling the government to challenge individual licensing decisions…"[48]

Its proposed solution was correspondingly two-sided. It recommended removing Cabinet's power to set aside or refer back individual licensing decisions while creating a general power of policy direction, accompanied by safeguards intended to make the exercise of that power transparent. Elsewhere, the Committee expressed the principle more simply:

> "The minister should have the right to offer general policy directions…"[49]

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[45] Federal Cultural Policy Review Committee, Report of the Federal Cultural Policy Review Committee (Ottawa: Minister of Supply and Services Canada, 1982).

[46] *Ibid*., pp. 16–17.

[47] *Ibid*., pp. 16–17.

[48] *Ibid*., p. 307.

[49] *Ibid*., p. 307.

For present purposes, the importance of Applebaum-Hébert lies less in the institutional machinery it proposed than in the distinction underlying it. The Committee did not regard governmental policy direction and CRTC independence as inherently inconsistent. Rather, the legitimacy of governmental intervention depended upon the function being exercised. In its "general supervisory role", the Commission could properly be subject to governmental policy direction. In its "adjudicative" role, particularly the licensing of individual broadcasters, it should remain free from political control.

Applebaum-Hébert therefore adds another important formulation to the developing genealogy. Lambert had distinguished "broad policy matters" from "specific individual cases". Responsible Regulation had referred to "general policy matters" while protecting specific proceedings from subsequent governmental direction. Applebaum-Hébert now distinguished general policy direction from governmental intervention in individual licensing decisions and did so specifically in relation to the CRTC and the *Broadcasting Act*.

An important terminological caution remains. A "general power of policy direction" or "general policy directions" is not the same expression as a direction "of general application". The latter words had still not appeared in the materials examined thus far.

Nevertheless, by 1982 two concepts that would eventually be reflected in section 7 can increasingly be seen separately in the documentary record. One concerned the subject matter of governmental direction: broad or general policy. The other concerned its application: government should establish policy rather than determine the treatment of particular applicants, individual licences or specific regulatory cases.

What had not yet occurred was the drafting step that would combine those concepts in the eventual statutory formulation.

K) 1982: A National Broadcasting Strategy - What Would a Broader Direction Power Be Used For?

Shortly after the Applebaum-Hébert Committee reported, the Department of Communications prepared an internal discussion paper entitled A National Broadcasting Strategy, dated November 17, 1982.[50] The paper is particularly useful because it moves beyond the abstract question whether government should possess a broader power of policy direction and identifies concrete broadcasting policies that officials feared the government might be unable to implement under the existing *Broadcasting Act*.

The immediate concern was rapid technological change and the increasing availability to Canadians of new programming services, many of them foreign. The Department was considering a broadcasting strategy involving five principal initiatives:

1. phased importation of additional foreign programming services;
2. tiering of cable services;
3. revision of the CRTC's Canadian-content regulations;

[50] Department of Communications, A National Broadcasting Strategy, internal discussion paper, November 17, 1982, pp. 50–51.

4. revision of the CRTC's priority-carriage regulations for cable; and
5. licensing of new Canadian services.[51]

Each initiative engaged responsibilities assigned by Parliament to the CRTC. The difficulty, from the government's perspective, was that the Governor in Council's existing powers to direct the Commission were "rather limited". The CRTC might interpret the existing *Broadcasting Act*, or exercise its regulatory and licensing powers, in a manner inconsistent with the government's preferred strategy.

The Department regarded that as a potentially serious obstacle. In discussing one policy alternative, the paper warned:

> "…it would not be an exaggeration to say that the government might be wholly unable to implement this policy alternative because of shortcomings in existing statutory powers of direction."[52]

The proposed solution was to broaden the statutory power so that the Governor in Council could, subject to appropriate safeguards, issue "legally binding directives on matters of policy to the CRTC".[53] The objective was to ensure that governmental broadcasting policies could be implemented "in full and without question".[54]

The five examples are important in considering what officials at the time understood a broader policy-direction power might encompass. The contemplated subjects were not confined to statements of broadcasting policy at a high level of abstraction. They included matters such as Canadian-content regulations, cable carriage rules, the introduction and distribution of foreign programming services and the licensing of new Canadian services. A governmental policy direction could therefore have significant practical consequences for the manner in which the CRTC exercised its regulatory responsibilities.

At the same time, the examples should not be taken to suggest that the Department contemplated Cabinet selecting the successful applicant in an individual licensing proceeding. "Licensing of new Canadian services" could describe governmental policy concerning whether or on what general basis a new class or category of service should be licensed, while leaving the Commission to determine particular applications. That distinction is consistent with the line drawn repeatedly in the preceding materials between governmental policy and the disposition of individual regulatory cases.

The paper is also important to the legislative genealogy because the Department expressly connected the proposed reform of the broadcasting direction power with the broader power contemplated in the telecommunications legislation of the preceding years, including Bills C-43 and C-16.[55] Broadcasting and telecommunications were therefore not simply confronting similar problems independently. The Department itself was looking to the telecommunications proposals

[51] *Ibid*., pp. 50–51.

[52] *Ibid*., pp. 50–51.

[53] *Ibid*., pp. 50–51.

[54] *Ibid*., pp. 50–51.

[55] Department of Communications, A National Broadcasting Strategy, internal discussion paper, November 17, 1982, pp. 50–51.

when considering how the governmental power of direction under the *Broadcasting Act* should be reformed.

A National Broadcasting Strategy thus supplies an important bridge between the two strands of the history. The failed Phase Two telecommunications legislation had proposed a broad governmental power to direct the CRTC concerning national telecommunications policy. Applebaum-Hébert had meanwhile articulated the institutional distinction between governmental policy direction and independent licensing adjudication. The Department's November 1982 paper now identified concrete broadcasting policies for which a broader direction power might actually be required.

What the paper did not yet supply was a statutory formula defining the permissible breadth of that power. It proposed legally binding directives "on matters of policy" but did not use either "broad policy matters" or "general application".

That would begin to change only a few months later.

L) 1983: Towards a New National Broadcasting Policy - "Broad Policy Matters" and Particular Cases

In March 1983, the government released *Towards a New National Broadcasting Policy*. The policy followed closely upon Applebaum-Hébert and the Department's November 1982 National Broadcasting Strategy and substantially sharpened the proposed boundary between governmental policy direction and CRTC decision-making.[56]

The government announced that it would seek parliamentary authority permitting the Governor in Council to issue "broad policy directives to the CRTC". Importantly, the proposed power was itself to be limited:

> "These directives would be limited to broad policy matters only…"[57]

The proposal then identified matters that would be specifically excluded from governmental direction. Cabinet would not be permitted to issue directions concerning the issuance of a broadcasting licence to a particular applicant; the amendment or renewal of a particular broadcasting licence; specific programming content; restrictions upon freedom of expression; or charges for a particular broadcasting service or activity.[58]

The policy paper itself used a revealing heading:

> "DIRECTION TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION ON GENERAL POLICY MATTERS"

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[56] Government of Canada, Towards a New National Broadcasting Policy (March 1983), unpaginated.

[57] Department of Communications, News Release, "Fox announces Broadcasting Strategy for Canada", March 1, 1983, p. 3.

[58] *Ibid*., p. 4.

Under that heading, it stated that there was a consensus that the federal government should be able:

> "…to issue directives to the CRTC on broad policy matters, subject to adequate safeguards and procedures."[59]

The terminology is significant. By March 1983, the government itself was using both "general policy matters" and "broad policy matters" to describe the appropriate subject of governmental direction. More importantly, the proposed exclusions show what the government understood the limitation to accomplish. A governmental direction could establish broadcasting policy, but it could not determine the treatment of a particular applicant, particular licence or particular broadcasting service or activity.

This considerably strengthens the distinction that had emerged in the preceding materials. Lambert had distinguished "broad policy matters" from "specific individual cases". Responsible Regulation had distinguished "general policy matters" from intervention in a specific case. Applebaum-Hébert had distinguished the CRTC's "general supervisory role" from its adjudicative role in individual licensing decisions. The government's 1983 policy now brought those ideas directly into a proposed reform of the *Broadcasting Act*: directions would be confined to broad policy matters and would not extend to specified particular regulatory matters.

The relationship with the November 1982 National Broadcasting Strategy is also instructive. The Department had contemplated governmental policy concerning such concrete subjects as Canadian-content requirements, cable carriage and tiering, foreign programming services and the licensing of new Canadian services. The March 1983 policy did not retreat from the possibility that governmental directions could have significant regulatory consequences. What it did was place an important boundary around that authority: policy could be established by government, but the direction power was not to be used to determine the treatment of particular applicants, licences or services.

By this point, therefore, the two concepts that would eventually appear together in section 7 can be identified with considerable confidence. The first concerns the subject matter of a direction: it should concern general or broad policy matters. The second concerns its application: it should not determine particular applicants, licences or other specific regulatory cases.

The eventual formulation - "directions of general application on broad policy matters" - is capable of expressing those two ideas in remarkably compact language. But it would be premature to conclude that this was already the intended statutory formulation. The expression "general application" still had not appeared in the materials examined. In 1983, the government continued to express the second limitation principally by specifying the particular matters into which Cabinet could not intervene.

The conceptual pieces were therefore increasingly in place. The drafting step that would join them together had not yet occurred.

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[59] Towards a New National Broadcasting Policy, *supra* note 56, "3. Direct CRTC on policy matters" (unpaginated).

M) 1984–85: The Two Bills C-20 - From "Any Matter" to "Policy"

On February 8, 1984, the Liberal government introduced Bill C-20, proposing amendments to several communications statutes. For present purposes, its most important feature was a new Governor in Council power of direction. Significantly, the proposed provision was to be placed in the *Canadian Radio-television and Telecommunications Commission Act*, rather than the *Broadcasting Act*, and would therefore potentially apply across both broadcasting and telecommunications.[60]

Proposed section 14.1(1) would authorize the Governor in Council to:

> "…issue to the Commission a direction concerning any matter that comes within the jurisdiction of the Commission…"

The breadth of the language is striking. Despite the government's use only the previous year of such expressions as "broad policy directives", "broad policy matters" and "general policy matters", the proposed statutory power contained no express policy limitation at all. Separate provisions protected certain matters, including directions concerning particular broadcasting licences, but the basic power extended to "any matter" within the CRTC's jurisdiction.

Parliament was dissolved before the Bill proceeded and it died on the Order Paper. Following the September 1984 election, however, the new Progressive Conservative government introduced its own Bill C-20. Remarkably, it initially proposed the same formulation:

> "…a direction concerning any matter that comes within the jurisdiction of the Commission…"

Again, the provision was to be included in the *Canadian Radio-television and Telecommunications Commission Act.* There was therefore considerable continuity across governments. Both initially proposed a direction power substantially broader on its face than the policy-limited authority contemplated in the government's 1983 broadcasting policy.

The breadth of the proposed power became a major issue when CRTC Chairman André Bureau appeared before the House of Commons Standing Committee on Communications and Culture on June 25, 1985. Bureau did not oppose a governmental power of policy direction. His objection was to legislation that permitted Cabinet to intervene in "any matter" within the Commission's jurisdiction.[61]

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[60] Bill C-20, An Act to amend the *Canadian Radio-television and Telecommunications Commission Act*, the *Broadcasting Act* and the *Radio Act*, 2nd Sess., 32nd Parl., 1984, cl. 1 (first reading February 8, 1984); Bill C-20, An Act to amend the *Canadian Radio-television and Telecommunications Commission Act*, the *Broadcasting Act* and the *Radio Act*, 1st Sess., 33rd Parl., 1984, cl. 1 (first reading December 20, 1984).

[61] House of Commons, Standing Committee on Communications and Culture, Minutes of Proceedings and Evidence, Issue No. 25, June 25, 1985, pp. 25:6–7 (André Bureau, Chairman, CRTC).

Bureau emphasized the Commission's statutory role as a "single independent public authority" and the importance of protecting the integrity of its public and quasi-judicial proceedings. As drafted, he said, the Bill:

> "…does not preclude the government from intervening at any time … in a matter before the CRTC."

The CRTC therefore proposed language limiting a direction to one "constituting a broadcasting or telecommunications policy". Its concern was that the Bill as drafted was sufficiently broad to authorize directions concerning "the most trivial and minute details".[62] The Commission described the kind of directions it regarded as appropriate as ones of:

> "…general orientation and broad application to the Canadian broadcasting and telecommunications systems."

The wording is notable. "General orientation and broad application" is conceptually very close to the eventual statutory limitation, but it is not the expression "general application". That distinction remains important.

Bureau then provided unusually concrete examples of what he meant by "the most trivial and minute details". An unrestricted direction power could potentially allow Cabinet to intervene in regulations, rules of procedure, the dates and subjects of hearings, the inclusion or exclusion of matters from special hearings and even whether a particular intervener should appear.[63] He contrasted that possibility with Communications Minister Marcel Masse's publicly stated intention to authorize "broad policy directions". Bureau responded:

> "We welcome that. We have no problem with that. We say, use those words; put them in the law."

There is an important distinction embedded in that exchange. The Department's 1982 National Broadcasting Strategy had contemplated governmental policy affecting such matters as Canadian-content and priority-carriage regulations. Bureau's objection to governmental intervention in "regulations" cannot therefore mean that every policy touching a matter subsequently implemented through regulation necessarily falls outside a legitimate direction power. Rather, the emerging distinction appears to be between government establishing the policy that the regulatory system is to pursue and government itself making the regulatory choices by which that policy is implemented.

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[62] House of Commons, Standing Committee on Communications and Culture, Minutes of Proceedings and Evidence, Issue No. 25, June 25, 1985, pp. 25:16–17 (André Bureau); CRTC, accompanying submission to the Committee, June 25, 1985.

[63] House of Commons, Standing Committee on Communications and Culture, Minutes of Proceedings and Evidence, Issue No. 25, June 25, 1985, p. 25:17 (André Bureau).

That distinction became clearer during clause-by-clause consideration on November 6, 1985. The government amended the Bill by inserting a single word. The power to issue "directions concerning any matter" became a power to issue:

> "…policy directions concerning any matter…"

Although the textual change was modest, the government's explanation attributed considerable limiting force to the word "policy". Alain Gourd, Deputy Minister of Communications, explained that "Policy refers to public policy" and therefore did not include matters such as travel expenses, hearing structure or the location and regularity of hearings. Benoît Bouchard, Secretary of State, described the contemplated directions as involving "comprehensive policies", the "general thrust", "major policies" and "general policies". Government would establish the major policy; the CRTC would "interpret, administer and regulate" it and decide matters of detail. As Bouchard put it:

> "…the government's objectives are quite broad and it is up to the agency itself to decide on matters of detail."[64]

The Committee then confronted the general-versus-specific distinction even more directly. Lynn McDonald, the New Democratic Party Member for Broadview-Greenwood, proposed an amendment that would have confined the direction power to:

> "…a general broadcasting or telecommunications policy to a class of issues…"

She explained that the object was to prevent Cabinet from attempting:

> "…to deal with a specific case by directive when that is clearly the job of the CRTC."

McDonald's amendment was defeated. But the government did not reject the distinction she was attempting to draw. Geoff Scott, the Progressive Conservative Member for Hamilton - Wentworth and Parliamentary Secretary to the Minister of Communications, responded that her proposed words "really are the thrust of that motion we have just amended" and that the first part of her amendment was "already covered" by the insertion of the word "policy". Bouchard subsequently described the government amendment in terms that are particularly important to the present inquiry:

> "The amendment specifies that these are general directions on general policy and not on specific cases."[65]

This exchange is one of the clearest pre-1988 articulations of the idea that would later be associated with "general application". McDonald was attempting to distinguish policy applicable to a class of issues from governmental direction concerning a specific case. The government

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[64] House of Commons, Standing Committee on Communications and Culture, Minutes of Proceedings and Evidence, Issue No. 28, November 6, 1985, pp. 28:16–17 (Alain Gourd, Deputy Minister of Communications; Benoît Bouchard, Secretary of State).

[65] *Ibid*., pp. 28:18–20, 28:23 (Lynn McDonald, MP for Broadview - Greenwood; Geoff Scott, MP for Hamilton - Wentworth and Parliamentary Secretary to the Minister of Communications; Benoît Bouchard, Secretary of State).

maintained that the distinction was already implicit in the word "policy", and Parliament did not enact McDonald's more explicit formulation.

The Bill as reported on November 22 accordingly retained the formulation "policy directions concerning any matter". A separate provision continued to prohibit directions concerning the issuance, amendment, renewal, suspension or revocation of a broadcasting licence involving a particular person. The statutory language was thus considerably broader than the government's explanation of the limits it believed the word "policy" imposed.

The Bill nevertheless went no further. It died on the Order Paper when Parliament was prorogued on August 28, 1986, and was not reintroduced.[66] The proposed direction power therefore never became law.

The C-20 episode materially advances the genealogy. By the end of 1985, the record contains directions of "general orientation and broad application", "general … policy to a class of issues", and "general directions on general policy and not on specific cases". The debates also distinguish governmental responsibility for major or general policy from the CRTC's responsibility to "interpret, administer and regulate" that policy and decide matters of detail.

N) 1985: Law Reform Commission-General Policy in Advance of Specific Cases

In March 1985, while Bill C-20 was before Parliament, the Law Reform Commission of Canada published its final report Independent Administrative Agencies: A Framework for Decision Making. The report was not concerned specifically with broadcasting or telecommunications. It examined more generally the relationship between government and independent administrative agencies, including the appropriate use of executive policy directions.[67]

The Commission accepted that policy directions could provide a legitimate means for government:

> "…to spell out general policies by which the agency should be guided in carrying out its mandate…"

At the same time, it emphasized the danger that such directions could become instruments for direct governmental control of agency decisions. It therefore stated the limitation in particularly clear terms:

> "Policy directions should be issued only to address general policy issues in advance of specific cases…"[68]

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[66] Canada Gazette, Part I, Extra, vol. 120, no. 2, August 28, 1986, Proclamations.

[67] Law Reform Commission of Canada, Independent Administrative Agencies: A Framework for Decision Making, Report 26 (Ottawa: Law Reform Commission of Canada, 1985), pp. 25–28.

[68] *Ibid*., pp. 25–26.

The Commission also emphasized the governmental character of the policy being expressed. In its view:

> "…policy directions should reflect broad governmental policy, not policy viewed through the lens of a single department."

It accordingly preferred directions issued by the Governor in Council to directions from an individual minister. The report also observed that "Directions conveyed through regulations would almost always be general…"

Government could establish "general policies" reflecting "broad governmental policy". Those directions should address "general policy issues" and should be given "in advance of specific cases". They should not become a means of "direct control over agency decisions", particularly where an agency was exercising specialized adjudicative functions.[69]

The importance of this report should not be overstated. It is principally evidence that the distinction emerging in the CRTC debates formed part of a broader contemporary understanding of the proper relationship between government policy-making and independent administrative decision-making. The more direct broadcasting genealogy resumes the following year with the report of the Task Force on Broadcasting Policy.

O) 1986: Caplan-Sauvageau - Directions "Formulated in General Terms"

In September 1986, the Task Force on Broadcasting Policy, chaired by Gerald Caplan and Florian Sauvageau, released its report on the future of Canadian broadcasting policy. The Task Force returned directly to the longstanding debate over the respective responsibilities of elected government and the CRTC for broadcasting policy and regulation.[70]

The Task Force favoured giving the government a formal power of policy direction. At the same time, it considered that such a power should replace, rather than supplement, governmental intervention in particular CRTC decisions through the existing power to set aside or refer decisions back to the Commission.[71]

The Task Force also recorded the concern on the other side. Quoting the Institut canadien d'Éducation des adultes, it noted the objection that Bill C-20 had not confined directives to broad policy and therefore risked partisan intervention in regulation: "The danger of partisan political intervention is all the greater because the Bill does not state how and on what basis such new directives would be formulated."[72]

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[69] *Ibid*., p. 28.

[70] Task Force on Broadcasting Policy, Report of the Task Force on Broadcasting Policy (Ottawa: Minister of Supply and Services Canada, 1986), pp. 19–20, 175–76.

[71] *Ibid*., pp. 175–76.

[72] Report of the Task Force on Broadcasting Policy (Caplan-Sauvageau), September 1986, section "The Power to Issue Directions to the CRTC".

The proposed direction power itself was to be exercised with restraint. The Task Force stated that directives should:

> "be used in moderation so as to leave the regulatory authority free of intervention in exercising its day-to-day mandate…"

More importantly for present purposes, it recommended:

> "…directives shall be formulated in general terms, like regulations, and the regulatory authority shall be responsible for interpreting them and monitoring their application."[73]

The Task Force recommended that government choose between two mechanisms rather than retain both: either the power to set aside or refer CRTC decisions back, or a power to issue directives. It preferred the latter. It also recommended public consultation before a directive and stated that directives should be used "in moderation", take the form of regulations, not operate retroactively, be issued only by the government rather than individual ministers, and be "formulated in general terms, like regulations", leaving interpretation and application to the regulatory authority.[74]

That formulation is an important development. The Task Force did not merely distinguish governmental policy from particular licensing decisions. It expressly divided responsibility for a direction between government and regulator. Government would formulate the direction "in general terms". The CRTC would then be responsible for interpreting the direction and determining its application through the regulatory process.

The comparison with the 1982 and 1983 materials is also useful. A National Broadcasting Strategy had contemplated governmental directions capable of affecting concrete areas of regulatory policy, while Towards a New National Broadcasting Policy had excluded governmental determination of particular applicants and licences. Caplan-Sauvageau adds a further dimension: even after government has established the policy, the Commission should retain responsibility for interpreting the direction and deciding how it is to be applied.

For the wording genealogy, however, precision remains important. Caplan-Sauvageau did not recommend "directions of general application". It recommended that directives be "formulated in general terms". The expressions are closely related conceptually but they are not textually identical.

The next step would bring the two dimensions of the problem into still sharper focus. When the CRTC responded to Caplan-Sauvageau in March 1987, it expressly confronted both the difficulty of defining "broad policy" and the need to prevent a direction from affecting a specific application before the Commission.

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[73] *Ibid*., pp. 175–76.

[74] *Ibid*., recommendations concerning the power to issue directions to the CRTC.

P) 1987: The CRTC Response - “Broad Policy” and a “Specific Application”

The CRTC responded to the Caplan-Sauvageau report on March 10, 1987. Although the Commission generally supported the Task Force’s recommendation for a governmental power of policy direction, its response exposed more clearly the two distinct questions that such a power presented.

The response should also be read against the Task Force’s institutional design. Caplan-Sauvageau had proposed replacing Cabinet’s power to set aside or refer particular Commission decisions back with a prospective power of general policy direction. The CRTC therefore approached the direction power as part of a broader allocation of responsibility: government could establish policy in advance, while the Commission would retain responsibility for applying that policy in particular proceedings.[75]

The first concerned the subject matter of a direction. The Commission identified the difficulty directly:

> “Because of the difficulty involved in defining what a broad policy is…”

Rather than attempting to define “broad policy” abstractly, the CRTC proposed that the direction power be tied to the broadcasting policy established by Parliament in section 3 of the *Broadcasting Act*. A direction should identify the particular statutory broadcasting-policy objective that it was intended to further.[76]

The second question concerned the application of a direction. The Commission proposed a separate limitation:

> “No direction should affect a specific application before the Commission during the period between the expiration of any prescribed time for the filing of interventions and the date of making a decision.”

The purpose, it explained, was to “preserve the integrity and the nature of the process”.[77]

The distinction is important. The CRTC did not treat the requirement that a direction concern broad policy as sufficient protection against governmental intervention in a particular regulatory proceeding. It addressed the two problems separately. The direction should concern policy identified by Parliament, but there should also be a distinct restriction preventing it from affecting a specific application during the Commission’s decision-making process.

The CRTC’s formulation was not yet the language that Parliament would enact. It did not propose that directions be “of general application”, nor did it define “broad policy” by adding

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[75] *Ibid*.

[76] Canadian Radio-television and Telecommunications Commission, Submission to the House of Commons Standing Committee on Communications and Culture, March 10, 1987, Part I, pp. 15–18.

[77] *Ibid*., pp. 15–18.

such a requirement. Indeed, its proposed protection for specific applications was considerably narrower: it applied during a defined stage of an application proceeding rather than establishing a general requirement that every direction itself be of general application.

Q) 1987: Teleglobe — The Debate Over a Broad Direction-Making Power

The debate over the appropriate limits of the Governor in Council's direction-making authority was not confined to broadcasting legislation. It arose again in early 1987 during Parliament's consideration of Bill C-38, the *Teleglobe Canada Reorganization and Divestiture Act*. The Bill contained two distinct provisions authorizing directions to the CRTC. Clause 15(1) proposed a discretionary power to issue, in relation to the new corporation, "a policy direction concerning any matter within the jurisdiction of the Commission".[78] Clause 30, by contrast, contemplated a mandatory direction dealing with specified transitional regulatory arrangements.

As discussed earlier in connection with the two Bills C-20 introduced in 1984, the CRTC had long objected to the breadth of a direction-making power extending to "any matter" within its jurisdiction. Although the second Bill C-20 had been amended in committee in November 1985 to refer to "policy directions", the Commission's concerns about the distinction between general governmental policy and particular regulatory decisions had not been resolved when that Bill died on the Order Paper in August 1986.

Those concerns resurfaced during the Legislative Committee's consideration of Bill C-38. Appearing on March 17, 1987, CRTC Chairman André Bureau objected to the breadth of clause 15. While accepting the government's responsibility for establishing national policy, he emphasized the need to preserve the Commission's independence in deciding individual regulatory matters and to protect the procedural rights of parties appearing before it. His concern was that a direction ostensibly concerned with policy might, in substance, determine a particular regulatory matter.

Bureau also expressly raised a concern extending beyond Teleglobe.[79] He warned that the broadly worded direction-making authority proposed in clause 15 could establish a precedent for future legislation governing the CRTC. The appropriate limits of Cabinet's general power of direction had already been debated during consideration of Bill C-20, but Parliament had not enacted that legislation. Bureau was concerned that a provision adopted in the particular circumstances of the Teleglobe privatization might influence the formulation of more general legislation affecting both telecommunications and broadcasting.

The committee considered the CRTC's proposed amendments the following day, March 18, 1987.[80] Brian Tobin identified the amendments as originating with the Commission and moved to restrict clause 15 to a "policy direction of general orientation concerning any matter". That

[78] *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c. 12, s. 15(1).

[79] House of Commons, Legislative Committee on Bill C-38, Minutes of Proceedings and Evidence, Issue No. 3, March 17, 1987, pp. 26–46 (André Bureau's testimony).

[80] House of Commons, Legislative Committee on Bill C-38, Minutes of Proceedings and Evidence, Issue No. 4, March 18, 1987, pp. 50–55 (consideration of the CRTC's proposed amendments).

amendment was defeated, along with other proposed safeguards, and clause 15 was adopted without amendment.

The implications for future legislation were expressly debated. Government members maintained that Bill C-38 addressed the particular circumstances of the Teleglobe privatization and that the broader question of Cabinet's direction-making authority should be considered when comprehensive telecommunications legislation returned to Parliament. They observed that Bureau had advanced similar objections during consideration of Bill C-20. Tobin responded that Parliament had not yet resolved those questions and should not establish a precedent through the Teleglobe legislation before determining the appropriate limits of the government's authority over the Commission. The disagreement was therefore not simply about the regulation of Teleglobe. It concerned whether Parliament should enact a broadly framed direction-making power in a specialized statute before settling the limits of such powers more generally.

The *Teleglobe Canada Reorganization and Divestiture Act* received Royal Assent on April 1, 1987, with section 15 retaining the broadly worded authority that the CRTC had opposed.[81] The committee's rejection of the proposed amendments does not necessarily establish that Parliament intended to authorize governmental interference in individual regulatory proceedings. It does establish that the proposed limitation to directions of general orientation was expressly considered and not adopted.

The continuity of the debate would become particularly apparent during consideration of Bill C-136 in 1988. As discussed below, Bureau would refer to four and a half years of discussions about the distinction between general policy directions and directions affecting individual regulatory matters, specifically reminding Members of Parliament Edwards and Gormley of their earlier exchanges. His testimony confirmed that the concerns raised during consideration of Bill C-38 were part of a longstanding disagreement about the appropriate limits of the Governor in Council's direction-making authority. The possibility that the Teleglobe legislation might establish a precedent for broader direction-making powers had been expressly identified before section 15 was enacted.

The Act also illustrates a different approach to governmental direction. Section 30 required the Governor in Council to issue a direction concerning the Commission's approval of Teleglobe's telegraph and telephone tolls during a defined transitional period.[82] The resulting Direction, P.C. 1987-705, was issued on April 2, 1987. It prescribed detailed regulatory requirements, including reductions of 13.5 per cent in the weighted average collection rates for telephone services and 10 per cent for teleprinter services, a permitted range of return on common equity, a 45/55 long-term debt-to-equity ratio and the treatment of fixed assets in determining revenue requirements.[83] The complete Direction is reproduced in Appendix A.[84]

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[81] *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c. 12, particularly sections 15 and 30.

[82] *Ibid*., s. 30(1). Section 30 came into force on April 2, 1987: SI/87-89.

[83] P.C. 1987-705, April 2, 1987, Direction to the Canadian Radio-television and Telecommunications Commission Respecting the Approval of the Telegraph Tolls and Telephone Tolls of the New Corporation in Force from Time to Time in the Transitional Period, cited as the Direction to the CRTC on the Regulation of the New Corporation Resulting from the Reorganization of Teleglobe, ss. 2–4.

[84] *Ibid*.

The contrast between sections 15 and 30 is instructive.[85] Section 15 conferred a broadly framed discretionary power whose permissible scope was contested. Section 30 imposed a statutory obligation to issue a direction concerning a particular regulatory subject during a defined period. Parliament thus demonstrated that it could authorize highly specific governmental directions when it chose to do so, while defining their purpose and scope in the legislation itself. The degree of specificity permissible in a direction depended upon the statutory authority under which it was issued, rather than upon any inherent requirement that governmental directions must always be general.

R) 1987: The Standing Committee - Directions "Expressly Restricted to Broad Policy Matters"

Following the Caplan-Sauvageau Task Force, the House of Commons Standing Committee on Communications and Culture undertook its own extensive review of broadcasting policy. In its Fifth Report, tabled on April 27, 1987, the Committee addressed the issue directly.

Recommendation 10 proposed:

> "The Governor in Council should be empowered to issue binding directions to the CRTC expressly restricted to broad policy matters in furtherance of the objectives of the *Broadcasting Act*."

The Committee further recommended that each direction expressly identify the particular statutory objectives that it sought to further.[86]

The relationship to the CRTC's March submission is close. The Commission had identified the "difficulty involved in defining what a broad policy is" and proposed that a direction be anchored to the particular broadcasting-policy objective in section 3 that it sought to advance. The Committee now converted that approach into a proposed substantive limitation on the statutory power itself: directions should be "expressly restricted to broad policy matters".

By April 1987, therefore, one half of the eventual formulation had become quite concrete. A parliamentary committee had recommended that the new direction power itself be expressly confined to "broad policy matters". But the other half had not yet appeared. The Committee did not recommend that the directions themselves be "of general application".

The two concerns were different. The Committee's proposed "broad policy matters" limitation addressed primarily the subject matter of a direction. The developing concern about application - whether a formally permissible policy direction could nevertheless affect a particular case - remained to be dealt with separately. It was not until the following year that both ideas appeared in the same statutory phrase.

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[85] *Supra* note 81.

[86] House of Commons, Standing Committee on Communications and Culture, Minutes of Proceedings and Evidence, Issue No. 34, April 27–28, 1987, Fifth Report, An Interim Report on the Recommendations of the Task Force on Broadcasting Policy: Specialty Programming Services and Some Proposed Legislative Amendments, Recommendation 10.

S) 1987: The *National Transportation Act* – A Different Way to Protect Particular Cases

A few months after the CRTC and the Standing Committee had addressed the scope of governmental directions in broadcasting, Parliament used a different drafting technique in transportation legislation.

Bill C-18, which became the *National Transportation Act*, 1987, authorized the Governor in Council to issue to the new National Transportation Agency:

> "…policy directions concerning any matter that comes within the jurisdiction of the Agency…"

The breadth of that power was then qualified by a separate provision:

> "A direction issued under subsection (1) shall not affect a matter that is before the Agency on the date of the direction and that relates to a particular person."[87]

Parliament did not limit the subject matter of the direction power to "broad policy matters". Nor did it require the direction itself to be "of general application". Instead, it conferred a broadly worded policy direction power and dealt separately with the danger of governmental intervention in an individual case.

That approach contrasts with the broadcasting proposals then under consideration. In March 1987, the CRTC had identified the difficulty of defining "broad policy" while also proposing a separate protection for a "specific application". In April, the Standing Committee recommended that the broadcasting direction power itself be "expressly restricted to broad policy matters". The transportation legislation demonstrates that this was not the only drafting solution available to Parliament.

The *National Transportation Act*, 1987 did not supply the eventual section *7 formulation. What it sh*ows is that, immediately before Bill C-136, Parliament was using another statutory technique: a broad power, coupled with a specific prohibition against affecting a pending matter relating to a particular person.

The comparison also suggests that the two limitations later included in section 7 were deliberate. Parliament had recently used a different drafting technique to guard against government intervention in particular cases.

[87] *National Transportation Act*, 1987, S.C. 1987, c. 34, s. 23(1), (2).

T) 1987: The Government Response - Agreement in Principle, but the Limits Remain Unsettled

In August 1987, the government responded to the Standing Committee's recommendations. On the power of direction, the government agreed in principle:

> "The Government agrees in principle that the Governor in Council should be empowered to issue binding policy directions to the CRTC, subject to certain limits and safeguards."[88]

Although the Standing Committee had recommended that the power be "expressly restricted to broad policy matters," the government did not yet adopt that formulation as the definitive statutory test. Instead, it stated:

> "The precise nature of this power and of the safeguards required to prevent its abuse would depend on the future role and structure of the CRTC."

The government therefore deferred its final position until the Committee had completed its review.[89]

By this stage, there was substantial agreement that the Governor in Council should have a binding power of policy direction over the CRTC. The remaining question was about how to address the boundaries rather than whether such a power should exist.

The Standing Committee had already supplied one possible substantive limitation - "broad policy matters" - but the government was not yet prepared to settle the "precise nature" of the power. Nor did its August response introduce a requirement that directions be "of general application."

That would happen in 1988.

U) 1988: The Standing Committee Completes Its Review

On June 9, 1988, the House of Commons Standing Committee on Communications and Culture tabled its Fifteenth and final report, A Broadcasting Policy for Canada. The report completed the extensive review that had begun following Caplan-Sauvageau.[90]

Two weeks later, in responding to the Fifteenth Report and providing further comments on the Committee's earlier reports, the government returned expressly to Recommendation 10 of the Fifth Report. It reproduced the formulation the Committee had adopted the previous year:

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[88] Government of Canada, *Government Response to the Fifth Report of the Standing Committee on Communications and Culture, "An Interim Report on the Recommendations of the Task Force on Broadcasting Policy: Specialty Programming Services and Some Proposed Legislative Amendments," and the Standing Committee's Sixth Report, "Recommendations for a New Broadcasting Act"* (August 1987), p. 2.

[89] *Ibid*., p. 2.

[90] House of Commons, Standing Committee on Communications and Culture, *Minutes of Proceedings and Evidence*, Issue No. 79, May 17, 19 and 24, 1988, Fifteenth Report, *A Broadcasting Policy for Canada* (June 1988).

> "The Governor-in-Council should be empowered to issue binding directions to the CRTC expressly restricted to broad policy matters in furtherance of the objectives of the *Broadcasting Act*. The directions should expressly refer to the specific objectives in the Act which they seek to further."[91]

In the same further comments, the government also accepted the Committee's separate Recommendation 13 that directions should not have retroactive effect or be issued in respect of a particular licence, noting that Bill C-136 went further in protecting licensing matters under active consideration.

The Fifteenth Report therefore marks the completion of the Committee's review rather than a new turn in the wording. By June 1988, the parliamentary record already contained a clear proposed limit: the Governor in Council should have a binding power of direction, but that power should be "expressly restricted to broad policy matters."

There was still no proposal that the directions themselves be "of general application."

That makes the events of the following two and a half months particularly important. On June 23, the government responded to the Committee, released its new broadcasting policy and introduced Bill C-136. Although all three reflected acceptance of a governmental policy-direction power, the wording of the Bill did not reproduce the Committee's proposed "broad policy matters" limitation. That discrepancy would become one of the central issues considered when the Bill reached Committee later that summer.

V) June 23, 1988: Government Policy Says "Broad"; Bill C-136 Says "Policy Directions"

On June 23, 1988, Flora MacDonald, Minister of Communications, tabled the government's response to the Standing Committee, its new broadcasting policy, Canadian Voices: Canadian Choices, and Bill C-136, the proposed new *Broadcasting Act*.[92]

The government's response to the Standing Committee appeared to accept the Committee's proposed limitation on the power of direction unequivocally. It reproduced Recommendation 10:

> "The Governor-in-Council should be empowered to issue binding directions to the CRTC expressly restricted to broad policy matters in furtherance of the objectives of the *Broadcasting Act*. The directions should expressly refer to the specific objectives in the Act which they seek to further."

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[91] See *supra* note 86, Recommendation 10; Government of Canada, Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada (June 1988), pp. 59, 61.

[92] *House of Commons Debates*, 2nd Sess., 33rd Parl., June 23, 1988 (Hon. Flora MacDonald, Minister of Communications, tabling the government response and *Canadian Voices: Canadian Choices* and introducing Bill C-136); Bill C-136, *An Act respecting broadcasting and to amend certain Acts in relation thereto and in relation to radiocommunication*, first reading June 23, 1988.

The government responded:

> "Agreed. See the new Bill, clauses 7 and 8."

It added that, further to its August 1987 response, the proposed new Act contained a power of policy direction "along the lines recommended."[93]

The policy paper released the same day was equally clear about the intended division of responsibilities. Canadian Voices: Canadian Choices stated that:

> "…the Government of the day should have the power to instruct the Commission on broad policy matters."

The document distinguished the government's responsibility for broadcasting policy from the Commission's responsibility for particular licensing decisions.[94] The policy paper itself described the Standing Committee's recommendations as having been "interwoven into the fabric of this policy paper."

The departmental drafting history provides further context for the language ultimately introduced in Parliament. A June 1, 1988 draft of Bill C-136 contained a proposed paragraph 7(1)(c) that would have authorized policy directions concerning "any other matter within the jurisdiction of the Commission under this Act."[95] This provision appeared alongside the proposed authority to issue directions concerning the implementation of broadcasting policy. It would therefore have provided an additional statutory basis for directions extending beyond the specifically identified broadcasting-policy objectives.

The proposed residual authority had a predecessor in Bill C-20, introduced in 1984.[96] That Bill proposed to amend the *Canadian Radio-television and Telecommunications Commission Act* to authorize directions concerning "any matter that comes within the jurisdiction of the Commission." Four years later, substantially similar language appeared in the June 1, 1988 draft of Bill C-136, although the direction-making power was now to be included in the proposed new *Broadcasting Act*. The residual provision was removed before Bill C-136 was introduced.

The breadth of the proposed provision attracted attention within the CBC. In a June 16, 1988 memorandum to CBC President Pierre Juneau, CBC counsel Peter E. Robinson expressed concern about the proposed direction power.[97] Paragraph 7(1)(c) was subsequently removed and was absent from Bill C-136 when it was introduced on June 23, 1988. The surviving documents establish the sequence of drafting and criticism, but do not establish that the CBC's intervention caused the deletion.

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[93] Government of Canada, *Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (June 1988), p. 59.

[94] Communications Canada, *Canadian Voices: Canadian Choices: A New Broadcasting Policy for Canada* (Ottawa: Communications Canada, 1988), pp. 15, 55–57.

[95] Departmental draft No. 7 of Bill C-136, dated June 1, 1988, R15542, Volume 43.7 (Library and Archives Canada).

[96] *Bill C-20, An Act respecting broadcasting and to amend certain Acts in relation thereto*, proposed s. 14.1(1); Draft No. 07 of Bill C-136, June 1, 1988, proposed para. 7(1)(c) (Library and Archives Canada R15542, Volume 43.7).

[97] Peter E. Robinson, CBC internal memorandum, June 16, 1988 (Library and Archives Canada R15542, Volume 43.6).

Against that background, the language of Bill C-136 as introduced is striking. Clause 7 did not say "broad policy matters." It provided instead that the Governor in Council could issue "policy directions" to the Commission with respect to the broadcasting-policy objectives identified in the direction.[98]

Thus, on June 23, the documentary record pointed in one direction while the statutory language pointed, at least textually, to something broader:

Standing Committee: directions "expressly restricted to broad policy matters."

Government response: "Agreed."

Canadian Voices: Canadian Choices: government should be able to instruct the CRTC "on broad policy matters."

Bill C-136: "policy directions."

The discrepancy is important. It would be too much to conclude from the wording alone that the government intended Bill C-136 to authorize narrow or case-specific directions. Its own contemporaneous statements indicate the opposite. But the Bill did not express the limitation in the statutory language that the Standing Committee had recommended and the government had said it accepted.[99]

Nor did any of these June 23 formulations yet contain the eventual requirement that a direction be "of general application." The government's policy paper spoke of broad policy matters; the Bill spoke of policy directions. The two concepts that would ultimately appear together in section 7 had still not been combined.

That omission sets up the August Committee proceedings. The question was no longer simply whether Cabinet should possess a direction power. There was substantial agreement on that point. The question was how the legislation should ensure that a power intended for governmental policy-making could not be used to intrude into the Commission's regulatory decision-making.

[98] Bill C-136, *An Act respecting broadcasting and to amend certain Acts in relation thereto and in relation to radiocommunication*, 2nd Sess., 33rd Parl., cl. 7 (first reading June 23, 1988).

[99] An interesting contemporary explanation of the proposed direction power appears in Jack Craine, *Report on Meeting of Friends of Canadian Broadcasting*, July 15, 1988, reporting on a meeting held July 14, 1988. Craine, a CBC representative at the meeting, recorded remarks by Jeremy Kinsman, then Assistant Deputy Minister, Cultural Affairs and Broadcasting, Department of Communications. According to Craine, Robert Gagnon (President and spokesperson of the Coalition pour la défense des services français de Radio-Canada) had expressed concern about government control of the CRTC. Kinsman replied that previous CRTC chairmen, including John Meisel, had complained that they received no real policy guidelines from the government. Craine then recorded Kinsman as saying: "Well, we've given him what he asked for".

W) August 10–11, 1988: From "Broad Policy" to Directions "of a General Nature"

The Legislative Committee on Bill C-136 began its hearings on August 10, 1988. Appearing at the opening meeting, Flora MacDonald, the Minister of Communications, described the proposed power of direction in considerably narrower terms than the language of clause 7 itself.

MacDonald told the Committee:

> "The power to issue directives is limited to broad policy and regulatory objectives. For example, the introduction of high definition television."

She added that the Bill specifically prevented directions concerning a particular matter or having retroactive effect.[100]

The reference to high-definition television is useful because it provides a contemporaneous governmental example of the level at which the direction power was expected to operate. The government could establish a policy orientation concerning the introduction of an important new broadcasting technology, leaving the Commission to apply that policy through its regulatory processes.

There was nevertheless a textual problem. Clause 7 did not actually say that the power was limited to "broad policy and regulatory objectives." As introduced, it authorized the Governor in Council simply to issue "policy directions." The Standing Committee's proposed restriction to "broad policy matters" had not been included.

The following day, the Canadian Association of Broadcasters (CAB), the national association representing private broadcasters, proposed an additional limitation. It recommended that clause 7(1) be amended to authorize:

> "…policy directions of a general nature."

The CAB explained the purpose of the proposed words:

> "This would set the scope of the directive powers to some degree and limit it to broad policy matters."[101]

The proposal brought together two concerns that had previously been addressed separately. The CAB did not merely say that the subject matter of a direction should be broad policy. It proposed an additional requirement concerning the character of the direction: it should be "of a general nature."

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[100] House of Commons, Legislative Committee on Bill C-136, Minutes of Proceedings and Evidence, Issue No. 1, August 10, 1988, p. 1:27 (Hon. Flora MacDonald, Minister of Communications).

[101] House of Commons, Legislative Committee on Bill C-136, Minutes of Proceedings and Evidence, Issue No. 2, August 11, 1988; Peter Niemczak, James R. Robertson and Nicole Saint-Denis, Library of Parliament, Clause-by-Clause Summary: Bill C-136 (August 26, 1988), cl. 7(1).

The CAB did not use the eventual expression "of general application." Nor did it propose the complete formulation ultimately enacted. By August 11, the Canadian Association of Broadcasters was expressly arguing that the bare statutory power to issue "policy directions" should be qualified by language of generality and explaining that the purpose of the qualification was to confine the power to broad policy matters.

The concern about the breadth of the proposed direction-making power was not confined to the principal institutional participants. Other witnesses appearing before the Legislative Committee, including the Public Interest Advocacy Centre, ACTRA, broadcaster Michel Gouin and former CRTC Commissioner Jean-Pierre Mongeau,[102] also addressed the relationship between governmental policy directions and the Commission's regulatory independence. Their positions were not identical. Some expressly supported the principle that elected governments should be able to establish broadcasting policy through directions to the Commission, while questioning the breadth of the proposed authority or the safeguards against interference in regulatory decisions. The oral evidence supplemented written submissions from individual broadcasters across the country and broadcasting organizations expressing similar concerns.[103] Taken together, these interventions demonstrate that the proposed direction-making power attracted attention from a considerably wider range of participants than the principal submissions alone might suggest.

Over the succeeding two weeks, the CRTC would propose "broad policy directions of general orientation"; André Bureau would confront the possibility that something framed as general policy could in substance determine an individual situation; and the surviving summary of CTV's submission would record the first proposal we have located using the precise words "of general application."

X) August 23, 1988: The CRTC - "Broad Policy Directions of General Orientation"

When the CRTC appeared before the Legislative Committee on August 23, André Bureau, the Chairman of the CRTC, returned to a concern that the Commission had raised repeatedly during the preceding years. The Commission supported a governmental power of direction but maintained that the legislation had to define the kind of policy direction that Cabinet could issue.

Bureau proposed:

> "…broad policy directions of general orientation."

[102] *House of Commons, Legislative Committee on Bill C-136, Minutes of Proceedings and Evidence*, evidence of ACTRA, August 16, 1988, p. 1130; evidence of Michel Gouin, August 18, 1988, pp. 5:86–5:89; evidence of Jean-Pierre Mongeau, August 24, 1988, pp. 7:25–7:26; evidence of Andrew Roman, Public Interest Advocacy Centre, August 25, 1988, p. 8:57.

[103] See, for example, CJCB Radio intervention dated August 26, 1988 and CHUM Limited intervention dated August 18, 1988, *Legislative Committee on Bill C-136* (Library and Archives Canada, Wallet 1 of 5).

He emphasized that the protection already contained in clause 7(2) for particular licences was not sufficient. The Commission made thousands of decisions that did not fall within that prohibition. As Bureau put it:

> "What we believe is necessary is that we define the kind of policy directions that could be enacted, and we say, 'broad policy of general orientation'."[104]

Bureau then identified a more difficult drafting problem:

> "This is after four and a half years of discussion. Mr. Edwards and Mr. Gormley will particularly remember that we have had many discussions on how to define the policy so that indeed we are not opening the door to some smart people coming up and proposing what could be termed a policy statement but what indeed is an individual situation."

He continued:

> "I thought we had come to the conclusion that the policy directions should be broad policy directions of general orientation, so it is clear that it has to be so large that it would not encompass those specific issues that could be used."[105]

The observation is particularly important because Bureau's concern went beyond a direction that openly named a particular licensee or application. Clause 7(2) already dealt with particular licences. His concern was that a direction could be framed as policy while in substance addressing an individual situation.

In that sense, simply calling something a "policy direction" was not enough. Nor would the problem necessarily disappear because the direction was drafted without naming the person or proceeding it was intended to affect. A formally general rule could potentially be drawn sufficiently narrowly that, in practical operation, it determined the treatment of a particular situation.

Bureau's evidence therefore brings into particularly sharp focus the distinction that had been developing throughout the earlier record. Breadth of policy was one limitation. Generality in application was another. His proposed wording - "broad policy directions of general orientation" - did not use the eventual statutory expression. But it attempted to capture both concerns: the subject matter should be broad policy, and the direction should possess sufficient generality that it could not be used to determine specific regulatory situations.

This evidence is especially significant given what happened next. CTV proposed that the words "of general application" be inserted into clause 7 itself and four days after that, the government amendment would use those precise words.

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[104] House of Commons, Legislative Committee on Bill C-136, Minutes of Proceedings and Evidence, Issue No. 6, August 23, 1988, p. 6:132 (André Bureau, Chairman, CRTC).

[105] *Ibid*., p. 6:132.

Y) August 26, 1988: CTV Proposes "of General Application"

In its written submission to the Legislative Committee dated August 18, 1988, CTV Television Network Limited proposed inserting the words "of general application" after "policy directions" in clause 7(1) of Bill C-136. The proposal was subsequently recorded in the Library of Parliament's August 26 clause-by-clause summary of the positions advanced by interveners before the Committee. The summary described CTV's position as follows:

> "CTV believes the words 'of general application' must be inserted after 'policy directions' and that sub (b) would then only apply to 5(2) as amended."[106]

This is a critical point in the wording history. CTV's August 18 submission is the earliest source presently located in which the precise words "of general application" are proposed as part of the statutory power of direction.

CTV's proposal did not arise in isolation. The Canadian Association of Broadcasters had already proposed adding "of a general nature" after "policy directions," explaining that this would help confine the power to broad policy matters. The CRTC subsequently proposed "broad policy directions of general orientation." By August 26, therefore, the Committee had before it several formulations aimed at introducing a requirement of generality into clause 7:

> CAB: "policy directions of a general nature."
>
> CRTC: "broad policy directions of general orientation."
>
> CTV: "policy directions of general application."[107]

CTV reiterated its proposed amendment in supplementary written responses dated August 29, 1988, transmitted under an August 30 covering letter.[108]

The documentary record thus establishes that CTV proposed inserting the words "of general application." It does not establish that CTV originated those words, nor does the presently available record establish that the government subsequently adopted them from CTV. The government may have developed the same language independently or received it from another source.

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[106] CTV Television Network Limited, written submission to the Legislative Committee on Bill C-136, August 18, 1988, p. 9; Peter Niemczak, James R. Robertson and Nicole Saint-Denis, Library of Parliament, Research Branch, Law and Government Division, *Clause-by-Clause Summary: Bill C-136: An Act Respecting Broadcasting and to Amend Certain Acts in Relation Thereto and in Relation to Radiocommunications* (August 26, 1988), cl. 7(1) (unpaginated), summary of the position of CTV Television Network Limited.

[107] House of Commons, Legislative Committee on Bill C-136, *Minutes of Proceedings and Evidence*, Issue No. 2, August 11, 1988 (Canadian Association of Broadcasters); Issue No. 6, August 23, 1988, p. 6:132 (André Bureau, Chairman, CRTC); CTV Television Network Limited, written submission to the Legislative Committee on Bill C-136, August 18, 1988, p. 9; Niemczak, Robertson and Saint-Denis, *Clause-by-Clause Summary*, August 26, 1988, cl. 7(1).

[108] CTV Television Network Limited, supplementary written responses to questions raised before the Legislative Committee on Bill C-136, August 29, 1988 (covering letter dated August 30, 1988).

The chronology is nonetheless striking. “CTV’s August 18 submission proposed ‘of general application.’ The proposal was recorded in the Library of Parliament’s August 26 clause-by-clause summary, and CTV reiterated its position on August 29. On August 30, the government amendment inserted ‘directions of general application on broad policy matters.”

For present purposes, the narrower conclusion is sufficient. “Broad policy matters” had been established in the documentary record well before Bill C-136. “Of general application” had not. The first use presently located of those precise words in connection with the direction power is CTV’s August 18, 1988 written submission.

Z) August 30, 1988: The Six-Word Formulation Enters Bill C-136

When the Legislative Committee reached clause-by-clause consideration on August 30, the government proposed to alter the language of clause 7. MacDonald explained the purpose of the change:

> “As recommended, I propose to clarify the language somewhat to make it crystal clear that this power can only be used with respect to matters of broad policy…”

The amendment itself was moved by Roger Clinch, the Progressive Conservative MP for Gloucester and Parliamentary Secretary to the Minister of Communications.[109] The words:

> “…issue to the Commission policy directions with respect to”

were replaced by:

> “…issue to the Commission directions of general application on broad policy matters with respect to”.[110]

The amendment carried, and clause 7 as amended was subsequently agreed to on division. For the first time, the complete formulation that would ultimately become section 7 appeared in the Bill:

> “…directions of general application on broad policy matters.”

The change was more than a stylistic elaboration of “policy directions.” The amended clause now contained two express qualifications: a direction had to be “of general application” and it had to concern “broad policy matters.”

[109] House of Commons, Legislative Committee on Bill C-136, Minutes of Proceedings and Evidence, Issue No. 10, August 30, 1988, p. 10:99 (Roger Clinch).

[110] House of Commons, Legislative Committee on Bill C-136, Minutes of Proceedings and Evidence, Issue No. 10, August 30, 1988, pp. 10:32, 10:99.

AA) What the 1988 Amendment Accomplished

The August 30 amendment brought together two limitations that had developed along different paths.

The first concerned the subject matter of a direction. The proposition that governmental direction should be confined to broad or general policy had a substantial history by 1988. It appeared in different forms in the Lambert Commission, the Economic Council, Applebaum-Hébert, government broadcasting-policy documents, Caplan-Sauvageau and the CRTC's submissions. Most importantly, the Standing Committee had recommended in 1987 that the power be "expressly restricted to broad policy matters," and the government had accepted that recommendation.

The second concerned the application of a direction. That concern also had a long history, although its vocabulary was less settled. Successive proposals had sought to protect identifiable persons, particular applicants, individual licences, specific cases and particular matters from governmental determination. By the mid-1980s, the discussion had moved beyond simply excluding named licensing decisions. The Law Reform Commission proposed that governmental policy be established in advance of specific cases; Caplan-Sauvageau proposed directions "formulated in general terms"; the 1985 Committee debate considered policy applicable to a "class of issues"; and in August 1988 the CAB and CRTC proposed directions "of a general nature" and "of general orientation."

Bureau's evidence exposed why the distinction mattered. A direction could be presented as a policy statement and nevertheless, in substance, address "an individual situation." The problem therefore could not necessarily be solved simply by prohibiting Cabinet from naming a particular licensee or application. The direction itself required a sufficient degree of generality.

The words added on August 30 can be read as addressing both dimensions. "Broad policy matters" appears to address what a direction may be about, while "of general application" appears to address the manner in which that policy may be applied. The 1988 record, however, does not expressly assign those separate functions to the two expressions.

The legislative history does not establish that the drafters consciously described the amendment in precisely those analytical terms. Nor does it reveal who devised the final six-word formulation. But treating the two expressions as doing identical work would be difficult to reconcile with the history that preceded their enactment. The Committee added both expressions, and Parliament later enacted both in Bill C-40.

That conclusion is reinforced by the change actually made to Bill C-136. The Committee could have confined the proposed power to "broad policy directions," as much of the earlier record had contemplated. It did not. Nor did it merely protect particular licences through the separate prohibition already contained in clause 7(2). Instead, it imposed an additional requirement upon the direction itself: it must be of general application.

The resulting formulation therefore captured, in unusually compact language, the distinction that had been developing for more than a decade: government could establish broad broadcasting

policy; the CRTC remained responsible for applying that policy to the particular regulatory situations within its jurisdiction.

That was the formulation Bill C-136 carried forward.

BB) The Broader 1988 Context

The amendment was adopted against a broader political and institutional backdrop that may also help explain the pressure to complete the legislation. By the summer of 1988, broadcasting reform had already been under sustained review for several years, through the Caplan-Sauvageau Task Force, parliamentary committee work, the government's responses and subsequent policy development. Indeed, when André Bureau appeared before the Legislative Committee on August 23, he began his discussion of the direction power by observing that "[t]his is after four and a half years of discussion."[111] Bill C-136 was therefore not the beginning of a new policy exercise, but an effort to bring a prolonged process to a legislative conclusion. At the same time, the parliamentary window was narrowing. After the Legislative Committee completed its work at the end of August, the Bill returned to the House. The House was still considering Bill C-136 at report stage on September 22. No subsequent completion of report stage or third reading appears in the parliamentary record before Parliament was dissolved on October 1; the general election followed on November 21.[112]

The legislation was also proceeding during an unusually consequential debate about Canada's economic and cultural relationship with the United States. The Canada–United States Free Trade Agreement had brought questions about the future of Canadian cultural industries and the continuing capacity to pursue distinct Canadian cultural policies into the wider political debate.[113] Those concerns coexisted with technological and market changes that were already reshaping the broadcasting system. None of these circumstances demonstrates why the government accepted the particular formulation added on August 30. They do, however, provide important context for the effort to complete a new broadcasting statute, and to define the respective policy-making roles of elected government and the CRTC, before the end of the Parliament.

Bill C-136 did not complete the legislative process before dissolution. Its direction-power formulation, however, did not disappear with the Bill. It reappeared in the successor legislation introduced in the new Parliament and ultimately became section 7 of the *Broadcasting Act* enacted in 1991.

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[111] *Supra* note 97.

[112] House of Commons Debates, 33rd Parl., 2nd Sess., September 22, 1988 (report-stage consideration of Bill C-136); Library of Parliament, *Canadian Parliamentary Historical Resources*, House of Commons Debates, 33rd Parl., 2nd Sess. (session ending October 1, 1988); Natural Resources Canada, *Results of the 34th Federal Election, November 21, 1988*.

[113] René Lemieux & Joseph Jackson, *Cultural Exemptions in Canada's Major International Trade Agreements and Investment Relationships*, Parliamentary Research Branch, Library of Parliament, PRB 99-25E (October 12, 1999); see also Inter-Parliamentary Union, *Canada: Parliamentary Elections, House of Commons, 1988*.

CC) 1989–91: Bill C-40 - Confirmation Rather than Further Definition

When Parliament returned to broadcasting reform after the 1988 election, the formulation adopted in Bill C-136 was carried forward into Bill C-40. The Governor in Council's power remained confined to "directions of general application on broad policy matters."

The parliamentary proceedings surrounding Bill C-40 did not materially elaborate upon the meaning of that formulation. They did, however, provide useful confirmation of the institutional division that Parliament understood the direction power to create.

On January 31, 1990, Marcel Masse, Minister of Communications, appeared before the Legislative Committee considering Bill C-40. He described the direction power as giving government:

> "…the authority to develop broad policy guidelines"

and immediately distinguished that role from individual regulatory decision-making:

> "This power certainly does not extend to individual decisions regarding licenses, or to matters being studied by the CRTC, nor can it be exercised retroactively."

Masse also distinguished the direction power from Cabinet's separate power of review, describing them as "completely different" powers. Direction operated prospectively at the level of broad policy; review operated in relation to particular CRTC decisions.[114]

At second reading on November 3, 1989, Masse again described the provision more generally as permitting the Governor in Council to give the CRTC "general instructions."

Sheila Finestone, Liberal MP for Mount Royal, accepted a governmental power of direction in principle but remained concerned about the effect of combining that power with Cabinet review of CRTC decisions. She said that governmental guidelines should be limited to:

> "…basic policy issues in the pursuit of the *Broadcasting Act*'s objectives."

Her principal concern remained the preservation of the CRTC's independence as an expert quasi-judicial regulator.[115]

Writing in her personal capacity around 1990, Sheridan Scott, then Legal Counsel to the CRTC, echoed the distinction André Bureau had drawn in 1988 between the government's legitimate role in establishing broadcasting policy and the Commission's independence in exercising its

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[114] Bill C-40, An Act respecting broadcasting and to amend certain Acts in relation thereto and in relation to radiocommunication, 2nd Sess., 34th Parl., cl. 7; House of Commons, Legislative Committee on Bill C-40, Minutes of Proceedings and Evidence, Issue No. 2, January 31, 1990; House of Commons Debates, November 3, 1989, p. 5548.

[115] House of Commons Debates, 2nd Sess., 34th Parl., November 3, 1989 (Sheila Finestone, MP for Mount Royal); see also House of Commons, Standing Committee on Canadian Heritage, Evidence, June 13, 1995 (quoting Finestone's November 3, 1989 remarks on Cabinet policy directions and CRTC independence).

regulatory responsibilities. Scott considered a governmental power to issue policy directions an appropriate means of implementing statutory broadcasting policy, but emphasized the need to guard against political interference in the regulatory process. She was particularly concerned about the potential consequences of combining Cabinet's powers of direction and review, including the possibility that directions could be used to influence the disposition of individual regulatory matters.[116]

The contemporary record therefore confirms the understanding already evident in the Bill C-136 record: government was to establish policy at a general level, while the CRTC retained responsibility for individual regulatory decisions. But they do not provide a new explanation of why Parliament chose the particular words "of general application," nor do they separately define the work performed by that expression as distinct from "broad policy matters."

The same is true of the government's description of the legislation after enactment. The Department of Communications characterized the new Act as giving the Governor in Council a power to issue "broad policy directions" to the CRTC.

Bill C-40 is therefore important principally because of continuity. Parliament had another opportunity to consider the direction power after the 1988 election and retained the more restrictive formulation produced by the Bill C-136 Committee process. The six words were no longer merely an amendment to a bill that died on the Order Paper. They became part of the new *Broadcasting Act*, which received Royal Assent on February 1, 1991.[117]

In order to understand why those six words were chosen and what distinction they were intended to capture, the more revealing record remains the one we have just examined from 1987 and 1988. The C-40 proceedings add confirmation, but little further definition.

DD) 1992–93: The Six Words Move into Telecommunications

The enactment of the *Broadcasting Act* did not end the legislative history of the six-word formulation. Almost immediately, it appeared in the parallel effort to modernize federal telecommunications legislation.

Bill C-62, the proposed *Telecommunications Act*, received first reading on February 27, 1992. Its direction power already contained the complete formulation subsequently enacted as section 8: the Governor in Council could issue to the CRTC "directions of general application on broad policy matters" with respect to the Canadian telecommunications policy objectives.[118]

A 1992 Department of Communications explanatory paper, Telecommunications: New Legislation for Canada, described the proposed power:

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[116] Sheridan Scott, *The New Broadcasting Act: An Analysis* (unpublished paper, c. 1990), pp. 28–32, (Library and Archives Canada, R12069, Volume 354).

[117] *Broadcasting Act*, S.C. 1991, c. 11, s. 7 (Royal Assent February 1, 1991).

[118] Bill C-62, An Act respecting telecommunications, 3rd Sess., 34th Parl., cl. 8 (first reading February 27, 1992).

> "The act empowers the Governor in Council to issue to the CRTC directions of general application on broad policy matters with respect to any of the objectives of the policy."

The Department added that directions "must bear on broad issues related to the application of the policy." It then expressly connected the proposed telecommunications power with the recently enacted broadcasting legislation:

> "With the recent adoption of the *Broadcasting Act*, the government now has a similar power in the field of broadcasting."[119]

The chronology is significant. Earlier telecommunications proposals had contributed substantially to the development of the underlying distinction between governmental policy-making and regulatory decision-making. But the complete six-word formulation first entered proposed legislation through the 1988 amendment to Bill C-136. By the time Bill C-62 was introduced in 1992, that formulation had already become law in section 7 of the *Broadcasting Act*. The available record therefore supports treating the 1992 telecommunications provision as an adoption of the same statutory model, rather than as the source of the broadcasting language.

The parliamentary record also provides useful evidence about the intended division of responsibility. During the Senate committee's pre-study of Bill C-62 on May 4, 1992, Perrin Beatty, the Minister of Communications, explained:

> "The philosophical basis for this power is that decisions of fundamental public policy should be made by the government and not by the regulator."

He immediately distinguished that function from regulatory decision-making:

> "The purpose of this section is not, for example, to get the minister involved in specific concerns about regulatory proceedings. This will be left to the CRTC."[120]

Beatty thus described essentially the same institutional boundary that had emerged from the broadcasting history: government determines fundamental public policy; the regulator deals with specific regulatory proceedings.

The same distinction was made still more explicitly when Bill C-62 returned before a House of Commons Sub-Committee on May 11, 1993. Asked about the possible use of a direction in relation to a specific matter, Larry Shaw, Director of Regulatory Policy, said:

> "...the power of direction is on matters of general application, on broad issues of policy of general application. In other words, quite rightly, the power of direction is very much a global power. It doesn't allow the Governor in Council to get into

[119] Communications Canada, Telecommunications: New Legislation for Canada (Ottawa: Department of Communications, February 1992), pp. 16–17.

[120] Senate, Standing Committee on Transport and Communications, Proceedings, Issue No. 12, May 4, 1992 (Hon. Perrin Beatty, Minister of Communications).

> the specifics of a matter before the commission has even had a chance to consider it."[121]

He added that it was difficult to contemplate using the direction power for something as specific as the BCI case then under discussion.

Beatty and Shaw therefore supplied unusually clear contemporaneous explanations of the telecommunications formulation. Government could establish fundamental or broad public policy prospectively; particular regulatory proceedings and the translation of that policy into regulatory decisions remained with the CRTC.

The *Telecommunications Act* ultimately enacted the formulation unchanged. Section 8 authorized:

> "…directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives."[122]

The importance of the telecommunications provision to the present inquiry is therefore greater than simple parallel wording. From 1993 onward, the same six words governed Cabinet direction of the same regulator under two different statutes. Their subsequent use under the *Telecommunications Act* - and disputes over the permissible specificity of those directions - can accordingly provide an important parallel in considering the limits of section 7.

A useful contemporaneous interpretation was supplied by Professor Hudson Janisch, who had acted as counsel to the Senate Standing Committee during its 1992 pre-study of Bill C-62. Writing in 1993, Janisch observed that executive directions had to be "of general application on broad policy matters" and expected the power to be exercised sparingly, with the CRTC "largely ... left to flesh out its mandate on its own."[123]

EE) 1995: The First Test-How General and How Broad?

The limits imposed by section 7 remained largely theoretical until 1995, when the government proposed to use the new power in connection with direct-to-home (DTH) satellite broadcasting. For the first time, the CRTC and the government confronted directly the question that had occupied the legislative history: how far could a direction go before it ceased to be one "of general application on broad policy matters"?

The DTH controversy did not arise in the abstract. New satellite technology was making DTH distribution commercially feasible, while Canadian policy-makers were concerned about competition from U.S. satellite services and about the regulatory framework for Canadian entrants. The CRTC had used its exemption power for certain DTH distribution undertakings; the government's subsequent policy review took a different view of how the emerging market

[121] House of Commons, Sub-Committee on Bill C-62, An Act respecting Telecommunications, Evidence, Issue No. 8, May 11, 1993, p. 27 (Larry Shaw, Director of Regulatory Policy).

[122] *Telecommunications Act*, S.C. 1993, c. 38, s. 8.

[123] H.N. Janisch, "At last! A new Canadian telecommunications act" (1993) 17 Telecommunications Policy 691, at 695.

should be structured. That collision between an existing Commission decision and a new governmental policy made section 7's boundary immediately practical.

On April 29, 1995, the government published proposed directions concerning DTH satellite distribution undertakings and DTH pay-per-view television programming undertakings. The proposals responded to the rapidly developing market for satellite television and would establish policy governing the CRTC's treatment of these new services.

Before the proposed directions were published in the *Canada Gazette* on April 29, Canadian Heritage had sought the CRTC's comments. In an April 24 letter to Marc Rochon, Deputy Minister of Canadian Heritage, responding to the Department's April 20 request, the Commission said that the proposed directions were:

> "…too specific and narrow, instead of general and broad as contemplated under the Act."

The Commission's position went directly to the statutory language. In its view, section 7 permitted the government to "elaborate upon or interpret the policies set out in the Act," but did not permit it to tell the Commission how those policies were to be implemented in a manner that effectively determined a licensing decision.[124]

John Manley, Minister of Industry, defended the government's authority but described it in similarly restrictive terms. Appearing before the House of Commons Standing Committee on Industry on April 24, he said that the section 7 power was "very carefully circumscribed." Four days later, discussing the respective responsibilities of government and regulator, he put the distinction more simply:

> "The government does not direct who gets a licence."

The government could establish policy; the licensing decision remained with the CRTC.[125]

That distinction became still clearer during the parliamentary controversy that followed. On June 7, Manley explained:

> "The job of the government is to make policy. … It is the job of the CRTC to implement policy."

The statement closely resembles the institutional division that had emerged during the development of section 7 and, subsequently, section 8 of the *Telecommunications Act*: government establishes policy at the appropriate level of generality; the Commission applies that policy through the exercise of its statutory regulatory authority.

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[124] Canadian Radio-television and Telecommunications Commission, letter to Marc Rochon, Deputy Minister of Canadian Heritage, April 24, 1995, concerning the proposed DTH policy directions (quoted and discussed in the June 1995 proceedings of the House of Commons Standing Committee on Canadian Heritage); see also Canada Gazette, Part I, April 29, 1995, proposed DTH and DTH pay-per-view directions.

[125] House of Commons Debates, 1st Sess., 35th Parl., April 24, 1995, p. 11677; April 28, 1995, p. 11937; June 7, 1995, p. 13367 (Hon. John Manley, Minister of Industry).

The controversy is important because the disagreement was not about whether Cabinet possessed a power of policy direction. Everyone accepted that it did. The dispute concerned the permissible specificity of such a direction. The CRTC maintained that a direction could become so "specific and narrow" that it crossed the statutory boundary even though it was expressed as government policy.

That is particularly significant in light of the 1988 legislative history. Bureau had warned that a clever drafter might produce something that could be called a policy statement but was in reality directed at "an individual situation." Seven years later, the CRTC was making essentially the same objection to the first proposed use of section 7: the problem was not simply whether a direction expressly named a particular licensee. The question was whether its substance left the Commission with the regulatory decision Parliament had entrusted to it.

The government nevertheless proceeded. Following parliamentary consideration, final directions concerning DTH satellite distribution and DTH pay-per-view television programming undertakings were issued on July 6, 1995. The episode therefore did not produce an authoritative judicial interpretation of section 7. But it produced something the enactment record had not: a concrete dispute between government and regulator over the line separating a permissible broad policy direction from impermissibly specific governmental intervention.[126]

For that reason, the 1995 DTH controversy provides the first important post-enactment evidence concerning the practical meaning of the six words.

FF) 1995: The CRTC Draws the Line - "General Rather than Specific and Broad Rather than Narrow"

The proposed DTH directions produced the first sustained dispute over the meaning of section 7. The issue was no longer hypothetical. Cabinet had drafted actual directions, and the Commission had to decide whether they remained within a power confined to "directions of general application on broad policy matters."

A contemporary commentary had already given the statutory language a distinctly two-part meaning. Peter Grant and Anthony Keenleyside, tracing the amendment made to Bill C-136, concluded:

> "Thus, the intent is now clear that the directions in question should be general rather than specific and broad rather than narrow."[127]

[126] Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order, SOR/95-319, P.C. 1995-1105, July 6, 1995; Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order, SOR/95-320, P.C. 1995-1106, July 6, 1995.

[127] Peter S. Grant and Anthony G. Keenleyside, Canadian Broadcasting Regulatory Handbook, 2nd ed. (Toronto: McCarthy Tétrault, 1995), discussion of the 1988 amendment to Bill C-136.

That formulation is particularly useful because it treats "general application" and "broad policy matters" as doing separate work: one contrasts general with specific; the other broad with narrow.

The CRTC adopted essentially the same understanding when Canadian Heritage sought its comments on the proposed DTH Orders in April 1995. In its April 24 letter to Marc Rochon, Deputy Minister of Canadian Heritage, the Commission said that the proposed Orders were:

> "…too specific and narrow, instead of general and broad as contemplated under the Act".

The Commission accepted that section 7 permitted government to elaborate upon or interpret the broadcasting and regulatory policies enacted by Parliament. Its objection was to directions that went further and told the Commission how those policies were to be implemented, particularly where the result was effectively to determine the licensing process. The Commission warned against governmental "micro-manage[ment]" and urged that any direction be confined to broad policy principles.

The objection therefore went beyond the express prohibition in section 7(2) against directing the issuance of a licence to a particular person. The Commission's concern was that government could approach the same result indirectly by prescribing the regulatory process or outcome so closely that little meaningful decision remained for the CRTC.

That argument closely resembles Bureau's warning in 1988 that something could be drafted as a policy statement while in substance dealing with "an individual situation." The 1995 dispute demonstrated why Parliament's addition of "of general application" mattered even though the Act separately protected particular licences.[128]

The government's response was not that specificity was irrelevant. John Manley, Minister of Industry, repeatedly described the direction power in constrained terms. On April 24 he called section 7 "very carefully circumscribed." On April 28 he stated:

> "The government does not direct who gets a licence."

And on June 7 he summarized the division of functions:

> "The job of the government is to make policy. … It is the job of the CRTC to implement policy."

The real disagreement was therefore more subtle. Both sides accepted that government made policy and the CRTC made licensing decisions. They disagreed over how much detail government could prescribe while still remaining on the policy side of that boundary.[129]

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[128] House of Commons Debates, 1st Sess., 35th Parl., April 24, 1995, p. 11677; April 28, 1995, p. 11937; June 7, 1995, p. 13367.

[129] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 93, June 13, 1995 (Suzanne Tremblay, Gordon Ritchie and Roger Tassé).

That disagreement came into particularly sharp focus before the Standing Committee on Canadian Heritage on June 13. Suzanne Tremblay, a Bloc Québécois member of the Committee, put the statutory objection directly to Gordon Ritchie, former chairman of the government's Direct-to-Home Satellite Broadcast Policy Review Panel, and Roger Tassé, a former Deputy Minister of Justice and member of the Panel. She observed that section 7 permitted directions only on broad policy matters, yet the Panel's recommendations were "extremely specific." How, she asked, could that be reconciled with the Act?

Ritchie's answer was that the Panel had first established:

> "a framework for general policy implementation."

It then identified the directions necessary to make that general policy effective.[130] In his view, the detailed provisions were not impermissibly specific; they were necessary to make the broader policy framework work.

Tassé made the legal argument more explicitly. He cautioned against examining each paragraph or word of the proposed directions in isolation. The directions had to be considered as a whole:

> "It is a policy, a general policy."

Nothing in section 7, he argued, prohibited the government from expressing that policy in "precise and understandable words." Nor was government confined simply to repeating the policy already contained in the *Broadcasting Act*. Parliament had deliberately empowered it to go further and clarify or supplement that policy.

At the same time, Tassé accepted a limiting principle. Government could not itself award a licence. That remained the CRTC's responsibility. The direction could frame the exercise of the Commission's authority, but:

> "…in the end, it is the CRTC which will say whether someone gets a licence or does not get a licence, and on what conditions."

His position was therefore not that a policy direction could do anything short of formally naming the successful licensee. It was that a general policy could contain precise implementing instructions without losing its character as general policy, provided that the Commission retained the ultimate licensing decision.

The June 13 exchange captures the competing interpretations of section 7 unusually well. The CRTC's approach emphasized the degree of regulatory discretion left to the Commission: a direction became suspect when it prescribed implementation so closely that Cabinet effectively made the regulatory decision. Ritchie and Tassé emphasized instead the character of the direction taken as a whole: a general policy did not cease to be general merely because government expressed it precisely or prescribed measures necessary to make it effective.

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[130] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 93, June 13, 1995 (Gordon Ritchie and Roger Tassé).

Neither interpretation makes one of the statutory expressions redundant. Both recognized a distinction between permissible policy and impermissible governmental substitution for the regulator. Their disagreement concerned where that line was to be drawn.

That disagreement would shortly become even more explicit in the Senate, where the Committee examining the proposed Orders returned directly to the legislative history of the phrases "general application" and "broad policy matters", sought the underlying legal advice, and confronted the "general rather than specific and broad rather than narrow" interpretation head-on.

GG) 1995: The Senate Returns to the Legislative History

The Senate Standing Committee on Transport and Communications approached the proposed DTH directions from a different angle. Rather than asking only whether DTH was an appropriate subject of national policy, members asked what Parliament had meant when it confined section 7 to directions "of general application on broad policy matters."

At its May 10 hearing, the Committee was taken directly to the history of the provision. Of particular importance was the change made to Bill C-136 in 1988: the original authority to issue "policy directions" had been narrowed by the addition of "of general application on broad policy matters."

The legislative history was also invoked directly before the House Heritage Committee. On June 13, 1995, the Conseil provincial du secteur des communications of the Canadian Union of Public Employees (CPSC) argued that the proposed Orders exceeded the proper governmental role under section 7. In doing so, it returned to Sheila Finestone's statements during enactment of the 1991 Act. It quoted her November 3, 1989, statement that Cabinet guidelines should be limited to "basic policy issues in the pursuit of the *Broadcasting Act*'s objectives," and her December 3, 1990 objection to combining Cabinet review with "general policy directions."

The significance is not that Finestone's statements were authoritative interpretations of section 7. Rather, the 1995 controversy itself was being argued by reference to the parliamentary record surrounding enactment. The institutional distinction debated in 1989–90 - governmental policy direction on one side and CRTC independence in regulatory decision-making on the other - had become part of the contemporary argument over what the six-word limitation permitted.[131]

That history mattered because the proposed DTH Orders contained provisions of considerable specificity. The issue was therefore the same one the CRTC had raised in its April 24 letter: whether Cabinet could select a broad subject of broadcasting policy but then prescribe its implementation at a level of detail inconsistent with the statutory limitation.

The Committee did not treat that as merely a policy disagreement. It sought the government's legal basis for concluding that the proposed Orders complied with section 7 and requested any written legal opinions, drafts or memoranda dealing with the issue.

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[131] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 93, June 13, 1995, evidence of the Conseil provincial du secteur des communications, Canadian Union of Public Employees, quoting Sheila Finestone's November 3, 1989, and December 3, 1990, statements concerning Cabinet policy directions and CRTC independence.

The resulting record disclosed sharply conflicting legal views. The CRTC itself had concluded that the proposed Orders went beyond section 7 because of their specificity and retroactive consequences.[132] Opinions from McCarthy Tétrault, Stikeman Elliott and Johnston & Buchan reached broadly similar conclusions, although on overlapping rather than identical grounds. Johnston & Buchan considered that the Directions prescribed detailed regulatory and licensing requirements rather than remaining confined to broad policy. McCarthy Tétrault and Stikeman Elliott also focused on the proposed Direction's effect on the existing DTH exemption order and its retrospective consequences.[133]

Canadian Heritage took the opposite position. It advised the Committee that the Department of Justice had concluded that both proposed Orders satisfied section 7, specifically including the requirements of "general application" and "broad policy matters". The underlying Justice advice was not disclosed. Roger Tassé similarly told the Committee that the DTH Panel had obtained its advice from Justice, while Gordon Ritchie said that Justice lawyers had reviewed and concurred in the draft Orders.

The Committee's own response is particularly revealing. It understood the legislative history as establishing that directions should be "general rather than specific and broad rather than narrow". But it did not understand those limits as confining Cabinet to abstract statements of policy. While recommending that language it considered too specific - including subsection 4(b) of the proposed DTH distribution Direction - be modified to satisfy the requirement of general application, the Committee itself proposed directions that would prevent the CRTC from refusing a DTH distribution licence because of the effect on the economic viability of existing licensees, require it to consider the benefits of increased consumer choice, and similarly prevent refusal of a DTH pay-per-view licence on economic-viability grounds.

The Committee therefore contemplated a direction containing quite specific regulatory instructions while objecting to provisions that it regarded as operating too specifically upon an existing regulatory situation. It described the "overwhelming" weight of the legal material before it as supporting the view that the government's proposed use of section 7 was ultra vires but carefully added that "only a court can decide that". It recommended modification rather than abandonment of the direction power as the means of implementing the government's DTH policy.[134]

HH) 1995: The Competing Interpretation-How Specific May a General Policy Be?

The parliamentary proceedings ultimately exposed two competing interpretations of section 7. They agreed on the basic division of responsibility: government could establish broadcasting

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[132] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 90, June 6, 1995 (Keith Spicer, Chairman, CRTC).

[133] House of Commons, Standing Committee on Canadian Heritage, Fourth Report, June 21, 1995, Minutes of Proceedings, Issue No. 62 (Meetings Nos. 93–100), concerning the proposed DTH directions and the legal opinions and submissions received by the Committee.

[134] Senate, Standing Committee on Transport and Communications, Proceedings, Issue No. 22, June 6, 1995, p. 14; Issue No. 23, June 7, 1995, pp. 12–13; Tenth Report, presented June 21, 1995, pp. 13–18, 40–41.

policy, while the CRTC remained the regulator and licensing authority. The disagreement concerned how much government could prescribe within a general policy direction before it crossed that boundary.

The CRTC's position emphasized regulatory discretion. Its April 24 letter objected that the proposed Orders were "too specific and narrow" and would permit government to move from elaborating broadcasting policy to directing how the Commission implemented it. The Commission was particularly concerned that sufficiently detailed instructions could effectively determine a licensing result without formally directing that a licence be issued to a named person.

That position found support among opponents of the proposed Orders. Before the Standing Committee on Canadian Heritage on June 13, the statutory objection was put starkly: section 7 authorized directions "of general application on broad policy matters," yet the proposed Orders descended into considerable detail. The Canadian Parliamentary Satellite Coalition similarly argued that the government was attempting to do indirectly what the Act prevented it from doing directly.

The government's defenders did not dispute the statutory limitation. Instead, they disputed the proposition that precision necessarily meant specificity of the prohibited kind.

The disagreement can therefore be stated quite precisely. For the CRTC, the amount of regulatory discretion remaining with the Commission was an important indication of whether government had remained within broad policy or had crossed into implementation. For Ritchie and Tassé, a detailed direction could still constitute general policy, provided that its provisions formed part of a general policy framework and the ultimate regulatory and licensing decisions remained with the Commission.[135]

The Orders themselves show why the distinction mattered. They did not identify the applicant who was to receive a DTH licence. But they did considerably more than announce a general preference for competition or Canadian DTH service. The distribution Order directed the CRTC to call immediately for licence applications and to complete the licensing process, absent the most compelling circumstances, by November 1, 1995. It also directed the Commission not to refuse a licence for specified reasons. The companion pay-per-view Order likewise prescribed matters governing the licensing process and required the Commission immediately to call for applications.

The controversy thus exposed an ambiguity that the six-word formulation did not itself resolve. A direction might apply to a class rather than a named person and address an unquestionably broad policy subject yet contain highly specific instructions about how the regulator was to proceed. Was such a direction still one "of general application on broad policy matters"?

The 1995 record provides no authoritative answer. But it identifies two possible approaches to the statutory boundary. One looks principally at what regulatory choices the direction leaves to

[135] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 93, June 13, 1995 (Gordon Ritchie and Roger Tassé).

the CRTC. The other asks whether the detailed provisions are components of a general governmental policy that leaves the ultimate regulatory decision with the Commission.

The distinction is important for the later history of both section 7 and section 8. The same issue would recur when later directions prescribed not merely governmental objectives but particular regulatory approaches or outcomes: specificity in drafting does not necessarily make a direction specific in application—but at some point precision may cease to guide the regulator and begin to decide for it.[136]

II) 1995: The CRTC Defends Regulatory Independence

The CRTC did not confine its objection to the April 24 letter. Keith Spicer, Chairman of the CRTC, subsequently defended the Commission's position before Parliament. The dispute, as he presented it, was not about the government's right to make broadcasting policy. It concerned the point at which policy direction became governmental intervention in the Commission's regulatory function.

That distinction was particularly important because the DTH controversy arose from an actual CRTC regulatory decision. The Commission had exempted certain DTH distribution undertakings from licensing requirements. The government's policy review followed, and the proposed directions would require a different regulatory approach. The practical question was therefore whether section 7 could be used to establish prospective policy even when that policy had immediate consequences for a regulatory course the Commission had already chosen.

Spicer appeared before the Standing Committee on Canadian Heritage as it began its intensive consideration of the proposed directions in June. The subsequent evidence makes clear how sharply the disagreement had developed. When Gordon Ritchie appeared on June 13, he described with "mounting astonishment" Spicer's attempt to portray the Panel's recommendations as an attack upon the Commission's independence and integrity. Ritchie insisted that the Panel instead regarded the CRTC as an essential institution under the *Broadcasting Act*, but one that remained expressly subject to directions properly issued by the Governor in Council.

The disagreement thus involved two propositions that were each difficult to dispute. The CRTC was an independent regulatory agency charged by Parliament with regulating and supervising the broadcasting system. But Parliament had also expressly made that authority subject to valid directions issued under section 7. The statutory question was where one authority ended and the other began.

That question became still more concrete when ExpressVu, whose proposed service was directly affected by the controversy, appeared before the Committee on June 15.

The significance of the competing positions is easier to see when the proposed directions are separated into two levels. At the first level were unmistakably broad governmental choices:

[136] Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order, SOR/95-319, ss. 5–7; Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order, SOR/95-320, ss. 5–6.

Canada should have a competitive DTH market; Canadian broadcasting policy should apply to the new technology; and the regulatory framework should permit Canadian DTH services to develop. At the second were instructions concerning the regulatory means by which those objectives were to be achieved - licensing calls, deadlines, eligibility rules and matters the CRTC could or could not treat as grounds for refusing a licence.

It was principally at this second level that the section 7 controversy arose. The CRTC's April 24 position was that government could elaborate or interpret the statutory policy but should not "micro-manage" its implementation or effectively create a licensing decision. Ritchie and Tassé, by contrast, considered detailed instructions permissible where they were necessary to give effect to a general policy and left the ultimate licensing decision with the Commission.

The distinction was not merely theoretical. After the directions were ultimately issued, the CRTC conducted the licensing process and decided among actual applicants. It approved ExpressVu's application for a national DTH satellite distribution undertaking following a public hearing, imposing detailed conditions of licence of its own. Cabinet had prescribed important elements of the regulatory framework; the Commission nevertheless conducted the proceeding and made the licensing decision.

The 1995 evidence therefore suggests that CRTC independence cannot itself define the limits of section 7. Parliament had expressly authorized Cabinet to influence the Commission through binding directions. Nor can the boundary be located simply by asking whether a direction affects a regulatory proceeding: an effective policy direction will often have regulatory consequences.

The harder question is whether the direction establishes the policy within which the Commission exercises its statutory discretion or instead prescribes the exercise of that discretion so completely that government has effectively made the regulatory decision itself. That was the point on which the CRTC and the government's defenders differed in 1995.

The DTH controversy did not settle that question. But by placing an actual regulatory dispute behind the statutory language, it gave practical content to a concern that had run through the legislative history from Bureau's warnings about "specific cases" and "individual situations" to Parliament's eventual choice of directions "of general application on broad policy matters."[137]

JJ) 1995: The Government Proceeds-and the CRTC Implements the DTH and DTH PPV Directions

The parliamentary proceedings did not produce an authoritative interpretation of section 7. Nor did they persuade the government to abandon the proposed DTH directions. On July 6, 1995, the Governor in Council issued two DTH and DTH PPV Directions: the Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order, SOR/95-319, and the companion Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television

[137] House of Commons, Standing Committee on Canadian Heritage, proceedings concerning the proposed DTH directions, June 1995; Evidence, Meeting No. 93, June 13, 1995; Evidence, Meeting No. 97, June 15, 1995; Decision CRTC 95-901, December 20, 1995.

Programming Undertakings) Order, SOR/95-320. The successive 1995 DTH texts are reproduced at Appendices B-D.[138]

The final Orders are important because they show how far the government believed a valid section 7 direction could go. They unquestionably addressed a broad national policy issue: the development of Canadian DTH satellite broadcasting. The distribution Order declared that DTH undertakings should operate under licence in a dynamically competitive market and should contribute to Canadian programming.

But the operative provisions went considerably further than stating those objectives. The CRTC was directed to ensure particular features of the regulatory framework, including Canadian programming contributions and the application of generally applicable Canadian satellite policy.

More strikingly, the Order prescribed elements of the licensing process itself. Section 5 directed the Commission not to permit DTH distribution undertakings to operate other than under licence and, following the licensing process, to take the necessary steps to terminate any other means of authorization. Section 6 prohibited the Commission from refusing a DTH distribution licence for the sole reason that the applicant also held a DTH pay-per-view licence.

That change answered one of the Committee's most specific concerns. The proposed provision had required the CRTC, immediately upon the Direction coming into force, to ensure that no DTH undertaking operated otherwise than under licence-language opponents argued was effectively directed at the existing exemption order. The final Direction retained the policy that DTH undertakings should ultimately operate under licence, but deferred termination of any other authorization until completion of the licensing process.[139]

Section 7 was more specific still:

> "The CRTC is directed to call, immediately … for licence applications"
>
> and to complete the licensing process as soon as practicable and, absent the most compelling circumstances, no later than November 1, 1995.

The companion pay-per-view Order similarly required the Commission immediately to call for applications for English- and French-language DTH pay-per-view undertakings. The government was therefore doing considerably more than identifying the desired policy destination. It was prescribing important elements of the route by which the Commission was to reach it.[140]

Yet the Orders stopped short of naming the successful applicants. That distinction was central to the government's defence throughout the controversy. Cabinet established the policy framework

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[138] Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order, SOR/95-319, P.C. 1995-1105, July 6, 1995; Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order, SOR/95-320, P.C. 1995-1106, July 6, 1995.

[139] Proposed Direction to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order, s. 4(b); Senate, Standing Committee on Transport and Communications, Tenth Report, presented June 21, 1995, pp. 17–18, 40; Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order, SOR/95-319, s. 5.

[140] SOR/95-319, ss. 3–7; SOR/95-320, ss. 3–6. Section 7 of SOR/95-319 required an immediate call for applications and completion of the licensing process, absent the most compelling circumstances, by November 1, 1995.

and constrained aspects of its implementation, but the CRTC would conduct the proceedings, assess the applicants and decide who received licences.

The Commission complied. It called for applications on July 11. The ensuing process produced three applications for national DTH distribution undertakings and six for DTH pay-per-view services, followed by a public hearing extending from October 30 to November 9. The Commission subsequently stated that its decisions were reached in light of both the government's DTH Orders and the record of its public proceeding.

The importance of 1995 is therefore not that it supplied a definitive interpretation of section 7. It did not. No court decided whether the Orders were "of general application on broad policy matters," and the competing parliamentary and legal arguments remained unresolved.

Its importance is that the controversy exposed, only four years after enactment, the central difficulty inherent in the statutory formula.

The CRTC's interpretation gave substantial weight to the regulator's freedom to determine how broad governmental policy should be implemented. Its April 24 position was that directions should be "general and broad," not "specific and narrow."

Ritchie, Tassé and the government advanced a broader conception of the power. A policy did not cease to be general merely because it was stated precisely. Cabinet could prescribe measures necessary to make its general policy effective, provided that the CRTC retained the regulatory decisions Parliament had entrusted to it.

The treatment of the required DTH pay-per-view contribution provides a particularly useful example. The April proposal would have required a contribution to independent Canadian production of "not less than 5%" of gross annual revenues. The final July Direction no longer fixed 5% as an operative requirement; instead, it required a significant financial contribution derived from a percentage of gross annual revenues. The 5% figure did not disappear entirely. It was moved into a "whereas" recital rather than retained in the binding direction. The government's policy preference therefore remained visible, but the numerical requirement was no longer itself an operative instruction to the CRTC.[141]

The final Orders demonstrate the practical consequences of the government's interpretation. They applied to classes of undertakings rather than named licensees and addressed an unquestionably important national broadcasting policy. But they also contained detailed and mandatory instructions governing the regulatory framework and licensing process.[142]

[141] Proposed Direction to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order, Canada Gazette, Part I, April 29, 1995; final Direction, SOR/95-320, July 6, 1995.

[142] CRTC, Public Notice CRTC 1995-217, December 20, 1995; Decision CRTC 95-901, December 20, 1995; Decision CRTC 95-902, December 20, 1995.

Table 1 – 1995 DTH Distribution Direction: Three Versions

Only provisions material to the present discussion are reproduced. The complete texts of the three stages are reproduced at Appendices B-D.

Issue	Panel - Apr. 1995	Proposed - Apr. 29	Final - July 6 (SOR/95-319)
Policy	"unrestricted market entry through licensing," subject to appropriate requirements	Substantially unchanged	New overarching "dynamically competitive market."
Programming	"same rules"	Same	"substantially the same rules" - more latitude.
Satellite reception	Signals from any satellite available to other distributors	Same	Separate requirement deleted.
Canadian satellites	Same rules	Same	"same generally applicable Canadian policy."
Canadian contribution	Equal Class 1 cable community-programming basis	Same comparator	"equitable obligations"; "maximum contributions"; significant percentage of revenues.
Program rights	Detailed contractual protections	Same	Substantially retained.
PPV / foreign satellite	Only DTH PPV; foreign-satellite use protected	Same	PPV retained; satellite issue recast by general policy.
French PPV	English service requires French service	Same	Qualified: at least one French service once licensed.
Origination	Prohibited	Same	Deleted.
Licence / exemption	Licence only; eliminate other authorization	Same	Retained; elimination follows licensing.
Cross-ownership	No refusal solely because applicant holds PPV licence	Same	Retained.
Timing	Within 90 days; earliest practicable	Same	Immediate call; absent compelling circumstances, complete by Nov. 1, 1995.

The second direction dealt with the related but distinct DTH pay-per-view programming undertaking. Its provisions differed from those applicable to DTH distribution undertakings and are set out separately below.

Table 2 – 1995 DTH Pay-Per-View (PPV) Direction: Three Versions

Only provisions material to the present discussion are reproduced. The complete texts of the three stages are reproduced at Appendices B-D.

Issue	Panel - Apr. 1995	Proposed - Apr. 29	Final - July 6 (SOR/95-320)
Policy	Unrestricted market entry	Unchanged	Dynamically competitive market.
Licence class	Establish PPV class	Same	Retained for DTH PPV.
Programming rights	Prohibit exclusive rights	Same	Exclusive or other preferential rights prohibited.
Canadian contribution	Same basis; not less than 5%	Same	5% removed from operative text; maximum contributions/significant percentage; 5% appears in recital.
Exhibition / remittances	Detailed ratios, minimums and remittances	Same	Substantially retained.
Sex-role / violence	Expressly applied	Same	Deleted as separate direction.
Independent production	Parity requirement	Same	Deleted as separate prescription.
Foreign satellites	Do not prohibit	Same	Recast as general policy; no refusal solely for compliant use.
Cross-ownership	Permitted subject to stated rule	Same	Retained.
Licensing / timing	No coordinated immediate-call provision	Same	Immediate coordinated English/French calls.

The 1995 process left an important distinction. A direction may concern a broad policy matter and nevertheless raise a separate question about whether it is sufficiently general in application. Conversely, the presence of detailed provisions does not necessarily establish that a direction has ceased to be general: the provisions may simply implement a broader policy applying across a class.

The statute itself does not say where that line lies.

An interesting comparative decision is *Mossell (Jamaica) Ltd. v. Office of Utilities Regulation*, in which the Judicial Committee of the Privy Council considered the scope of a ministerial direction-making power under section 6 of Jamaica's *Telecommunications Act*. The provision stated:

> The Minister may give to the Office such directions of a general nature as to the policy to be followed by the Office in the performance of its functions under this Act as the Minister considers necessary in the public interest and the Office shall give effect to those directions.

The Minister had directed the Office of Utilities Regulation not to intervene in certain telecommunications interconnection charges. The Privy Council held that the direction was ultra vires because it prevented the regulator from performing statutory duties. The authority to issue general policy directions did not extend to prohibiting the regulator from carrying out responsibilities assigned to it by legislation.

The Privy Council did not decide whether the direction was sufficiently general, disposing of the case instead on the separate ground that it unlawfully restricted the regulator's statutory functions. Although the Jamaican provision differs from sections 7 and 8 of the Canadian legislation, the decision illustrates a related limitation on governmental direction-making powers: even a direction concerning general policy must be consistent with the regulator's statutory responsibilities.[143]

What 1995 established in Canada was that the six words added to Bill C-136 in 1988 were not merely drafting decoration. Within four years of their enactment, the CRTC, government, Parliament and some of the country's leading broadcasting lawyers were debating precisely how the two limitations operated when Cabinet sought to turn broad policy into binding regulatory instructions.

That question was left unresolved. It would reappear, in remarkably similar terms, when governments later used the parallel power in section 8 of the *Telecommunications Act*.

[143] *Mossell (Jamaica) Ltd. v. Office of Utilities Regulation*, [2010] UKPC 1, paras. 14, 33–40, particularly paras. 37–40. See also paras. 41–45 concerning the regulator's obligation to comply with an invalid direction. Courtesy of Michael H. Ryan.

KK) 2006: The Telecommunications Policy Review Panel and the First Telecommunications Policy Direction

After the DTH controversy, section 7 produced no comparable public dispute over the boundary between governmental policy and regulatory decision-making. The next important development came instead under its telecommunications counterpart, section 8 of the *Telecommunications Act*.

The immediate background was the Telecommunications Policy Review Panel, appointed in 2005 to conduct a comprehensive review of Canada's telecommunications policy and regulatory framework. Its March 2006 Final Report recommended much greater reliance on market forces and substantially less economic regulation. It also considered the respective roles of government and the CRTC.

The Panel regarded section 8 as an important means by which government could establish telecommunications policy while leaving its regulatory implementation to the Commission. Significantly, it described the power as limited in both "subject matter and specificity." A direction had to concern the statutory telecommunications policy objectives and, by virtue of section 8 itself, be one "of general application on broad policy matters."[144]

The Panel's endorsement of section 8 must, however, be understood as part of a broader institutional design. It did not propose simply to make greater use of policy directions while leaving intact all of Cabinet's existing authority over particular Commission decisions. The Panel also recommended repealing the Governor in Council's power under section 12 to review individual CRTC telecommunications decisions. Under its proposed scheme, Cabinet could establish prospective policy through generally applicable directions on broad policy matters, while the Commission would apply that policy in deciding particular regulatory matters without Cabinet subsequently substituting its own decision for that of the CRTC through the review-and-vary process.[145]

The distinction is important. Section 8 and section 12 perform different functions. Section 8 permits Cabinet to establish binding policy prospectively, subject to the requirements of general application and broad policy. Section 12, by contrast, operates upon an actual CRTC decision and permits the Governor in Council to vary or rescind that decision or refer it back to the Commission for reconsideration. The Panel's proposed reforms would therefore have drawn a sharper institutional line between governmental policy-making and the disposition of particular regulatory decisions.

Hank Intven, a member of the Panel, appearing before the House Industry Committee in 2007, made the institutional connection explicit. Whatever one thought of the government's recent orders varying individual CRTC decisions, he said, "I don't think anyone in a modern industrialized democracy believes that the political arms of government should regularly interfere with the decision-making process of an independent professional telecom regulator."

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[144] Telecommunications Policy Review Panel, Final Report 2006 (Ottawa: Industry Canada, March 2006), ch. 10, p. 10-6.

[145] Telecommunications Policy Review Panel, Final Report 2006, Recommendation 9-5(c) (List of Recommendations, p. 12-19), recommending repeal of Cabinet's power to review individual CRTC telecommunications decisions.

Over the longer term, government and Parliament should instead develop clearer policy directions to be administered by an independent professional regulator. His evidence therefore supports reading the Panel's proposed use of section 8 and its proposed removal of Cabinet review of individual decisions as complementary elements of the same institutional design.[146]

As an immediate step, the Panel recommended that the government issue a policy direction under section 8. Its proposed direction would require the CRTC to rely more heavily on market forces and, where regulation remained necessary, to employ measures that were efficient and proportionate to their purpose. The TPRP's proposed Direction is reproduced at Appendix E.[147]

The government adopted that recommendation quickly. On June 13, 2006, it tabled a proposed direction, which was published in the Canada Gazette on June 17, and, following consultation and parliamentary review, issued the final Policy Direction, SOR/2006-355, on December 14, 2006. The government acknowledged that its text drew heavily on the Panel's proposal. The June 2006 proposed Direction and December 2006 final Direction are reproduced at Appendices F and G.[148]

But it did not adopt the other half of the Panel's institutional design. Section 12 remained in force, including Cabinet's authority to vary individual CRTC decisions. Indeed, during the same period the government was itself using the section 12 power in telecommunications matters. The resulting statutory framework therefore retained both forms of Cabinet authority: the prospective policy-direction power under section 8 and the power under section 12 to intervene in particular Commission decisions after they had been made.[149]

The 2006 Direction instructed the Commission to

> "…rely on market forces to the maximum extent feasible"

and, when regulation was necessary, to

> "…use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary".

The 2006 Direction also prescribed considerations governing regulatory measures, including technological and competitive neutrality, economic efficiency and the treatment of wholesale arrangements.[150]

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[146] House of Commons, Standing Committee on Industry, Science and Technology, Evidence, Meeting No. 43, February 12, 2007 (Hank Intven).

[147] Telecommunications Policy Review Panel, Final Report 2006, ch. 10, pp. 10-6–10-8.

[148] Industry Canada, News Release, June 13, 2006; Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355; Regulatory Impact Analysis Statement; Canada Gazette, Part I, vol. 140, no. 24, June 17, 2006, p. 1606.

[149] Order Varying Telecom Decision CRTC 2005-28, SOR/2006-288, P.C. 2006-1314, registered November 9, 2006.

[150] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355, s. 1(a)–(c).

It was consequently an important direction. It did not merely repeat the telecommunications policy objectives enacted by Parliament. It altered the general orientation of the CRTC's regulatory decision-making across the telecommunications sector.

The proposed Direction also generated an explicit debate over the limits of section 8. The Union des consommateurs and Michael Janigan of the Public Interest Advocacy Centre questioned whether a policy direction could be used to reshape regulatory rules that properly required legislative amendment. TELUS and Bell took the opposite view. Janet Yale, appearing for TELUS, said that the Direction fell "squarely within what Parliament intended when it enacted section 8," while Bell representative Lawson Hunter similarly defended it as falling within Parliament's grant of authority to government.

The House Industry Committee ultimately recommended a moratorium so that it could conduct a fuller review. The government declined. In the Regulatory Impact Analysis Statement accompanying the final Direction, it stated that it was satisfied that the Order, in its final form, was "fully within the power and authority of section 8 of the *Telecommunications Act*."

In rejecting delay, the government described the section 8 mechanism in functional terms: "The power to issue policy directions was designed to be an instrument to provide timely policy guidance to the regulator."

The episode therefore produced competing contemporary interpretations of the statutory boundary. Opponents questioned whether section 8 could be used to accomplish changes that properly required legislation; supporters emphasized that Cabinet was establishing general policy while leaving the CRTC to translate that policy into individual regulatory decisions. No court resolved the disagreement.

At the same time, its architecture differed importantly from the 1995 DTH Orders. Rather than focusing on a particular licensing context, its principal commands operated across regulatory proceedings and established general principles that the Commission was required to apply when exercising its statutory powers.

The episode is important less for the controversy surrounding the market-oriented policies than for the institutional structure in which the Direction operated. The government adopted the Panel's model of prospective policy direction without repealing Cabinet's separate section 12 power over individual CRTC decisions. Later disputes would sharpen the resulting question: how far could section 8 prescribe regulatory means or outcomes while remaining a direction of general application on broad policy matters?

The 2006 proceedings did not establish that specificity was incompatible with section 8. The government proceeded with a binding direction that told the CRTC how to approach regulation, including reliance on market forces and proportionality, and defended the instrument as policy guidance concerning the exercise of the Commission's statutory mandate. The controversy concerned how far such guidance could go. The fact that a direction could contain meaningful instruction was not in dispute.

Table 3 – 2006 Telecommunications Policy Direction: Three Versions

Only provisions material to the present discussion are reproduced. The complete texts are reproduced at Appendices F and G.

Issue	TPRP - Mar. 2006	Government - June 2006	Final - Dec. 2006
Mandate	"Interpret and implement"; emphasis on s.7(c), (f)	Same	"Implement"; express interpretive direction and special emphasis deleted.
Market forces	Maximum feasible reliance	Same	Retained.
When to regulate	Market forces unlikely to achieve objective within reasonable time; benefits exceed costs	Different criteria; SMP deleted	Efficient, proportionate, minimum necessary interference.
Significant market power	SMP prerequisite for specified forms of economic regulation	Deleted	Deletion retained.
Efficient entry	Do not deter efficient entry or promote inefficient entry	Retained / recast	Retained.
Neutrality	Symmetrical and competitively neutral to greatest extent possible	Retained / elaborated	Retained.
Wholesale	Limit mandated access; essential-services/SMP model	Phase-out review replaces fixed rule	Review retained with specified market-power and network-construction considerations.
Tariffs	Less intrusive mechanisms preferred	Minimally intrusive and onerous	Retained.
CRTC duties	General regulatory principles	Adds performance standards and streamlining duties	Largely retained.
Institutional setting	Longer-term repeal of s.12 review power proposed	s.12 retained	s.12 retained.

LL) 2019: A Second Telecommunications Policy Direction

In 2019, the government issued a second direction under section 8 of the *Telecommunications Act*. Unlike the 2006 Direction, which had emphasized reliance on market forces and regulatory measures that interfered with market forces only to the minimum extent necessary, the new Direction emphasized competition, affordability, consumer interests and innovation.[151] The March 2019 proposed Direction and June 2019 final Direction are reproduced at Appendices H and I.

The 2019 Direction did not repeal or replace the 2006 Direction. It was expressly framed as providing "additional directions," and one of its stated purposes was "to guide the Commission on how the 2006 Direction is to be implemented." The two directions therefore operated together.[152]

The operative provision required the CRTC, in exercising its powers and performing its duties under the *Telecommunications Act*, to consider how its decisions could promote competition, affordability, consumer interests and innovation. Among other things, the Commission was directed to consider whether its decisions would encourage competition and investment, foster affordability and lower prices, protect consumer rights, reduce barriers to entry, enable innovation and stimulate investment in research and development.[153]

[151] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation, SOR/2019-227, P.C. 2019-803, registered June 17, 2019, s. 1.

[152] SOR/2019-227, preamble.

[153] SOR/2019-227, s. 1(a).

The Direction also required the Commission, in its decisions, to demonstrate compliance with the Direction and explain how those decisions promoted the identified objectives, where applicable.[154]

During parliamentary debate, the Direction was described as generally applicable. On June 10, 2019, Lloyd Longfield, Liberal MP for Guelph, described the proposed approach as:

> "…a clear and binding direction to the CRTC"

that would:

> "…apply to all its decisions on a going forward basis."[155]

It established considerations that were to inform the Commission's decision-making across the telecommunications sector rather than prescribe the result of a particular proceeding or determine the rights of a particular carrier.

The final Direction reflected the same approach. When it was issued on June 17, 2019, the government described it as requiring the CRTC to consider competition, affordability, consumer interests and innovation in all of its telecommunications decisions. The CRTC likewise stated that the Direction would be applied to current and future telecommunications proceedings.[156]

One participant in the 2019 consultation pressed the issue in the opposite direction. DistribuTEL argued that the proposed Direction should be more mandatory: rather than merely requiring the CRTC to "consider" how its measures would promote competition, affordability, consumer interests and innovation, Cabinet could require the Commission to ensure that its measures promoted those outcomes. DistribuTEL expressly argued that stronger language would not cease to be "of general application" on "broad policy matters." The government did not adopt the proposal and retained the less prescriptive "consider" formulation.[157]

The 2019 Direction generally identified policy considerations to guide Commission decision-making rather than prescribing particular regulatory mechanisms. Cabinet established generally applicable policy priorities, while leaving the CRTC to determine their consequences in particular proceedings and the regulatory measures required in individual cases.

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[154] SOR/2019-227, s. 1(b).

[155] House of Commons Debates, 42nd Parl., 1st Sess., No. 430, June 10, 2019, p. 28823 (Lloyd Longfield).

[156] Innovation, Science and Economic Development Canada, "Government directs CRTC to place consumer interests and innovation at the forefront of telecom decisions," June 18, 2019; Canadian Radio-television and Telecommunications Commission, "Statement by the CRTC's Chair and Chief Executive Officer, Ian Scott, on the government's policy direction," June 18, 2019.

[157] DistribuTEL Communications Limited, Comments on the Proposed Order Issuing a Direction to the CRTC, 2019, paras. 14–17; SOR/2019-227, s. 1(a).

Table 4 – 2019 Telecommunications Policy Direction: Proposed and Final

Only provisions material to the present discussion are reproduced. The complete texts are reproduced at Appendices H and I.

Issue	Proposed - Mar. 9, 2019	Final - June 2019 (SOR/2019-227)
Relationship with 2006	Operates in complementary fashion with 2006 Direction	"Additional directions"; guides how 2006 Direction is implemented.
Reach	When relying on regulation, consider how "measures used" promote objectives	Broadened to Commission "decisions"; "when relying on regulation" deleted.
Competition	Encourage all forms of competition	Adds investment.
Affordability	Lower prices particularly where there is "potential" to exercise market power	"Potential" deleted; focuses on exercise of market power.
Access	Affordable access to high-quality services	Adds all regions, including rural areas.
Consumer rights	Enhance and protect consumer rights	Adds accessibility.
Entry	Reduce barriers for "new and smaller" providers	New, regional or smaller than incumbent national providers.
Innovation / R&D	Enable innovation and stimulate R&D/intangible investment	Substantially retained.
Reasons / compliance	When relying on regulation, demonstrate compliance and identify how measures promote objectives	Broadened to decisions generally; explain promotion of objectives where applicable.
Pending matters	Applies to pending matters	Retained.

Its significance for the present history lies partly in the contrast with what followed. When the government returned to section 8 in 2022, the proposed direction did considerably more than identify policy objectives to guide Commission decision-making. It contained increasingly detailed instructions concerning particular regulatory mechanisms. The resulting debate brought the question of specificity - and the meaning of both "general application" and "broad policy matters" - back to the centre of the section 8 power.

Between the 2019 and 2022 Directions, the Broadcasting and Telecommunications Legislative Review Panel considered the institutional balance directly. Its Terms of Reference asked whether the legislation struck "the right balance between enabling government to set overall policy direction while maintaining regulatory independence." In its January 2020 Final Report, the Panel did not recommend changing the substantive scope of the Governor in Council's direction power under either Act. The review therefore left the existing statutory limitation in place while the next round of telecommunications policy directions was being developed.[158]

MM) 2022: The Specificity Problem Returns

In June 2022, the government proposed to replace the 2006 and 2019 Policy Directions with a single new direction under section 8 of the *Telecommunications Act*. The proposed Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy retained broad objectives such as competition, affordability, consumer interests and innovation, but went

[158] Broadcasting and Telecommunications Legislative Review Panel, Terms of Reference, June 2018, questions 7.2 and 14.1; Broadcasting and Telecommunications Legislative Review Panel, Canada's Communications Future: Time to Act, Final Report, January 2020, discussion of government policy directions and regulatory independence.

considerably further than its predecessors in prescribing particular regulatory approaches.[159] The June 2022 proposed Direction is reproduced at Appendix J.

The distinction is apparent within the proposed Direction itself. Some provisions stated general principles. The CRTC should ensure that its proceedings and decisions were transparent, predictable and timely; regulatory measures should be efficient and proportionate; and decisions should be based on sound and recent evidence.

Other provisions were substantially more prescriptive. In relation to fixed Internet competition, the Commission "must" maintain a regulatory framework mandating wholesale access. It "must" continue to mandate aggregated wholesale high-speed access until it determined that broad, sustainable and meaningful competition would persist without it. It "must" mandate wholesale high-speed access services offering a variety of speeds, including low-cost options in all regions.[160] Other provisions prescribed approaches concerning mobile wireless competition, consumer protection, accessibility and universal access.

The government was therefore doing more than identifying policy objectives for the Commission to pursue. In several areas it was identifying regulatory mechanisms that the CRTC was required to maintain or adopt.

That made the government's explanation of its choice of instrument particularly significant. The Regulatory Impact Analysis Statement expressly identified section 8 as authority to issue directions "of general application to the CRTC on broad policy matters." It also explained that the government had received petitions asking it to intervene in technical regulatory matters.[161]

The government distinguished those matters from the proposed Direction. Its position was that:

> "…it is more appropriate for the CRTC to adjudicate and implement these matters in consultation with industry based on policy guidance provided by the Government."

That distinction closely resembles the institutional division encountered repeatedly in the history of the power of direction: government establishes policy; the regulator adjudicates and implements it.

The difficulty was determining how far "policy guidance" could go. The proposed Direction did not merely tell the CRTC that wholesale Internet competition was an important policy objective. It required the Commission to maintain wholesale access and, at least until specified competitive conditions were satisfied, aggregated wholesale high-speed access.

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[159] Proposed Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy, Canada Gazette, Part I, Vol. 156, No. 23, June 4, 2022, pp. 2857–2868, proposed ss. 1–23; Regulatory Impact Analysis Statement.

[160] *Ibid*., proposed ss. 9–11; see also Regulatory Impact Analysis Statement, pp. 2858–2860, describing the mandatory wholesale-access framework and aggregated wholesale high-speed access requirements.

[161] *Ibid*., Regulatory Impact Analysis Statement, p. 2857 (statutory authority under s. 8) and pp. 2861–2862 ("Instrument choice").

The government addressed that issue indirectly in explaining its choice of a policy direction rather than legislation. It characterized the proposed Direction as "outcome-based regulation":[162]

> "…its measures are direct but give considerable discretion to the CRTC, which will be responsible for elaborating any changes to its own activities or any compliance actions by industry."

The formulation is important. The government did not proceed on the assumption that a direction on a broad policy matter must be confined to statements of broad principle. It contemplated directions that could be "direct" and could prescribe regulatory approaches, provided sufficient discretion remained with the CRTC in implementing them.[163]

The circumstances surrounding the proposed Direction made the issue sharper. At the same time, the government was considering petitions under section 12 asking it to vary or rescind the CRTC's 2021 decision concerning wholesale Internet rates. It declined to do so. The CRTC's decision remained in place.[164]

Instead, the government proposed to address its broader concerns about Internet competition prospectively through section 8. The juxtaposition is revealing. Section 12 provided a mechanism for Cabinet to intervene in relation to a particular CRTC decision. The government declined to use that mechanism to alter the wholesale rates established by the Commission. It instead turned to section 8 to establish policy governing the regulatory framework going forward. Yet the proposed section 8 Direction itself contained detailed and mandatory instructions about important elements of that framework.

The proposal therefore brought back, in a telecommunications setting, a problem encountered during the 1995 DTH controversy. A direction could plainly be binding. It could also do more than repeat the policy objectives contained in the statute. But at what point did sufficiently detailed policy guidance cease to concern a "broad policy matter", or cease to be "of general application", and instead become direction concerning regulatory choices that the Commission itself was supposed to make?

The concern was not new. As early as 1976, the CRTC had resisted a direction power that could permit government to tell the regulator "precisely what to do." The subsequent legislative history increasingly distinguished broad or general governmental policy from particular regulatory decisions. The 2022 proposal raised the same boundary question in a much more developed statutory setting.

The ensuing consultation produced submissions that addressed the words "general application" and "broad policy matters" directly.

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[162] *Ibid*., Regulatory Impact Analysis Statement, pp. 2861–2862, "Instrument choice."

[163] *Ibid*., p. 2862.

[164] Order in Council P.C. 2022-0535, May 19, 2022, concerning petitions in respect of Telecom Decision CRTC 2021-181; see also Canada Gazette, Part I, Vol. 156, No. 23, June 4, 2022, pp. 2856, 2861–2862.

NN) 2022: The Interveners Debate the Limits of Section 8

The proposed Direction generated extensive comment. Most submissions addressed telecommunications policy rather than the legal limits of the power of direction. A smaller group, however, argued directly that particular provisions exceeded the authority conferred by section 8.

Their objections returned to the two limitations that had accompanied the power since 1993: a direction must concern "broad policy matters" and must be "of general application."

McCarthy Tétrault: Broad Policy and General Application as Separate Requirements

McCarthy Tétrault LLP identified three requirements imposed by section 8: a direction must be of general application, concern broad policy matters, and relate to the Canadian telecommunications policy objectives.[165]

McCarthy Tétrault did not contend that the proposed Direction as a whole exceeded section 8. It described section 2, identifying competition, affordability, consumer interests and innovation as considerations for CRTC decision-making, as:

> "a good example of a proper direction – it speaks to the broad policies that the CRTC is directed to pursue."

Its objection focused principally on sections 9 to 11 concerning wholesale Internet regulation. Those provisions required the Commission to maintain mandatory wholesale access, continue aggregated wholesale high-speed access until a specified competitive condition was satisfied, and mandate access to services offering a variety of speeds and costs.

McCarthy Tétrault characterized these as "very specific policies which the CRTC is directed to implement."

It advanced a separate objection under the words "general application." Although the provisions were framed in general terms, it argued that in practice they applied to a particular group - incumbent carriers - and a particular regulatory dispute concerning mandatory wholesale access.

The submission thus treated the two parts of the statutory formulation as doing different work. A direction could cease to concern a "broad policy matter" because it descended too far into regulatory detail. Separately, it could cease to be "of general application" because, despite formally general wording, its practical operation was directed to a particular group or dispute.

McCarthy Tétrault also relied on the relationship between sections 8 and 12 of the *Telecommunications Act*. Section 12 expressly permits Cabinet to vary, rescind or refer back a particular CRTC decision. Under that provision, however, the Commission decides first and Cabinet subsequently exercises its reviewing power. McCarthy Tétrault argued that section 8 could not instead be used prospectively to require the CRTC to make the particular decision

[165] McCarthy Tétrault LLP, representations concerning the proposed Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy, July 2022, discussing s. 8 and proposed ss. 2 and 9–11.

Cabinet preferred—allowing Cabinet to become the regulatory "first mover" and effectively "step into the shoes of the CRTC."[166]

TELUS: Broad Guidance, Not Specific Regulatory Instructions

TELUS Communications Inc. made a similarly direct jurisdictional argument. It accepted sections 2 to 7 of the proposed Direction as legitimate exercises of the section 8 power. Those provisions, it said, provided broad guidance concerning competition, affordability, consumer interests, innovation and principles of effective regulation.

TELUS drew the line elsewhere. It argued that sections 9 to 13 and several other provisions were sufficiently "narrow, specific and prescriptive" to exceed section 8. In its words, the offending provisions concerned matters of "specific (not general) application on narrow (not broad) policy matters."[167]

TELUS supported that interpretation with the legislative history of the direction power. It returned to Bill C-20 in 1984–85, when the proposed power would have authorized Cabinet to issue directions concerning "any matter" within the CRTC's jurisdiction. André Bureau, then Chairman of the CRTC, had objected that this could permit directions on the "most trivial and minute details" and had sought a more restricted formulation.

TELUS also returned to the enactment of the *Telecommunications Act*. It quoted Perrin Beatty, Minister of Communications, explaining to the Senate Committee in 1992 that the purpose of the direction power was not to involve government in "specific concerns about regulatory proceedings," which would remain with the CRTC. The power operated "before the fact" and permitted government to give "very broad direction" in "matters of general application."[168]

For TELUS, the subsequent statutory formulation reflected that division of responsibility. Cabinet could give broad guidance as to the interpretation and pursuit of telecommunications policy objectives. It could not prescribe the particular regulatory actions by which the Commission must implement them.

Richard Schultz: The Legislative History as an Institutional Choice

TELUS supplemented its submission with an expert report by Richard Schultz, James McGill Professor of Political Science Emeritus at McGill University. TELUS retained Schultz specifically to examine the historical rationale for the direction power, the legislative constraints upon it, and the legitimacy of particular provisions of the proposed Direction.[169]

Schultz's argument was historical and institutional rather than primarily doctrinal. He traced repeated efforts to determine the proper division of responsibility between government and the independent telecommunications regulator. In his account, the eventual wording of section 8

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[166] *Ibid*., discussion of *Telecommunications Act*, ss. 8 and 12.

[167] TELUS Communications Inc., Proposed Policy Direction - TELUS Comments, July 19, 2022, pp. 2–3.

[168] *Ibid*., pp. 24–25.

[169] *Ibid*., p. 2 and Appendix B, Richard Schultz, June 4 Proposed Cabinet Direction to the CRTC.

represented a deliberate choice after years of proposals for considerably broader governmental powers.

The significance of the 1993 formulation was therefore not simply that Parliament had authorized policy directions. It had authorized a restricted form of direction:

> "…directions of general application on broad policy matters."

Schultz concluded that the resulting institutional balance made the CRTC the primary decision-maker in interpreting the statutory objectives and determining the regulatory methods by which they would be implemented, while Cabinet retained a narrowly constrained prospective direction power and its separate authority to review particular Commission decisions.[170]

He considered sections 9 to 14 of the proposed Direction especially problematic. In his view, they appeared neither to be "of general application" nor to concern "broad policy matters," but instead sought to constrain the Commission's discretion over the regulatory methods it would employ. Had Parliament retained Bill C-20's proposed authority to direct the CRTC on "any matter," Schultz observed, such provisions might have been permissible. That formulation had not survived.[171]

Schultz also reached back to the 1995 DTH controversy. He relied on the Senate Committee's conclusion that the words "general" and "broad" had been added to prevent government from "dictating or micromanaging" how the CRTC regulated the industry, and its characterization of the intended directions as "general rather than specific and broad rather than narrow." He regarded that history as directly relevant to the proposed 2022 Direction.[172]

His conclusion was that the proposal represented, in his view, an "unprecedented degree of meddling" in technical matters previously left to the Commission and risked further eroding the CRTC's independent responsibility for implementing public policy.[173]

Michael Ryan: The Parallel Legislative Histories

Schultz's historical analysis also provides a useful connection to the work of Michael H. Ryan, whose scholarship he cited in discussing the history of Cabinet intervention in telecommunications regulation. Schultz relied on Ryan's study of Cabinet appeals in describing the historically restrained use of governmental review of regulatory decisions.[174]

Ryan's broader treatment of the direction power is particularly relevant here. In his discussion of section 8 in Canadian Telecommunications and Online Services Law, Ryan traces the power

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[170] Richard Schultz, June 4 Proposed Cabinet Direction to the CRTC, Appendix B to TELUS Communications Inc., Proposed Policy Direction - TELUS Comments, July 19, 2022, pp. 15–21.

[171] *Ibid*., discussion of proposed ss. 9–14; see also TELUS Comments, pp. 2–3.

[172] TELUS Comments, pp. 26–27; Richard Schultz, Appendix B; Senate Standing Committee on Transport and Communications, Tenth Report, June 1995, p. 13.

[173] TELUS Comments, p. 2; Richard Schultz, Appendix B.

[174] Schultz, Appendix B, citing Michael H. Ryan, "Executive Control of Administrative Action: 'Cabinet Appeals' and the CRTC" (2014), in his discussion of the historical use of Cabinet review of CRTC decisions.

through the 1975 Grey Paper, the Lambert Commission, the 1977–78 telecommunications bills, Bill C-20, and the work of the Economic Council and Law Reform Commission.

That history contains the same recurring distinction. Ryan records the CRTC's 1985 objection to a power permitting directions on the "most trivial and minute details," the Economic Council's recommendation that directions concern only "general policy matters" and not intervene once proceedings had begun in a "specific case," and the Law Reform Commission's view that ministerial control should occur "on a general policy level in advance of specific cases."[175]

Most significantly for present purposes, Ryan expressly connects the telecommunications history with broadcasting. His treatment of section 8 refers to the statutory history of section 7 of the *Broadcasting Act*, "which parallels that of s. 8 in significant respects." In his companion treatment of section 7, he states that the broadcasting power introduced in 1991 "has its roots in proposals that go back to 1975 that evolved alongside proposals" for a similar telecommunications direction power.[176]

Ryan does not reconstruct the detailed August 1988 sequence by which "of general application" was added to Bill C-136. His account nevertheless independently confirms the broader point apparent from the legislative record: the broadcasting and telecommunications powers developed along parallel and intersecting paths.

The Divide Exposed

Other participants made related arguments. BCE objected that mandatory provisions went beyond articulating broad policy and instead prescribed regulatory approaches the Commission was required to adopt. Rogers and the Canadian Wireless Telecommunications Association also questioned whether particular provisions exceeded section 8.[177] Vaxination Informatique approached the issue somewhat differently, emphasizing the character of a policy direction as enduring governmental guidance rather than a means of resolving a particular or "punctual" regulatory complaint.

The submissions did not establish a single test for section 8. They did, however, expose three related questions.

First, how specific may the subject matter of a direction become before it ceases to concern a "broad policy matter"?

Second, may a direction cease to be "of general application" even though drafted in general language because, in practical operation, it addresses a particular group, dispute or regulatory situation?

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[175] Michael H. Ryan, Canadian Telecommunications and Online Services Law, § 2:46, "Governor in Council - Power of Direction under the *Telecommunications Act*."

[176] *Ibid*., §§ 2:46–2:47.

[177] BCE Inc., Rogers Communications Inc. and Canadian Wireless Telecommunications Association, representations concerning the proposed Direction, July 19, 2022; CWTA, comments, pp. 2, 10, 12–13; Vaxination Informatique, comments, July 19, 2022, pp. 2, 12.

Third, how much regulatory discretion must remain with the CRTC? May Cabinet prescribe both the policy objective and the means by which it is to be achieved, or must selection of the regulatory means remain with the Commission?

Each question had antecedents in the earlier history. What was different in 2022 was the degree of prescription in the proposed Direction and the availability of nearly three decades of statutory language against which to test it.

The government would ultimately reject the jurisdictional objections. But in doing so it would necessarily take a position, if only implicitly, on how much regulatory specificity the words "directions of general application on broad policy matters" could bear.

OO) 2023: The Government Answers - and Issues the Renewed Direction

The final Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy was made on February 9, 2023, and registered the following day as SOR/2023-23.[178] It repealed the 2006 and 2019 Directions and replaced them with a single instrument. The final Direction is reproduced at Appendix K.

The accompanying Regulatory Impact Analysis Statement acknowledged the statutory limitation at the outset:

> "Section 8 of the Act provides the Governor in Council (GIC) with the authority to issue directions of general application to the CRTC on broad policy matters with regards to the telecommunications policy objectives set out in the Act."

At the same time, the government described the new Direction in terms considerably more concrete than the earlier Directions. It would provide "clear direction and guidance" on a number of matters and would "require[] the CRTC to put in place or maintain rules to improve competition." The RIAS nevertheless characterized the subjects addressed—including wholesale Internet access, wireless competition, consumer rights, broadband deployment and universal access—as "broad telecommunications policy areas."[179]

The Government Rejects the Section 8 Objections

The RIAS expressly recorded the jurisdictional objections raised during consultation:

> "BCE, Rogers, TELUS, the CWTA and McCarthy Tetrault suggested or argued that certain sections would exceed the authority of the GIC under section 8 of the Act. TELUS further argued that certain sections would be in conflict with provisions of the Act and therefore inoperable."

[178] Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy, SOR/2023-23, P.C. 2023-110, February 9, 2023, registered February 10, 2023, Canada Gazette, Part II, Vol. 157, No. 5, March 1, 2023, p. 638, ss. 22–23.

[179] Regulatory Impact Analysis Statement accompanying SOR/2023-23, "Background," "Objective" and "Description."

The government's answer was brief:

> "The Government considered and disagrees with these views."

It did not explain separately what it understood "general application" or "broad policy matters" to mean, nor why the provisions challenged as narrow and prescriptive nevertheless satisfied those requirements.[180]

That response is significant. The government did not avoid the jurisdictional issue by substantially withdrawing the provisions that had generated it. Although the final Direction contained a number of amendments, its central instructions concerning wholesale Internet regulation survived.

The Mandatory Wholesale Framework Remains

Proposed section 9 had required the Commission to maintain a regulatory framework mandating wholesale access for fixed Internet, monitor its effectiveness and adjust it as necessary. Final section 9 retained that structure. It provided that, in order to foster sufficient fixed Internet competition to protect users, the Commission "must" maintain a framework mandating wholesale services at just and reasonable rates, monitor its effectiveness and adjust it as necessary.[181]

The addition of the statutory language concerning just and reasonable rates refined the instruction. It did not alter its mandatory character.

The same was true of the provision that had attracted the sharpest criticism. Proposed section 10 provided:

> "The Commission must mandate the provision of an aggregated wholesale high-speed access service until it determines that broad, sustainable and meaningful competition will persist if the service is no longer mandated."

The final Direction retained that requirement and made it more explicit:

> "The Commission must mandate the provision of an aggregated wholesale high-speed access service - that is additional to any other types of wholesale high-speed access services that are mandated - until it determines that broad, sustainable and meaningful competition will persist even if the provision of an aggregated service is no longer mandated."[182]

The Commission therefore retained discretion to determine when competitive conditions justified ending the mandate. It did not retain the antecedent discretion to determine whether aggregated

[180] *Ibid*., "Consultation."

[181] SOR/2023-23, s. 9.

[182] *Ibid*., s. 10.

wholesale access should be mandated in the meantime. That distinction would later become central.

Some Flexibility Was Added - but Not to the Central Choice

There were changes elsewhere. Proposed section 11 had required wholesale high-speed access services at a variety of speeds, including low-cost options "in all regions," and had instructed the Commission not to permit discontinuance where that would eliminate affordable consumer options.

The final version removed the reference to "all regions" and the prohibition against discontinuance. Instead, it required the Commission to mandate a variety of speeds, including low-cost options, "for the purpose of ensuring affordable options for consumers while allowing for the modernization of networks."[183]

The RIAS records that the CRTC itself had suggested amendments intended to give flexibility to the broadband-funding provision and to "specify and focus" the provision concerning wholesale-service speeds. The government accepted those changes.[184] But these amendments did not adopt the broader solution proposed by BCE - replacing mandatory language with "should" or making regulatory measures conditional "if necessary." The core fixed-Internet provisions continued to say "must."

The final Direction therefore preserved an important feature of the 2022 proposal. Government did not merely identify competition, affordability or consumer interests as objectives and leave the Commission to select the regulatory means. In some areas it prescribed the regulatory framework itself.

Table 5 – 2022–23 Telecommunications Policy Direction: Proposed and Final

Only provisions material to the present discussion are reproduced. The complete texts are reproduced at Appendices J and K.

Issue	Proposed - June 2022	Final - Feb. 2023 (SOR/2023-23)
Overall direction	CRTC "must implement" s.7 objectives in accordance with Order	Retained.
Key objectives	Consider how decisions can promote competition, affordability, consumer interests and innovation	Substantially retained; "can promote" becomes "would promote."
Access	Affordable, high-quality service in all regions, including rural areas	Expanded to high-quality, reliable and resilient services; remote areas and Indigenous communities included.
Effective regulation	Transparent, predictable, coherent; efficient and proportionate measures	Retained.
Wholesale framework	"must" maintain fixed-Internet wholesale-access framework	Retained in substance.
Aggregated HSA	"must mandate" aggregated wholesale HSA until broad, sustainable and meaningful competition would persist without it	Retained and made explicit as additional to other mandated wholesale HSA services.
Speeds / affordability	"must mandate" variety of speeds, including low-cost options in all regions; discontinuance restriction	Retained with more flexibility; "all regions" and discontinuance prohibition removed.
Wholesale tariffs	More expedient interim/final tariffs; possible reform/expertise/best practices	Retained.

[183] *Ibid*., s. 11.

[184] Regulatory Impact Analysis Statement accompanying SOR/2023-23, "Consultation."

Issue	Proposed - June 2022	Final - Feb. 2023 (SOR/2023-23)
Mobile wireless	Promote competition, affordability, consumer interests and innovation; periodic review	Retained with elaboration.
Consumer protection	Strengthen protections, CCTS participation, sales/switching measures	Retained and refined.
Earlier Directions	Repeal 2006 and 2019 Directions	Retained.

A Broader Conception of Policy Direction

The 2006 Direction had instructed the Commission principally how to approach the statutory objectives - by relying on market forces to the maximum extent feasible and regulating efficiently and proportionately. The 2019 Direction added priorities such as competition, affordability, consumer interests and innovation.

The 2023 Direction went further. It combined provisions of that traditional kind with instructions requiring the Commission to maintain or employ particular regulatory mechanisms.

The government evidently regarded that degree of prescription as compatible with section 8. Its RIAS had already characterized the proposed instrument as "outcome-based regulation": its measures could be "direct" while leaving the CRTC "considerable discretion" to elaborate changes to its activities and compliance requirements for industry. The final Direction reflected that conception.

On that approach, a direction does not cease to concern a broad policy matter merely because it identifies a regulatory mechanism that the Commission must employ. What matters is that the direction operates within a broader policy field and leaves the Commission meaningful responsibility for designing and applying the resulting regulatory regime.

That was not the interpretation advanced by McCarthy Tétrault, TELUS, Schultz and others. Their argument placed the boundary earlier: Cabinet might prescribe the policy objective and its relative priority, but the Commission must remain free to determine the regulatory methodology and make the particular regulatory choices necessary to implement it.

The disagreement was therefore no longer abstract. Section 10 supplied a concrete test case. Cabinet had determined that aggregated wholesale high-speed access must be mandated. The Commission would determine its implementation and eventually decide when the prescribed competitive condition permitted the mandate to end.

Whether that remaining discretion was enough to preserve the Direction as one "of general application on broad policy matters" was left unresolved in 2023.

The issue would soon move from academic and regulatory debate into litigation, where it remains unresolved.

PP) 2024–26: Section 8 Reaches the Courts - SaskTel and the Meaning of “General” and “Broad”

The 2023 Direction did not remain merely an exercise in executive interpretation. Its wholesale-Internet provisions soon became part of the CRTC’s regulatory framework and, eventually, the subject of litigation.

Section 10 was central. It directed the Commission that it “must mandate” aggregated wholesale high-speed access until the Commission determined that broad, sustainable and meaningful competition would persist without it. The Commission subsequently reconsidered the wholesale high-speed access regime and, in Telecom Regulatory Policy CRTC 2024-180, required SaskTel and other large incumbents to provide aggregated wholesale access over fibre-to-the-premises facilities.[185]

SaskTel challenged that decision in the Federal Court of Appeal. Its argument brought directly before the Court the meaning of the words that had governed the direction power since 1993.

BCE Inc. also commenced an appeal arising from the same CRTC decision but subsequently discontinued it. SaskTel’s challenge therefore became the proceeding in which the section 8 issue remained live.[186]

SaskTel Separates the Three Statutory Requirements

SaskTel’s memorandum treats section 8 as imposing three distinct requirements. A direction must:

1. be “of general application”;
2. relate to “broad policy matters”; and
3. be “with respect to the Canadian telecommunications policy objectives.”[187]

That analytical structure is notable because it does not treat the statutory phrase as a single general restraint. Each component is said to impose an independent limitation.

On “general application,” SaskTel argues that “general” connotes universality or application to all cases rather than something partial or particular. Section 10, in its submission, fails that test

[185] SOR/2023-23, s. 10; Telecom Regulatory Policy CRTC 2024-180, August 13, 2024.

[186] BCE Inc. commenced a related appeal from Telecom Regulatory Policy CRTC 2024-180 and subsequently discontinued it; SaskTel’s appeal and judicial-review proceeding remained before the Federal Court of Appeal.

[187] Saskatchewan Telecommunications, Memorandum of Fact and Law, Saskatchewan Telecommunications v. Competitive Network Operators of Canada et al., Federal Court of Appeal files A-434-25 (lead file) and A-284-24, June 12, 2026, paras. 70–73.

because it applies to large incumbent carriers, in their relationship with resellers, in respect of a particular wholesale service.[188]

On "broad policy matters," the argument is different. "Broad" is said to describe policy that is general in nature and does not descend into detail. Section 10 instead imposes a specific requirement concerning one particular telecommunications service-aggregated wholesale HSA.[189]

SaskTel therefore advances substantially the same two-axis analysis that had emerged during the 2022 consultation: who or what the direction applies to, and the level of specificity at which Cabinet is directing the regulator.

Policy Direction or Regulatory Decision?

SaskTel's principal argument, however, goes beyond terminology.

It says that section 10 does not merely identify competition or wholesale access as policy objectives. It directs the Commission to employ a particular regulatory measure whose appropriateness would otherwise be determined by the CRTC on evidence following a public proceeding.[190]

The point is framed institutionally. Sections 24, 25 and 27 of the *Telecommunications Act* assign the regulation of the terms on which carriers provide telecommunications services to the CRTC. SaskTel contends that section 8 cannot be read so broadly that Cabinet may itself make those regulatory choices in advance.

Its formulation is striking:

> "Section 10 of the Policy Direction is, in effect, a substitution of a decision by cabinet for the jurisdiction of the CRTC."

The regulatory design, SaskTel argues, gives the Commission broad discretion to regulate a complex national industry and is inconsistent with reading section 8 as permitting Cabinet to regulate directly at first instance.[191]

That argument closely resembles the concern expressed repeatedly in the earlier history: government may establish policy, but the regulator must remain responsible for applying that policy through regulatory decision-making.

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[188] Saskatchewan Telecommunications, Memorandum of Fact and Law, Saskatchewan Telecommunications v. Competitive Network Operators of Canada et al., Federal Court of Appeal files A-434-25 (lead file) and A-284-24, June 12, 2026, paras. 74–75.

[189] *Ibid*., paras. 76–78.

[190] Saskatchewan Telecommunications, Memorandum of Fact and Law, Saskatchewan Telecommunications v. Competitive Network Operators of Canada et al., Federal Court of Appeal files A-434-25 (lead file) and A-284-24, June 12, 2026, paras. 79–80.

[191] *Ibid*., paras. 86–88.

Sections 8, 12 and 15

SaskTel reinforces the argument through the structure of the Act.

Section 12 permits the Governor in Council, after the Commission has made a decision, to vary or rescind it or refer it back for reconsideration. SaskTel characterizes that as a retrospective reviewing power. In its submission, section 10 improperly alters that relationship by enabling Cabinet to require the Commission to make a particular regulatory choice prospectively.[192]

The argument is particularly interesting in light of the history considered above. The 2006 Telecommunications Policy Review Panel had distinguished prospective policy direction from Cabinet intervention in particular Commission decisions. The 2022 submissions of McCarthy Tétrault and TELUS similarly relied on the distinction between sections 8 and 12.

SaskTel adds another statutory comparator: section 15. That provision expressly permits the Minister, after consulting the Commission, to establish standards concerning technical aspects of telecommunications and require the Commission to give effect to them.

For SaskTel, section 15 demonstrates that where Parliament intended government to exercise more direct control over the Commission's regulatory function, it said so expressly and defined the subject matter of that power. Reading section 8 as authorizing detailed regulatory commands more generally would blur that statutory allocation of responsibility.[193]

The Legislative History Returns Again

The litigation also returns attention to the legislative history.

Michael H. Ryan's account of the development of section 8 traces the 1975 Grey Paper, the Lambert Commission, earlier telecommunications bills, Bill C-20 and the recurring distinction between general governmental policy and decision-making in specific regulatory cases. Ryan's treatment also connects the telecommunications provision with the parallel evolution of the broadcasting direction power.[194]

That history supplies context for SaskTel's broader contention that the final wording of section 8 operates as a restriction rather than an open-ended delegation.

There is, however, an important limit to Ryan's account. As discussed earlier, he does not reconstruct the detailed August 1988 sequence through which "of general application" was added to Bill C-136. The primary-source broadcasting record considered in this paper therefore adds a further layer to the genealogy against which the litigation can be understood.

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[192] *Ibid*., paras. 81–83.

[193] *Ibid*., paras. 84–87.

[194] Michael H. Ryan, Canadian Telecommunications and Online Services Law, § 2:46, "Governor in Council - Power of Direction under the *Telecommunications Act*"; see also Richard Schultz, June 4 Proposed Cabinet Direction to the CRTC, Appendix B to TELUS Comments.

From Legislative History to Justiciable Issue

SaskTel's challenge brings into litigation a distinction that has recurred throughout the history of the direction power.

The question is not simply how detailed a direction may be. It is whether Cabinet has itself made a regulatory choice that Parliament entrusted to the Commission.

The two statutory limitations may also prove analytically independent. A rule directed to a class of carriers or services can possess the formal characteristics of general application while still being challenged as insufficiently broad because it prescribes a particular regulatory mechanism. Conversely, formally general wording may potentially fail the first requirement if its practical operation is directed to a particular group or regulatory dispute.

As of the date of writing, the Federal Court of Appeal has granted leave, consolidated SaskTel's appeal and judicial-review proceeding, and designated A-434-25 as the lead file. The Court has expressed no view on the merits.[195]

For decades, the meaning of "of general application on broad policy matters" was debated without authoritative judicial interpretation. SaskTel has now placed those words squarely before the Court.

QQ) 2025: The CRTC's Interpretation - A Mandatory Mechanism Can Still Be "General" and "Broad"

While SaskTel's challenge was developing, the CRTC itself addressed the meaning of the statutory limitation in Telecommunications in the Far North, Telecom Regulatory Policy CRTC 2025-9.

The issue arose directly under section 10 of the 2023 Direction. Several parties argued that the Direction, and particularly section 10, required - or at least strongly favoured - the Commission to mandate a wholesale high-speed access service in the Far North.[196]

The Commission rejected that interpretation.

It stated:

> "The Policy Direction is a direction of general application on broad policy matters and provides the Commission with the discretion to decide whether to mandate an aggregated wholesale HSA service in the Far North."

[195] Saskatchewan Telecommunications, Memorandum of Fact and Law, June 12, 2026, para. 14; Federal Court of Appeal docket, A-434-25/A-284-24.

[196] Telecom Regulatory Policy CRTC 2025-9, Telecommunications in the Far North, Appendix, para. 55.

The Commission acknowledged that section 10 speaks in mandatory terms. But it considered important aspects of the measure - particularly its geographic scope - to remain for the CRTC to decide.[197]

That interpretation is important because it identifies a conception of section 8 different from SaskTel's.

On the Commission's view, Cabinet may prescribe a regulatory mechanism without necessarily crossing the statutory boundary. The Direction can still be one "of general application on broad policy matters" if the Commission retains meaningful discretion concerning where and how that mechanism should apply.

The point was not merely theoretical.

The Commission proceeded to apply its established Wholesale Analysis to the Far North. It considered whether wholesale HSA should be mandated in light of the Essentiality Test, relevant policy considerations and the distinctive economic and geographic conditions of the region. It ultimately declined to mandate wholesale HSA there.[198]

The result therefore illustrates the discretion the Commission believed remained to it. Section 10 said that aggregated wholesale HSA "must" be mandated. Yet the Commission concluded that this did not compel it to impose such a service in every geographic market.

Two Competing Conceptions of Regulatory Discretion

The contrast with SaskTel is unusually clear.

For the CRTC, the relevant question is whether the Commission retains meaningful discretion in applying the regulatory mechanism prescribed by Cabinet. Geographic scope, implementation and the circumstances in which the mechanism should operate may remain for the Commission.

SaskTel places the statutory boundary earlier. In its submission, section 8 requires the Commission to retain the antecedent regulatory choice whether the mechanism should be adopted at all. Leaving the Commission discretion only over its application does not cure the problem if Cabinet has already made the central regulatory decision.

The difference can be stated simply.

Under the CRTC's interpretation, Cabinet may prescribe the regulatory instrument, provided the Commission retains substantial responsibility for its application.

Under SaskTel's interpretation, prescribing the regulatory instrument itself may already cross the line from broad policy direction into regulation.

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[197] Telecom Regulatory Policy CRTC 2025-9, Appendix, paras. 56–57.

[198] *Ibid*., para. 75 and Appendix, paras. 1–57.

That distinction echoes the historical debate traced throughout this paper. The question has repeatedly been not whether government may state policy in forceful or precise terms, but how far it may go in determining the regulatory choices through which that policy is implemented.

Telecom Regulatory Policy CRTC 2025-9 is therefore significant for more than its outcome in the Far North. It is one of the clearest instances in which the Commission itself has expressly interpreted the words "of general application on broad policy matters." Its interpretation preserves a substantial field for detailed governmental direction, provided meaningful regulatory discretion remains with the Commission.

Whether section 8 permits that division of responsibility is now one of the questions raised by the SaskTel litigation.

The discussion now returns to broadcasting. While these telecommunications developments were unfolding, Parliament and the CRTC were separately reconsidering the reach of the parallel section 7 direction power in the context of online broadcasting.

RR) 2020–21: Bill C-10 - Extending the Direction Power to the New Regulatory Tools

Bill C-10, An Act to amend the *Broadcasting Act* and to make consequential amendments to other Acts, was introduced in the House of Commons on November 3, 2020.

As introduced, Bill C-10 proposed no amendment to section 7 of the *Broadcasting Act*. Nor was such an amendment part of the Bill when it received Second Reading on February 16, 2021. The change came during the Standing Committee on Canadian Heritage's clause-by-clause consideration of the Bill.[199]

The reason was connected to the new regulatory structure proposed for online broadcasting. Bill C-10 would give the CRTC significant new order-making and regulation-making powers, including under proposed sections 9.1 and 11.1. The government contemplated using the existing section 7 policy-direction power to provide guidance concerning the Commission's exercise of those new powers.

Before proposing an amendment to section 7, departmental officials gave unusually explicit evidence about the intended division of responsibility between government and the CRTC.

Policy Is Mandatory; Application Belongs to the CRTC

On March 8, 2021, Thomas Owen Ripley, Director General of the Broadcasting, Copyright and Creative Marketplace Branch at Canadian Heritage, explained why Bill C-10 itself did not prescribe quotas or targets for particular kinds of programming:

[199] Bill C-10, An Act to amend the *Broadcasting Act* and to make related and consequential amendments to other Acts, 2nd Sess., 43rd Parl., First Reading, November 3, 2020; House of Commons, Journals, February 16, 2021.

> "The CRTC is better placed as the independent and expert regulator to make decisions on how to best support all types of content and to have it evolve over time."

Ripley added that, following Royal Assent, the Minister intended to propose a policy direction concerning how the Commission should use its new regulatory tools.[200]

Jean-Stéphen Piché, Senior Assistant Deputy Minister at Canadian Heritage, described the institutional balance more directly:

> "Creating the right distance between the broadcasters and government is very important."

That was why the CRTC operated at arm's length. Government nevertheless needed the ability to instruct the Commission concerning policy changes while leaving the CRTC sufficient leeway to determine how those instructions should be adapted to the broadcasting environment.

When asked how much discretion would remain, Piché drew the distinction succinctly:

> "The direction is not an option. The direction needs to be implemented but the 'how' component, how it is being applied, is subject to the expertise of the CRTC...."

He later added:

> "We leave some discretion on the application of that direction."[201]

Ripley then connected that division of responsibility directly to the existing words of section 7. Government retained the ability to issue a policy direction if it considered the CRTC to be moving inconsistently with public-policy objectives, but:

> "...that policy direction ... must be of general application. That's really important, because that stops this government from intervening, say, and targeting a specific media company or specific licensing decision or something like that."

He concluded:

> "The government's role in this instance is to articulate broad policy objectives of general application."[202]

That explanation is useful because Ripley associated "general application" principally with the identity and reach of the direction: government could not target a particular media company or

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[200] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 18, March 8, 2021, p. 4 (Thomas Owen Ripley).

[201] *Ibid*., p. 5 (Jean-Stéphen Piché).

[202] *Ibid*., p. 9 (Thomas Owen Ripley).

licensing decision. At the same time, the CRTC retained responsibility for the manner in which the general policy was applied.

Minister Steven Guilbeault likewise told the Committee that Bill C-10 was not intended to change the basic regulatory structure and "preserves the autonomy conferred on the CRTC to implement the appropriate regulations and achieve the objectives of the Act."[203]

The CRTC itself described a similar allocation of responsibility when it appeared before the Committee on March 26. Ian Scott, Chair and CEO of the CRTC, told the Committee:

> "The key is that you put the important policy principles in legislation ... and you leave the details, with respect, to the expert regulator, along with policy direction powers."

Scott Hutton, Chief of Consumer, Research and Communications at the CRTC, similarly asked Parliament to establish clear major objectives while giving the Commission the flexibility necessary to implement and adapt them as circumstances evolved.[204]

The April 23 Amendment

Against that background, the government proposed amendment G-7, a government amendment to clause 7 of Bill C-10, during clause-by-clause consideration on April 23, 2021.

It would add a new section 7.1:

> For greater certainty
>
> 7.1 For greater certainty, orders may be made under section 7 with respect to the orders made under subsection 9.1(1) or 11.1(2) or the regulations made under subsection 10(1) or 11.1(1).

Ripley explained that there had been:

> "...some confusion among stakeholders following the tabling of Bill C-10, whether it would be appropriate for the government to give an indication about the way that those powers should be used."

The amendment was intended to clarify that Cabinet's existing policy-direction power could extend to the Commission's exercise of the new order and regulation-making powers.

Ripley immediately qualified that proposition by reference to section 7's existing limitation:

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[203] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 18, March 8, 2021, p. 11 (Hon. Steven Guilbeault).

[204] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 21, March 26, 2021 (Ian Scott and Scott Hutton).

> "G-7, Mr. Chair, is intended to clarify the scope, as long as it still remains at a level of general application. We're not talking about interfering in specific decisions."

He then gave examples:

> "Rather, the expectation is that the CRTC would ensure certain kinds of discoverability or certain kinds of contributions from certain types of players, and that would be appropriate."[205]

Those examples are significant.

Government's position was not merely that Cabinet could articulate an abstract broadcasting objective and leave everything else to the CRTC. Ripley contemplated directions concerning particular kinds of regulatory outcomes - including discoverability requirements and contributions from defined types of regulated players - while maintaining that those directions could remain "of general application."

The example therefore provides a concrete illustration of government's understanding of the statutory limitation. A direction did not cease to be of general application merely because it prescribed a regulatory objective for a defined category of actors or regulatory activity. The distinction Ripley drew was between such categorical direction and governmental intervention in a specific company or specific regulatory decision.

That interpretation is strikingly similar to the distinction that would later emerge on the telecommunications side. A direction could be quite consequential and could identify the kind of regulatory result government expected, while leaving the Commission responsible for its application.

It also leaves unanswered the problem André Bureau had identified in 1988: whether a formally general category could be drawn so narrowly that it effectively determined a particular case.

"Orders Made" and "Regulations Made"

The drafting of G-7 underwent one further change.

During consideration of the amendment, Anthony Housefather, Liberal MP for Mount Royal, proposed changing references to the "making of orders" and "making of regulations" to "orders made" and "regulations made." Those changes were adopted.[206]

The resulting provision therefore referred expressly to directions concerning orders and regulations after they had been "made."

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[205] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 26, April 23, 2021, p. 15 (Thomas Owen Ripley); Minutes of Proceedings, Meeting No. 26.

[206] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 26, April 23, 2021, pp. 15–16 (Anthony Housefather); Minutes of Proceedings, Meeting No. 26.

The significance of that wording was not explored fully during the C-10 proceedings. It would become considerably more important when substantially the same provision returned in Bill C-11.

Bill C-10 Dies - but the Amendment Returns

Bill C-10, including the new section 7.1, passed the House of Commons on June 21, 2021. The Senate gave it Second Reading on June 29 and referred it to committee.

Parliament was dissolved in August before the Senate completed its consideration. Bill C-10 therefore died on the Order Paper, and section 7.1 was never enacted.[207]

Bill C-10 nevertheless established an important interpretive marker: government maintained that directions could address defined regulatory outcomes while remaining subject to the existing requirement of general application. The same issue returned in Bill C-11.

SS) 2022–23: Bill C-11 - Parliament Reconsiders the Limits of Section 7

Bill C-11, the *Online Streaming Act*, revived the proposed amendment to the direction power that had died with Bill C-10.

This time the provision was included in the Bill as introduced. Clause 7 proposed adding a new subsection 7(7) to the *Broadcasting Act*:

> For greater certainty
>
> (7) For greater certainty, an order may be made under subsection (1) with respect to orders made under subsection 9.1(1) or 11.1(2) or regulations made under subsection 10(1) or 11.1(1).[208]

The provision was substantially the successor to proposed section 7.1 of Bill C-10. Its significance, however, became much more controversial during parliamentary consideration of Bill C-11.

The disagreement was not over whether section 7(1) continued to require directions to be "of general application on broad policy matters." It concerned what those words would mean once Cabinet was expressly authorized to direct the CRTC with respect to regulatory orders and regulations that could themselves be highly detailed.

Competing Interpretations Emerge

Criticism began during the House proceedings and continued before the Senate.

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[207] House of Commons, Journals, 43rd Parl., 2nd Sess. (dissolution, August 2021).

[208] Bill C-11, An Act to amend the *Broadcasting Act* and to make related and consequential amendments to other Acts, 1st Sess., 44th Parl., cl. 7.

Some witnesses argued that subsection 7(7), notwithstanding its introductory words "for greater certainty," materially enlarged Cabinet's ability to intervene in the CRTC's regulatory work.

At Second Reading, Conservative MP Marty Morantz argued that subsection 7(7) would go beyond general directions on broad policy matters and permit Cabinet to direct the CRTC "on specifics."[209]

The Forum for Research and Policy in Communications (FRPC) also recommended deleting subsection 7(7). Its Executive Director, Monica Auer, told the Heritage Committee that Bill C-11 would erode the Commission's independence by giving Cabinet power to override the CRTC when it exercised its new Part II powers.[210]

The concern was particularly acute because the new broadcasting regime made greater use of orders. An order could potentially apply to a particular undertaking or impose requirements considerably more specific than a generally applicable regulation.

The Directors Guild of Canada proposed a distinction reflecting precisely that problem: Cabinet could retain the ability to direct the Commission concerning regulations of general application, but directions should not extend to orders concerning particular persons or undertakings.[211]

Other witnesses attacked subsection 7(7) more broadly. They argued that the existing section 7 permitted government to establish broad policy while leaving detailed regulatory implementation to the CRTC, whereas subsection 7(7) could allow Cabinet to reach into the substance of the Commission's regulatory decisions.

The debate therefore returned to the same distinction that had appeared repeatedly in the history of the direction power: when does governmental policy become governmental regulation?

The CRTC had already put the objection in structural terms. It warned that although directions would formally remain subject to "general application on broad policy matters," some Commission orders could apply to only one or a small number of services. A direction concerning such an order could therefore allow government to direct the CRTC in "very narrow and specific ways." In the Commission's view, a direction of that kind could not in effect remain of general application or deal only with broad policy matters and would limit CRTC independence.[212]

The same concern was advanced by several witnesses in the Senate. The Internet Society recommended removing the proposed changes and restoring the existing Act's limits. FRPC again argued that subsection 7(7) would undermine CRTC independence. Robert Armstrong, President of Communications Médias Inc. and a former CRTC official, said the existing Act already gave Cabinet adequate authority over broad policy matters and that subsection 7(7)

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[209] House of Commons Debates, 44th Parl., 1st Sess., May 11, 2022, p. 5405 (Marty Morantz).

[210] House of Commons, Standing Committee on Canadian Heritage, Evidence, Meeting No. 24, May 30, 2022 (Monica Auer, Executive Director, Forum for Research and Policy in Communications).

[211] Directors Guild of Canada, Brief to the Standing Senate Committee on Transport and Communications concerning Bill C-11, October 31, 2022, p. 11.

[212] CRTC, written material concerning Bill C-11 and CRTC independence, November 16, 2022, questions 11–12.

would "expand considerably" the nature of directions government could give, creating "a whole series of very detailed opportunities" to interfere with the Commission's normal functioning.[213]

The CRTC Prefers the Existing Section 7

The CRTC addressed the issue directly when it appeared before the Senate Standing Committee on Transport and Communications on November 16, 2022.

Ian Scott, Chair and CEO of the CRTC, was asked whether subsection 7(7) would diminish the Commission's independence. He replied:

> "...we would prefer that the policy direction power, as it exists today in the *Broadcasting Act*, be the statutory language."

Scott acknowledged that government and ministers were accountable to Parliament while the Commission was intended to operate at arm's length. He characterized subsection 7(7) as moving the balance:

> "...slightly closer to-how can I put it? - lessening the independence of the commission."

He then put the institutional question memorably:

> "'How long are the arms?' I prefer as the regulator to have them as long as possible."[214]

Scott's concern was not confined to directions dealing expressly with a particular company or licence.

Asked what subsection 7(7) would change in practice, he explained:

> "...it could allow more discretion to government to give the commission direction of a narrower type with respect to narrower issues, rather than as originally contemplated, a broad policy direction."

He offered an example. A broad direction might require Canadian ownership or a Canadian CEO. If government went further and addressed a specific ownership case, he said, "it gets less comfortable."

When Senator Paula Simons suggested that the provision could permit a future government to "micromanage," Scott declined that word. Instead, he described a spectrum:

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[213] Standing Senate Committee on Transport and Communications, evidence on Bill C-11, 2022 (Internet Society; Forum for Research and Policy in Communications; Robert Armstrong, Communications Médias Inc.).

[214] Standing Senate Committee on Transport and Communications, Evidence, 44th Parl., 1st Sess., Issue No. 31, November 16, 2022 (Ian Scott, Chair and CEO, CRTC).

> "...it moves the balance point on the spectrum to allow government more say or a more detailed say, rather than a lesser one...."[215]

The distinction is important. Scott did not identify a single bright line between permissible policy and impermissible intervention. He described a spectrum between broad policy and increasingly detailed governmental direction.

That conception closely resembles the difficulty exposed in 1995. A direction need not identify the eventual licensee or regulated undertaking to raise a problem. The degree of prescription itself may affect whether government is establishing policy or performing the regulator's function.

The CRTC's Written Position

The Commission made the point still more explicitly in a written submission provided in connection with its Senate appearance.

It began with the existing division of responsibility:

> "The task of determining how to best regulate and supervise is left to the CRTC: an independent, quasi-judicial administrative tribunal."

The government nevertheless possesses a legitimate policy role:

> "Under the current *Broadcasting Act*, the Governor in Council (GiC) has the ability to issue policy directions to the CRTC, which must be 'of general application on broad policy matters'...."

In the Commission's view, proposed subsection 7(7):

> "…would appear to deviate from the purpose of the policy direction power set out in subsection 7(1) of the Act, which provides that directions must be general in their application, and must relate to policy matters broadly."

The problem arose because the powers to which subsection 7(7) referred could themselves be exercised with considerable specificity:

> "The CRTC's ability to make regulations and issue orders is at the core of its regulatory expertise and can, when the circumstances warrant, be exercised in a very specific and detailed manner."

[215] *Ibid*.

Accordingly:

> "Subsection 7(7), as proposed, could be interpreted to provide the GiC with the ability to intervene in the minutiae of the CRTC's work."[216]

The Commission also identified a drafting problem inherited from Bill C-10. Subsection 7(7) referred to directions concerning "orders made" and "regulations made." That language appeared capable of contemplating governmental direction concerning an instrument after the CRTC had already made it.

That possibility further blurred the distinction between prospective establishment of general policy under section 7 and Cabinet's separate powers concerning particular Commission decisions.

The Commission concluded that government was entitled to make its policies known, but:

> "…care must also be taken to ensure that political considerations do not intrude on the CRTC's public, quasi-judicial processes."[217]

The Senate Deletes Subsection 7(7)

The issue came to a head during the Senate Committee's clause-by-clause consideration.

Senator Yuen Pau Woo drew attention to the existing section 7 power and asked why that power did not create the same concern.

Senator Simons' response went directly to the statutory language:

> "No, because, for the very good point you just raised, it's general application. This was the differentiation that the expert witnesses made before us, that that is about broad general principles."

She continued:

> "The concern about 7.7 was, because it flows through all these other clauses, it would allow a specificity of direction that is not encompassed in the original language of the bill."

The Committee voted not to adopt clause 7, thereby deleting proposed subsection 7(7).[218]

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[216] CRTC, "CRTC Independence," written submission to the Standing Senate Committee on Transport and Communications, November 16, 2022.

[217] *Ibid*.

[218] Standing Senate Committee on Transport and Communications, Third Report, December 14, 2022 (recommending deletion of clause 7).

The Government Disagrees with the Deletion

The deletion did not reflect agreement between the government and the Senate about the meaning of section 7.

Minister Pablo Rodriguez had defended the provision before the Senate Committee on November 22, 2022, by relying on subsection 7(1). He said a policy direction could only be of general application and therefore could not target individual platforms: "Bill C-11 doesn't change that. No new powers are being granted to the government. No new powers are being granted to cabinet at all." When pressed on subsection 7(7), he repeated that because it flowed from subsection 7(1), "there is no intervention on something specific."[219]

The following day, Ripley was asked about the Committee's decision. He maintained the government's position:

> "The government's view on clause 7(7) is still that the political direction must be of general application."

He continued:

> "The government's view is that the concerns that this committee had were unfounded, because in our view it has always been an obligation to ensure that it is generally applicable."[220]

That response is important. The government did not concede that subsection 7(7) would authorize directions outside the limits of existing section 7(1). Its position was that those limits continued to control whatever subject matter subsection 7(7) identified.

The disagreement was therefore interpretive.

For the government, general application remained the effective safeguard. Cabinet could direct the CRTC concerning the exercise of its new regulatory powers so long as the direction remained generally applicable rather than targeting a particular company or decision.

For the CRTC and the provision's critics, that was not necessarily enough. A direction could be formally general and nevertheless become so detailed or prescriptive that Cabinet had moved beyond broad policy and into the Commission's regulatory function.

Parliament Leaves the Existing Limitation Intact

The Senate Committee formally reported Bill C-11 with the deletion of clause 7 on December 14, 2022.

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[219] Senate, Standing Committee on Transport and Communications, Evidence, November 22, 2022, Issue No. 32, p. 1 (Hon. Pablo Rodriguez; exchange with Senator Paula Simons).

[220] Standing Senate Committee on Transport and Communications, Evidence, 44th Parl., 1st Sess., Issue No. 39, December 7, 2022, p. 39:39 (Thomas Owen Ripley).

At Third Reading, Senator Donna Dasko described the competing interpretations starkly. Witnesses had argued that subsection 7(7) would permit Cabinet to give "very specific and detailed direction" to the CRTC, while government officials maintained that the provision would have almost no effect:

> "There was major impact on the one hand, versus no impact at all on the other...."

Senator Simons explained the Committee's conclusion:

> "...we agreed as a committee to completely delete subclause 7(7) in its entirety and to maintain the CRTC's independence from the potential for government micromanagement."[221]

On February 2, 2023, the Senate passed Bill C-11 with amendments and returned it to the House of Commons. The government and the House ultimately accepted the Senate's deletion of subsection 7(7), although they rejected a number of the Senate's other amendments.

The *Online Streaming Act* received Royal Assent on April 27, 2023, without subsection 7(7).[222]

Significance

The Bill C-11 proceedings provide unusually direct evidence of the competing interpretations of section 7(1). Government treated general application as the principal safeguard: Cabinet could address regulatory powers and fairly concrete policy outcomes so long as it did not determine a particular company or decision. The CRTC placed greater emphasis on "broad policy matters," describing a spectrum on which increasingly detailed direction could intrude upon the Commission's regulatory function even without naming a company.

The Senate removed subsection 7(7), but Parliament did not amend section 7(1) to define the boundary more precisely. The competing interpretations therefore remained unresolved when, only months later, government issued a policy direction implementing the new online-streaming regime under the unchanged section 7 power.

TT) 2023: The Proposed Online Streaming Direction - How "High-Level" May a Direction Be?

The proposed policy direction published for consultation in 2023 put the competing interpretations exposed during Bill C-11 into practice. The proposed Direction is reproduced at Appendix L.

The government was proceeding under the unchanged section 7 power: directions still had to be "of general application on broad policy matters." The proposed Direction nevertheless

[221] Senate Debates, 44th Parl., 1st Sess., No. 94, January 31, 2023, pp. 2772–73 (Senator Paula Simons).

[222] *Online Streaming Act*, S.C. 2023, c. 8, Royal Assent April 27, 2023.

contemplated detailed guidance concerning the Commission's implementation of the new online-streaming regime.

The Government's Own Description

In the Regulatory Impact Analysis Statement, the government expressly addressed its choice of legal instrument.

It recited that section 7 authorized the Governor in Council to issue directions "of general application on broad policy matters" and said that a policy direction was appropriate because the government wished to give the Commission "high-level directions."

Elsewhere, however, the RIAS acknowledged that the Direction would do more than identify abstract objectives. It stated that, in multiple instances, the Direction instructed the Commission to take "specific actions", made some regulatory approaches that might otherwise have been available to the Commission incompatible with government policy, and reduced the Commission's flexibility to pursue alternative approaches.[223]

That juxtaposition is important.

The government evidently did not understand "broad policy matters" to require that every regulatory choice remain open to the CRTC. Nor did it regard the requirement of a "specific action" as necessarily inconsistent with section 7.

Its apparent position was that a direction could remain "high-level" even while narrowing the Commission's regulatory choices.

That conception closely resembled the government's position in the parallel telecommunications proceeding. The legal boundary was not drawn between policy and any constraint on regulatory discretion. The question was how much discretion could be removed before Cabinet ceased to be giving policy direction and began making the regulatory decision itself?

Different Views of the Proper Degree of Prescription

The consultation submissions reflected different attitudes toward that question.

The Canadian Association of Broadcasters urged clearer and, in some respects, more prescriptive instructions concerning contributions and implementation priorities. Unifor similarly proposed replacing some provisions that merely required the Commission to "consider" matters with mandatory language and sought a stronger direction concerning initial contributions by online undertakings.[224]

Neither appears to have raised a section 7 objection to that degree of prescription.

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[223] Regulatory Impact Analysis Statement accompanying SOR/2023-239, "Regulatory analysis — Benefits and costs," especially "Regulatory scenario" and "Costs."

[224] Canadian Association of Broadcasters, comments on the proposed Order, July 2023; Unifor, comments on the proposed Order, July 2023.

FRIENDS took a different institutional approach. In its July 25, 2023, submission, it described "the most important role of a policy direction" as one of "emphasis." Legislation, in its view, should endure while a direction identified the government's current priorities. That approach permitted strong policy guidance while leaving important implementation choices to the Commission.[225]

The difference was not necessarily between strong and weak policy. It was between a direction that emphasizes governmental priorities and one that itself resolves particular regulatory choices.

The Draft Direction Enters a Live CRTC Proceeding

The issue quickly became concrete.

While the Direction was still only a proposal, the CRTC was conducting its initial proceeding concerning base contributions by online undertakings. Parties began invoking the draft Direction as a reason why the Commission should or should not adopt particular regulatory approaches.

The Writers Guild of Canada objected to proposed section 12(e), concerning priority for direct expenditures on Canadian programming, partly because participants were already relying on that provision to constrain the CRTC's developing contribution framework.

In a July 26, 2023, reply, the WGC emphasized that the draft Direction was not yet binding and that the Commission, as an arm's-length regulator, remained responsible for exercising its statutory independence unless and until a valid direction came into force.[226]

That episode illustrates the practical importance of the distinction. A direction need not identify a particular company to affect a particular proceeding. A generally worded policy direction can become highly consequential once parties invoke it as limiting the regulatory alternatives available to the Commission.

FRIENDS Invokes Section 7 Expressly

FRIENDS made the strongest express section 7 argument in the CRTC implementation proceeding rather than in its comments on the proposed Direction.

Netflix and Google had relied on the draft Direction in arguing that the Commission's proposed base-contribution approach was inconsistent with government policy. In response, FRIENDS invoked the statutory limitation itself.

Its position was that a policy direction was binding only insofar as it remained "of general application on broad policy matters." A purported direction that specifically prevented the

[225] FRIENDS, comments on the proposed Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), July 25, 2023.

[226] Writers Guild of Canada, Reply Comments, Broadcasting Notice of Consultation CRTC 2023-138, July 26, 2023.

Commission from doing something it considered required by the *Broadcasting Act* would, in FRIENDS' submission, be ultra vires and should be disregarded by the Commission.[227]

That was an express jurisdictional argument, although it arose in a different posture from the challenge mounted against the proposed Telecommunications Direction.

FRIENDS was not arguing that the proposed Broadcasting Direction as a whole-or even a particular provision already in it - was necessarily invalid. Its argument was instead that section 7 imposed an outer limit on how the Direction could be used to constrain the Commission in an actual regulatory proceeding.

A Different Debate from Telecommunications

Unlike the 2022 Telecommunications consultation, no comparably comprehensive challenge to identified provisions of the proposed Broadcasting Direction has been found. The section 7 issue instead emerged in application: how far could a generally applicable direction constrain the Commission in a concrete proceeding while remaining on the policy side of the line?

The final Direction would provide a considerably more concrete indication of the government's answer.

UU) 2023: The Final Online Streaming Direction - "High-Level" Policy and Specific Regulatory Instructions

On November 9, 2023, the Governor in Council made the Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), SOR/2023-239.[228] It was the first use of the section 7 direction power since the 1995 DTH directions. The final Direction is reproduced at Appendix M.

Its timing was particularly significant. Only months earlier, Parliament had enacted the *Online Streaming Act* without proposed subsection 7(7). The government now proceeded under the unchanged section 7 power that had been at the centre of the Bill C-11 debate.

The Government Describes Its Direction as "High-Level"

The Regulatory Impact Analysis Statement expressly addressed the statutory basis for the instrument:

> "Section 7 of the Act gives the Governor in Council the ability to give directions of general application on broad policy matters with respect to the broadcasting policy and regulatory policy objectives set out in the Act."

[227] FRIENDS, Response to Other Submissions, Broadcasting Notice of Consultation CRTC 2023-138, July 2023, para. 49.

[228] Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), SOR/2023-239, P.C. 2023-1125, made and registered November 9, 2023, Canada Gazette, Part II, Vol. 157, No. 24, November 22, 2023.

The government said policy directions were the appropriate instrument to direct the CRTC's implementation of the new regulatory framework and distinguished other Governor in Council powers because those other powers were inconsistent with its intention to issue "high-level directions" concerning implementation of the *Online Streaming Act*.[229]

The RIAS nevertheless gave an unusually candid account of the effect those high-level directions would have on Commission discretion.

Without the Direction, the Commission would have had a greater range of regulatory choices. With it:

> "…several approaches that the Commission may have considered are incompatible with the policy directions."

The RIAS described the directions as binding the Commission on "general matters of broad application to its decisions." But it immediately acknowledged:

> "In multiple instances, the directions instruct the Commission to take specific actions."

As a result:

> "…the Commission's flexibility to pursue other avenues ... is reduced."[230]

Those statements provide unusually clear evidence of the government's understanding of section 7.

The government did not regard "broad policy matters" as requiring Cabinet to leave every choice of regulatory means or outcome to the CRTC. Nor did it regard an instruction to take a "specific action" as necessarily inconsistent with section 7. In its view, a direction could remain high-level and generally applicable even while foreclosing regulatory alternatives and reducing the Commission's discretion.

The individual provisions show what that conception meant in practice.

Table 6 – 2023 Online Streaming Direction: Proposed and Final

Only provisions material to the present discussion are reproduced. The complete texts are reproduced at Appendices L and M.

Issue	Proposed - June 2023	Final - Nov. 2023 (SOR/2023-239)
Canadian programming	CRTC directed to impose equitable financial and non-financial requirements supporting Canadian programming and creators	Retained.
Community / exceptional broadcasters	Encourage innovation and support sustainability	Adds fostering collaboration.
Discoverability	Prioritize outcome-based requirements minimizing need for algorithm changes	Retained.

[229] Regulatory Impact Analysis Statement accompanying SOR/2023-239, "Instrument choice."

[230] *Ibid*., "Regulatory analysis — Benefits and costs," especially "Regulatory scenario" and "Costs."

Issue	Proposed - June 2023	Final - Nov. 2023 (SOR/2023-239)
Flexible regulation	Minimize burden; avoid effects outside Act; respect choice; use incentive/outcome-based and digital tools	Largely retained; burden minimization qualified "where appropriate"; collaboration added.
Social-media creators	Do not impose regulatory requirements respecting programs of social-media creators, including podcasts	Retained in substance.
Video games	No regulatory requirements respecting transmission of video games	Retained.
s.4.2 programs	Establish "clear, objective and readily ascertainable criteria" producing specified statutory limitation	Retained.
Expenditures	Detailed considerations; proportionality, flexibility and direct Canadian-programming expenditures	Core provisions retained.
French-language programming	Within broader official-language support	Strengthened with separate French-language requirement.
Canadian-program definition	Consult; Canadian creative positions/IP; audio/audio-visual differences; independent producers	Substantially retained.
Engagement / reporting	Indigenous, equity-seeking and OLMC engagement; periodic reporting	Retained and broadened in specified respects.
Implementation	Necessary regulatory changes within two years; priorities specified	Retained.

Section 4 - Cabinet Requires Regulatory Action

Section 4 directed the Commission to:

> "…impose requirements on broadcasting undertakings"

to ensure strong support for Canadian programming and Canadian creators. Those requirements were to include financial and non-financial requirements and to be equitable having regard to the size and nature of undertakings and as between foreign online and Canadian broadcasting undertakings.[231]

This goes beyond identifying a policy objective. Cabinet determined that the Commission must impose requirements.

At the same time, the Direction did not determine contribution rates, recipients, particular financial obligations, classes of undertaking or the regulatory instrument by which those requirements were to be imposed. Those matters remained for the Commission.

Section 4 therefore illustrates one version of the government's dividing line: Cabinet may prescribe the required policy outcome and require regulatory action while leaving substantial responsibility for regulatory design and implementation to the CRTC.

Section 6 - Direction Concerning Regulatory Methodology

Section 6 concerned discoverability and showcasing.

Its first sentence directed the Commission to consider established and emerging means of promoting Canadian programming. That is conventional policy direction.

[231] SOR/2023-239, s. 4.

Its second sentence went further:

> "In making regulations or imposing conditions in respect of discoverability and showcasing requirements, the Commission is directed to prioritize outcome-based regulations and conditions that minimize the need for broadcasting undertakings to make changes to their computer algorithms that impact the presentation of programs."[232]

Cabinet was therefore addressing not merely the objective but the regulatory technique the Commission should prefer.

The language preserved discretion. "Prioritize" did not prohibit other approaches, and "minimize the need" did not absolutely prohibit regulation affecting algorithms.

But the provision is striking in light of Bill C-11. The subsequent Direction, made under the unchanged section 7, expressly instructed the CRTC how it should approach "making regulations or imposing conditions" - regulatory powers of the kind that had generated the subsection 7(7) controversy.

That history does not establish invalidity. It does show that government continued to take the position advanced during Bill C-11: subsection 7(7) was not necessary for Cabinet to give generally applicable policy guidance concerning the Commission's exercise of its new regulatory powers.

Section 10 - General in Application, Specific in Result

Section 10 presents a sharper case.

It provides:

> "The Commission is directed not to impose regulatory requirements on
>
> (a) online undertakings in respect of the programs of social media creators, including podcasts; and
>
> (b) broadcasting undertakings in respect of the transmission of video games."[233]

This is not an instruction to consider a factor, pursue an objective or prefer one regulatory technique.

It determines the regulatory result.

The Commission may not impose regulatory requirements in the specified circumstances.

[232] *Ibid*., s. 6.

[233] *Ibid*., s. 10.

At the same time, the provision does not concern an identified undertaking, program or proceeding. It applies to whole categories of programs and undertakings.

Section 10 therefore illustrates particularly clearly why the two statutory expressions may need to be considered separately.

It has the formal attributes of general application because it applies to defined classes rather than to a named undertaking or proceeding. The earlier history nevertheless suggests that class-based wording may not be conclusive if a class is drawn so narrowly that the direction addresses, in practical operation, a particular situation. In this instance, however, the categories themselves are broad.

The harder question is whether the categorical decision that those matters are not to be regulated is itself a "broad policy matter," or whether Cabinet has determined a regulatory question that Parliament otherwise entrusted to the CRTC.

A direction can therefore be general in application while being highly specific in the regulatory result it commands.

That is very close to the distinction that had been developing since the 1970s and 1980s: who or what does the direction apply to, and how far does it go in determining the regulator's decision?

Section 11 - Cabinet Directs the Exercise of a Particular Statutory Power

Section 11 is still more pointed.

It addresses the CRTC's new regulation-making power under section 4.2 of the *Broadcasting Act* and directs the Commission to establish:

> "…clear, objective and readily ascertainable criteria"

including criteria that "ensure" that the Act applies only to programs satisfying a specified condition concerning their previous broadcast by a licensed or registered undertaking other than a social-media service.[234]

The first portion could readily be described as broad policy: regulatory criteria should be clear, objective and ascertainable.

The second portion is different. Cabinet prescribes a substantive limitation that those criteria must produce.

The Commission's regulations must ensure that the Act applies only to the identified category.

[234] *Ibid*., s. 11.

Cabinet is therefore not merely identifying the goal of the regulation. It is limiting the class of programs to which the Commission may apply the Act when exercising the discretion Parliament conferred through section 4.2.

Again, the direction operates generally rather than against an identified undertaking. But that does not answer the separate question whether it remains a direction on a broad policy matter.

Section 11 is especially noteworthy because it authorizes the Governor in Council to direct the Commission concerning the exercise of one of the new statutory regulatory powers debated during Bill C-11. The government evidently regarded that as permissible under the unchanged section 7.

Section 12 - Detailed Policy Without Determining the Formula

Section 12 provides a useful intermediate case.

It gives the CRTC extensive directions concerning expenditure requirements. Among other things, the Commission must address proportionality and different business models, consider flexibility and specified demographic information, support particular categories of Canadian programming and creators and, "where appropriate," prioritize direct expenditure requirements.[235]

The provision is detailed, and some elements are mandatory.

But it does not itself fix the contribution rate, expenditure formula, classes of regulated undertaking or recipients of the eventual requirements. Much of the provision uses language such as "consider," "consider providing flexibility" and "where appropriate."

Section 12 takes a somewhat different approach. Cabinet gives extensive and sometimes mandatory guidance concerning how a particular statutory power should be exercised, while leaving the CRTC substantial discretion over the regulatory machinery and ultimate quantitative result.

A Spectrum Within a Single Direction

The Direction therefore contains provisions of quite different character: broad statements of policy, required outcomes that leave regulatory means largely to the Commission, directions concerning regulatory methodology, and provisions that eliminate particular regulatory choices.

The dividing line does not depend simply on whether a provision is mandatory or detailed. Some mandatory provisions leave the means substantially to the regulator, while detailed provisions elsewhere preserve discretion through qualifications such as "where appropriate," "where possible" and "consider."

[235] *Ibid*., s. 12.

The Government's Practical Interpretation of Section 7

It provides the clearest practical statement since 1995 of how government understands the six-word limitation.

On that interpretation, a direction may remain one "of general application on broad policy matters" even though it requires the Commission to take particular regulatory action, makes some otherwise available regulatory approaches unavailable, prescribes aspects of regulatory methodology and reduces the Commission's discretion.

The government's approach appears to require a generally applicable policy framework that leaves meaningful regulatory implementation to the CRTC rather than determining an individual case.

That interpretation goes further than the position advanced by the CRTC during Bill C-11. Scott had described a spectrum in which increasingly narrow and detailed governmental direction moved the balance away from broad policy and toward governmental involvement in the regulator's work.

The 2023 Direction shows how far the government believed it could go under section 7.

The Direction does not determine whether that interpretation is legally correct. No court has yet authoritatively drawn that boundary under section 7.

But by 2023 the issue that had existed largely in legislative history, parliamentary debate and the 1995 DTH controversy had become concrete. The Governor in Council had issued a generally applicable direction containing provisions that expressly governed the CRTC's choice and exercise of regulatory powers.

And then it was left to the Commission to implement it…at least until the Government indicated in June 2026 that it was going to issue new directions relating to the *Online Streaming Act.* As of the present date in October 2026, the texts of any such new directions have not yet been made public.

VV) Conclusion

The history of the direction power reflects a recurring effort to accommodate two objectives. Elected government must be able to establish public policy for communications, but the CRTC must retain the independence and discretion necessary to administer the statutory scheme and decide particular regulatory matters. The power enacted in 1991, and carried into the *Telecommunications Act* in 1993, was one legislative response to that problem.

The words "of general application on broad policy matters" do not produce a mechanical test. The history instead points to two related questions: to what or to whom a direction applies, and how far it prescribes the regulatory choices left to the Commission. The recurring controversies - from the 1995 DTH directions, through the telecommunications directions, to Bills C-10 and C-11 and the 2023 Online Streaming Direction - show that a direction may be generally framed yet

highly prescriptive or may address a broad policy subject while materially narrowing the regulator's discretion. Specificity of language and specificity of application are therefore related, but not identical, questions.

Parliament has repeatedly preserved the direction power while resisting formulations that would erase the distinction between governmental policy and regulatory decision-making. Yet the precise boundary has rarely been tested judicially. The result is a statutory phrase with a substantial legislative history but limited authoritative interpretation. That history does not dictate the outcome of every future dispute, but it does identify the problem the limiting words were designed to address: government may set policy for the regulator, but a policy direction is not simply an alternative means of making the regulatory decision itself.

SUMMARY OF INTERPRETIVE STATEMENTS

The following table brings together, in broadly chronological form, selected statements discussed in this paper concerning the nature and limits of the Governor in Council's powers of direction. It is intended as a reference aid rather than as a statement of a single governing test. The formulations arose in different statutory and institutional contexts and should be read with the discussion in the body of the paper.

Year	Source / Context	Characterization of the Direction Power
1976	CRTC - telecommunications reform	Cabinet could establish classes of eligibility, but should not determine the particular applicant. Directions from Cabinet should be "Negative, Rather than Positive."
1979	Lambert Commission	Government directives should concern "broad policy matters" and "not pertain to specific individual cases."
1979	Economic Council of Canada - Responsible Regulation	Policy directives should address "general policy matters," rather than intervene after proceedings had begun in a specific case.
1982	Applebaum-Hébert Committee	Government could issue "general policy directions"; individual licensing decisions should remain insulated from political intervention.
1983	Government - Towards a New National Broadcasting Policy	Directions should be limited to "broad policy matters," with particular applicants, licences and services excluded.
1985	André Bureau, Chairman of the CRTC	The proposed power over "any matter" could reach the "most trivial and minute details." Bureau proposed directions having "general orientation and broad application."
1985	Law Reform Commission of Canada	Policy directions should address "general policy issues in advance of specific cases."
1986	Caplan-Sauvageau Task Force	Directives should be "formulated in general terms, like regulations," leaving interpretation and application to the CRTC.
1987	CRTC - response to Standing Committee	Directions could concern "broad policy," but no direction should affect a "specific application."
1987	House of Commons Standing Committee	Binding directions should be "expressly restricted to broad policy matters."

Year	Source / Context	Characterization of the Direction Power
1988	CRTC / André Bureau - Bill C-136	Bureau proposed "broad policy directions of general orientation" and warned that a formally general policy statement could in substance be directed at an individual situation.
1988	CTV submission, as summarized by the Library of Parliament	CTV proposed inserting the words "of general application" after "policy directions."
1988	Bill C-136 amendment	Parliamentary committee adopted the formulation "directions of general application on broad policy matters." The debate described the amendment principally as clarifying that the power concerned broad policy.
1989	Marcel Masse, Minister of Communications	Government would have authority to develop "broad policy guidelines"; the power did not extend to individual licensing decisions or matters being studied by the CRTC.
1993	Department of Communications official - Bill C-62	The telecommunications direction power was "very much a global power": broad policy issues of general application, not a matter as specific as a particular case.
1995	CRTC - proposed DTH Directions	The proposed Directions were "too specific and narrow, instead of general and broad as contemplated under the Act."
1995	Outside legal commentary	The apparent statutory intention was that directions should be "general rather than specific and broad rather than narrow."
1995	Gordon Ritchie and Roger Tassé - DTH Policy Review Panel	Detailed provisions could implement a general policy. Tassé urged that the directions be considered "as a whole" and argued that section 7 did not prevent policy from being expressed in precise and understandable terms.
2006	Telecommunications Policy Review Panel	The section 8 power "is not unfettered." Directions are limited in "their subject matter and their specificity" and must concern broad policy matters and be of general application.
2019	Government / 2019 Telecommunications Direction	The Direction supplied additional, generally applicable policy considerations - competition, affordability, consumer interests and innovation - to guide CRTC decisions on a going-forward basis.
2022	TELUS - proposed Telecommunications Direction	Several provisions were said to be "narrow, specific and prescriptive" and to concern "specific (not general) application on narrow (not broad) policy matters."

Year	Source / Context	Characterization of the Direction Power
2022	Richard Schultz - proposed Telecommunications Direction	The legislative history was invoked to distinguish broad governmental policy guidance from detailed intervention in regulatory methods and technical matters assigned to the CRTC.
2022	Ian Scott, Chair and CEO of the CRTC - Bill C-11	Emphasizing the CRTC's status as an arm's-length regulator, Scott asked: "How long are the arms?" He contrasted broad policy direction with increasingly narrow and detailed governmental involvement.
2022	CRTC - Bill C-11 written submission	Existing section 7 was said to balance governmental oversight and regulatory independence; extending directions expressly to regulations and orders could invite intervention in highly specific regulatory "minutiae."
2023	Government - renewed Telecommunications Direction	The government rejected objections that the proposed Direction exceeded section 8. Its approach contemplated direct measures while leaving the CRTC responsibility for elaborating implementation and compliance.
2023	Government - Online Streaming Direction	The Direction was described as "high-level," while the accompanying analysis acknowledged that it required "specific actions," foreclosed some regulatory approaches and reduced CRTC flexibility in some respects.
2025	CRTC - Telecom Regulatory Policy 2025-9	The 2023 Telecommunications Direction was "a direction of general application on broad policy matters"; although section 10 mandated an aggregated wholesale HSA service, details such as geographic scope remained for the Commission.
2024–26	SaskTel - Federal Court of Appeal challenge	SaskTel argues that section 10 is not of general application or a sufficiently broad policy character and is, in effect, a substitution of Cabinet's decision for the jurisdiction of the CRTC. The issue remains before the courts.

The documents reproduced in these appendices retain the wording, spelling and punctuation of their original sources, including apparent typographical errors. Minor formatting changes have been made for consistency and readability; line-break artifacts introduced in transcription have been removed. Regulatory Impact Analysis Statements accompanying published Directions have not been reproduced.

Appendix A – 1987 Teleglobe Direction

Source: Reproduction in Appendix B to D.A. Ford and Associates, Study of Issues Related to the Extension of the Exclusive Mandate of Teleglobe Canada Inc. (October 1991). The original Order in Council has not been independently obtained. The reproduced pages are retained to avoid transcription errors.

P.C. 1987-705
2 April, 1987

Privy Council

1987-263

DIRECTION TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING THE APPROVAL OF THE TELEGRAPH TOLLS AND TELEPHONE TOLLS OF THE NEW CORPORATION IN FORCE FROM TIME TO TIME IN THE TRANSITIONAL PERIOD

Short Title

1. This Direction may be cited as the Direction to the CRTC on the Regulation of the New Corporation Resulting from the Reorganization of Teleglobe.

Definitions

(a) For the purposes of this Direction,

"Act" means the Teleglobe Canada Reorganization and Divestiture Act;

"collection rates", in respect of telephone and teleprinter services, means charges or tolls paid by a customer in Canada for the provision of those services between a point in Canada and a point outside Canada.

Direction

2. This Direction shall limit the exercise of the statutory powers, duties and functions of the Commission in relation to the new corporation only to the extent specified herein.

3. Subject to subsection 321(2) of the Railway Act, the Commission shall approve tolls of the new corporation that reduce, effective January 1, 1988, the weighted average collection rates for telephone services by 13.5 per cent and the weighted average collection rates for the class of telegraph services known as teleprinter services by 10 per cent from the rates in effect immediately prior to the coming into force of the Act.

(1) In approving tolls of the new corporation the Commission shall

(a) accept as the allowed rate of return on common equity, on average over the transitional period, a return that is within the range defined by the weighted average mid-point of the return allowed by the Commission on common equity of Bell Canada and British Columbia Telephone Company, and that mid-point plus 2 per cent; and

(b) accept, at the time this Direction comes into force, for the purpose of calculating the revenue requirement of the new corporation,

(i) a new balance sheet in which the net fixed assets are 140 per cent of net historical book value as reflected in the balance sheet of Teleglobe, including any changes occurring in the ordinary course of business before the commencement of the transitional period, and a corresponding opening capital structure, and

(ii) a ratio of long-term debt to equity of 45/55.

(2) For the purposes of this section, the weighted average mid-point is calculated on the basis of the operating revenues from telecommunication services, on a non-consolidated basis as reported to the Commission, of Bell Canada and British Columbia Telephone Company, respectively.

4. Where the Commission determines that the tolls of the new corporation result in a rate of return that is outside the range described in paragraph 5(1)(a), or that the new corporation has not made an application for approval of the reductions described in section 4, the Commission shall make one or more orders pursuant to the powers, duties and functions within the Commission's jurisdiction to achieve the rate of return and the reductions.

(a) This Direction shall have force and effect during the transitional period.

Appendix B – 1995 DTH and DTH PPV – Policy Review Panel proposals

Source: Report of the Policy Review Panel, Annex I, printed pp. 36–40. Proposed texts reproduced in English; these were recommendations, not issued Orders in Council.

1. Proposed Direction Concerning DTH Satellite Distribution Undertakings.

WHEREAS all classes and types of satellite broadcasting undertakings play a significant role in the implementation of the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act*;

WHEREAS Direct-to-Home Satellite Distribution Undertakings will become an increasingly important primary and alternative means for the distribution of Canadian programming services, in both official languages, as well as of foreign programming services to subscribers in all parts of Canada;

WHEREAS Direct-to-Home Satellite Distribution Undertakings can, if appropriately regulated, develop into an important vehicle for the distribution of Canadian pay-per-view services as well as other new video services and thereby make significant contributions to the development of independently produced Canadian programming;

WHEREAS such Direct-to-Home Satellite Distribution Undertakings should be allowed unrestricted market entry through licensing, subject to appropriate requirements, including their contribution to the development of programming, in order to provide pay-per-view services and other Canadian and foreign programming services in competition with each other and with other distribution undertakings that provide programming services to Canadians;

AND WHEREAS it is in the public interest to have DTH distribution undertaking licensed in Canada as soon as possible;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Communications, pursuant to section 7 of the *Broadcasting Act*,* is pleased hereby to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of Direct-to-Home (DTH) Satellite Distribution Undertakings.

* S.C. 1991, c. 11

ORDER ISSUING DIRECTIONS TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING POLICY FOR THE LICENSING OF DIRECT-TO-HOME (DTH) SATELLITE DISTRIBUTION UNDERTAKINGS

Short Title

1. This Order may be cited as the Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order.

Interpretation

2. In this Order,

"**Class 1 cable licensee**" means a holder of a Class 1 cable licence within the meaning of paragraph 8(a) of the Cable Television Regulations, 1986; (télédistributeur de classe 1)

"**CRTC**" means the Canadian Radio-television and Telecommunications Commission; (CRTC)

"**DTH distribution undertaking**" means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (entreprise de distribution par SRD)

"**DTH pay-per-view television programming undertaking**" means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (entreprise de programmation de télévision à la carte par SRD)

"**other distribution undertakings**" includes cable distribution, Satellite Master Antenna Television (SMATV) and radiocommunication distribution undertakings that are licensed or exempted by the CRTC from the requirement for a licence under section 9 of the *Broadcasting Act*; (autres entreprises de distribution)

"**pay-per-view television programming undertaking**" means a pay television programming undertaking that provides a general interest pay-per-view service. (entreprise de programmation de télévision à la carte)

Directions

3. The CRTC is hereby directed to ensure, by appropriate means, that, with respect to the operation of a DTH distribution undertaking,

(a) the same rules that are in effect for other distribution undertakings govern the selection of particular Canadian and foreign programming services that are offered by the undertaking to its subscribers;

(b) the undertaking's subscribers are able to receive signals distributed by the undertaking directly from any satellite the program-carrying signals of which may

be received directly by other distribution undertakings for redistribution to their subscribers;

(c) the undertaking is subject to the same rules as other satellite broadcasting undertakings in respect of the use of Canadian satellites for the distribution of Canadian programming services to its subscribers;

(d) the undertaking contributes financially, on an annual basis, to the independent production of Canadian programming to the same extent that Class 1 cable licensees are required to contribute to community programming;

(e) the undertaking is not prevented from or impeded in distributing to its subscribers the same or equivalent programming services offered by other distribution undertakings as a result of contracts or arrangements entered into by other licensees for the acquisition of rights to the distribution or exhibition of such programming services via other distribution undertakings within Canada;

(f) the undertaking is prohibited from distributing any pay-per-view service other than that offered by a DTH pay-per-view television programming undertaking;

(g) the undertaking is not prohibited from distributing a pay-per-view service referred to in paragraph (f) for the sole reason that a foreign satellite is to be used for the delivery of part of that pay-per-view service;

(h) where the undertaking decides to distribute English-language pay-per-view services, the undertaking is required to distribute French-language pay-per-view services; and

(i) the undertaking is prohibited from originating any programming.

4. In order to give effect to this Order, the CRTC is hereby directed

(a) not to authorize any person or class of persons to carry on a DTH distribution undertaking other than by means of a licence issued by the CRTC for that purpose; and

(b) to take, immediately on the coming into force of this Order, all necessary and appropriate steps to ensure that no person is authorized to carry on a DTH distribution undertaking by any means other than a licence.

5. The CRTC is hereby further directed not to refuse to issue a license to an applicant to carry on a DTH distribution undertaking for the sole reason that the applicant holds a license to carry on a DTH pay-per-view television programming undertaking.

6. The CRTC is hereby further directed to call for applications for a licence to carry on a DTH distribution undertaking within 90 days after the day on which this Order comes into force and, thereafter, to schedule a public hearing to consider those applications at the earliest time practicable.

2. Proposed Direction Concerning Pay-per-view Television Undertakings.

WHEREAS pay-per-view services will become an increasingly important vehicle for the exhibition of feature films and other television programming and an increasingly important source of financial contribution to the development of independently-produced Canadian programming;

AND WHEREAS pay-per-view television programming undertakings should be allowed unrestricted market entry through licensing, subject to appropriate requirements, including their contribution to the development of programming, in order to provide to their subscribers, in competition with each other, the widest range of Canadian and foreign feature films and other programming;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Communications, pursuant to section 7 of the *Broadcasting Act**, is pleased hereby to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of pay-per-view television programming undertakings that provide services through Direct-to-Home (DTH) Satellite Distribution Undertakings.

* S.C. 1991, c. 11

ORDER ISSUING DIRECTIONS TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING POLICY FOR THE LICENSING OF PAY-PER-VIEW TELEVISION PROGRAMMING UNDERTAKINGS THAT PROVIDE SERVICES THROUGH DIRECT-TO-HOME (DTH) SATELLITE DISTRIBUTION UNDERTAKINGS

Short title

1. This Order may be cited as the Directions to the CRTC (Direct-to-Home (DTH)) Pay-Per-View Television Programming Undertakings) Order.

Interpretation

2. In this Order,

"**CRTC**" means the Canadian Radio-television and Telecommunications Commission; (CRTC)

"**DTH distribution undertaking**" means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (entreprise de distribution par SRD)

"**DTH pay-per-view television programming undertaking**" means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (entreprise de programmation de télévision à la carte par SRD)

"**other pay-per-view television programming undertakings**" means pay-per-view television programming undertakings that provide general interest pay-per-view television programming via satellite to cable affiliates; (autres entreprises de programmation de télévision à la carte)

"**pay-per-view television programming undertaking**" means a pay television programming undertaking that provides a general interest pay-per-view service. (entreprise de programmation de télévision à la carte)

Directions

3. The CRTC is hereby directed to establish a class of licences in respect of the carrying on of a pay-per-view television programming undertaking.

4. The CRTC is hereby further directed, in the exercise of its authority to issue, amend, renew, suspend or revoke any licence of the class of licences, referred to in section 3, in respect of the carrying on of a pay-per-view television programming undertaking

(a) to prohibit, by appropriate means, the undertaking from acquiring exclusive rights to pay-per-view distribution of feature films and other programming within Canada;

(b) to require, by appropriate means, the undertaking to contribute financially, on an annual basis, to the independent production of Canadian programming in the same manner and to the same extent as that required of other pay-per-view television programming undertakings, which financial contribution shall be not less than 5% of gross annual revenues;

(c) taking into consideration the total number of channels over which the undertaking's service is offered, to apply rules that are comparable or equivalent to those rules in effect in respect of other pay-per-view television programming undertakings and that pertain to the annual exhibition ratios of Canadian to foreign films and events, the annual minimum numbers of Canadian films and events to be exhibited and the remittances to be paid by the undertaking to rights holders for the Canadian films and events it exhibits;

(d) to apply the CRTC rules governing sex-role portrayal and the depiction of violence to the programming exhibited by the undertaking;

(e) to ensure, to the same extent as for other pay-per-view television programming undertakings, that the Canadian films and video programming exhibited by the undertaking have been produced by independent production companies; and

(f) not to prohibit the utilization of foreign satellites for the distribution of part of the undertaking's programming to subscribers through a DTH distribution undertaking; and

(g) not to refuse to issue a licence to an applicant for the sole reason that the applicant holds a licence to carry on a DTH distribution undertaking.

Appendix C – 1995 DTH and DTH PPV – April 29 Canada Gazette proposals

Editorial source note: The Regulatory Impact Analysis Statements accompanying the two proposed Directions are published in Canada Gazette, Part I, April 29, 1995 (same issue as the proposed instruments). Official source: https://publications.gc.ca/site/eng/9.529946/publication.html

April 29, 1995 Canada Gazette, Part I — Proposed DTH Directions

English text of the two proposed Orders, with the Gazette notices and original parenthetical French definition equivalents. Source: Canada Gazette, Part I, April 29, 1995, pp. 1317–1322. The separate French-language columns and regulatory impact analysis are not reproduced.

1. Proposed DTH Pay-Per-View Television Programming Direction

Canada Gazette, Part I, April 29, 1995, pp. 1317–1319. Statutory authority: *Broadcasting Act*, s. 7.

Notice is hereby given, pursuant to subsection 8(1) of the *Broadcasting Act*, that the Governor in Council proposes, on the recommendation of the Minister of Communications, pursuant to section 7 of that Act, to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of pay-per-view television programming undertakings that provide services through Direct-to-Home (DTH) Satellite Distribution Undertakings.

Interested persons may make representations with respect to the proposed Order within 34 days after the date of publication of this notice. All such representations must cite the Canada Gazette, Part I, and the date of publication of this notice, and be sent to the Minister of Communications, c/o Director General, Broadcasting Policy Branch, Department of Communications, 365 Laurier Avenue West, 11th Floor, Ottawa, Ontario K1A 0M5.

April 25, 1995 — MICHEL GARNEAU, Assistant Clerk of the Privy Council

ORDER ISSUING DIRECTIONS TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING POLICY FOR THE LICENSING OF PAY-PER-VIEW TELEVISION PROGRAMMING UNDERTAKINGS THAT PROVIDE SERVICES THROUGH DIRECT-TO-HOME (DTH) SATELLITE DISTRIBUTION UNDERTAKINGS

Short title

1. This Order may be cited as the Directions to the CRTC (Direct-to-Home (DTH)) Pay-Per-View Television Programming Undertakings) Order.

Interpretation

2. In this Order,

"**CRTC**" means the Canadian Radio-television and Telecommunications Commission; (CRTC)

"**DTH distribution undertaking**" means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (entreprise de distribution par SRD)

"**DTH pay-per-view television programming undertaking**" means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (entreprise de programmation de télévision à la carte par SRD)

"**other pay-per-view television programming undertakings**" means pay-per-view television programming undertakings that provide general interest pay-per-view television programming via satellite to cable affiliates; (autres entreprises de programmation de télévision à la carte)

"**pay-per-view television programming undertaking**" means a pay television programming undertaking that provides a general interest pay-per-view service. (entreprise de programmation de télévision à la carte)

Directions

3. The CRTC is hereby directed to establish a class of licences in respect of the carrying on of a pay-per-view television programming undertaking.

4. The CRTC is hereby further directed, in the exercise of its authority to issue, amend, renew, suspend or revoke any licence of the class of licences, referred to in section 3, in respect of the carrying on of a pay-per-view television programming undertaking

(a) to prohibit, by appropriate means, the undertaking from acquiring exclusive rights to pay-per-view distribution of feature films and other programming within Canada;

(b) to require, by appropriate means, the undertaking to contribute financially, on an annual basis, to the independent production of Canadian programming in the same manner and to the same extent as that required of other pay-per-view television programming undertakings, which financial contribution shall be not less than 5% of gross annual revenues;

(c) taking into consideration the total number of channels over which the undertaking's service is offered, to apply rules that are comparable or equivalent to those rules in effect in respect of other pay-per-view television programming undertakings and that pertain to the annual exhibition ratios of Canadian to foreign films and events, the annual minimum numbers of Canadian films and events to be exhibited and the remittances to be paid by the undertaking to rights holders for the Canadian films and events it exhibits;

(d) to apply the CRTC rules governing sex-role portrayal and the depiction of violence to the programming exhibited by the undertaking;

(e) to ensure, to the same extent as for other pay-per-view television programming undertakings, that the Canadian films and video programming exhibited by the undertaking have been produced by independent production companies;

(f) not to prohibit the utilization of foreign satellites for the distribution of part of the undertaking's programming to subscribers through a DTH distribution undertaking; and

(g) not to refuse to issue a licence to an applicant for the sole reason that the applicant holds a licence to carry on a DTH distribution undertaking.

2. Proposed DTH Satellite Distribution Direction

Canada Gazette, Part I, April 29, 1995, pp. 1320–1322. Statutory authority: *Broadcasting Act*, s. 7.

Notice is hereby given, pursuant to subsection 8(1) of the *Broadcasting Act*, that the Governor in Council proposes, on the recommendation of the Minister of Communications, pursuant to section 7 of that Act, to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of Direct-to-Home (DTH) Satellite Distribution Undertakings.

Interested persons may make representations with respect to the proposed Order within 34 days after the date of publication of this notice. All such representations must cite the Canada Gazette, Part I, and the date of publication of this notice, and be sent to the Minister of Communications, c/o Director General, Broadcasting Policy Branch, Department of Communications, 365 Laurier Avenue West, 11th Floor, Ottawa, Ontario K1A 0M5.

April 25, 1995 — MICHEL GARNEAU, Assistant Clerk of the Privy Council

ORDER ISSUING DIRECTIONS TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING POLICY FOR THE LICENSING OF DIRECT-TO-HOME (DTH) SATELLITE DISTRIBUTION UNDERTAKINGS

Short Title

1. This Order may be cited as the Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order.

Interpretation

2. In this Order,

"**Class 1 cable licensee**" means a holder of a Class 1 cable licence within the meaning of paragraph 8(a) of the Cable Television Regulations, 1986; (télédistributeur de classe 1)

"**CRTC**" means the Canadian Radio-television and Telecommunications Commission; (CRTC)

"**DTH distribution undertaking**" means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (entreprise de distribution par SRD)

"**DTH pay-per-view television programming undertaking**" means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (entreprise de programmation de télévision à la carte par SRD)

"**other distribution undertakings**" includes cable distribution, Satellite Master Antenna Television (SMATV) and radiocommunication distribution undertakings that are licensed or exempted by the CRTC from the requirement for a licence under section 9 of the *Broadcasting Act*; (autres entreprises de distribution)

"**pay-per-view television programming undertaking**" means a pay television programming undertaking that provides a general interest pay-per-view service. (entreprise de programmation de télévision à la carte)

Directions

3. The CRTC is hereby directed to ensure, by appropriate means, that, with respect to the operation of a DTH distribution undertaking,

(a) the same rules that are in effect for other distribution undertakings govern the selection of particular Canadian and foreign programming services that are offered by the undertaking to its subscribers;

(b) the undertaking's subscribers are able to receive signals distributed by the undertaking directly from any satellite the program-carrying signals of which may be received directly by other distribution undertakings for redistribution to their subscribers;

(c) the undertaking is subject to the same rules as other satellite broadcasting undertakings in respect of the use of Canadian satellites for the distribution of Canadian programming services to its subscribers;

(d) the undertaking contributes financially, on an annual basis, to the independent production of Canadian programming to the same extent that Class 1 cable licensees are required to contribute to community programming;

(e) the undertaking is not prevented from or impeded in distributing to its subscribers the same or equivalent programming services offered by other distribution undertakings as a result of contracts or arrangements entered into by other licensees for the acquisition of rights to the distribution or exhibition of such programming services via other distribution undertakings within Canada;

(f) the undertaking is prohibited from distributing any pay-per-view service other than that offered by a DTH pay-per-view television programming undertaking;

(g) the undertaking is not prohibited from distributing a pay-per-view service referred to in paragraph (f) for the sole reason that a foreign satellite is to be used for the delivery of part of that pay-per-view service;

(h) where the undertaking decides to distribute English-language pay-per-view services, the undertaking is required to distribute French-language pay-per-view services; and

(i) the undertaking is prohibited from originating any programming.

4. In order to give effect to this Order, the CRTC is hereby directed

(a) not to authorize any person or class of persons to carry on a DTH distribution undertaking other than by means of a licence issued by the CRTC for that purpose; and

(b) to take, immediately on the coming into force of this Order, all necessary and appropriate steps to ensure that no person is authorized to carry on a DTH distribution undertaking by any means other than a licence.

5. The CRTC is hereby further directed not to refuse to issue a licence to an applicant to carry on a DTH distribution undertaking for the sole reason that the applicant holds a licence to carry on a DTH pay-per-view television programming undertaking.

6. The CRTC is hereby further directed to call for applications for a licence to carry on a DTH distribution undertaking within 90 days after the day on which this Order comes into force and, thereafter, to schedule a public hearing to consider these applications at the earliest time practicable.

Appendix D – 1995 DTH and DTH PPV – July final Directions

Editorial source note: The Regulatory Impact Analysis Statements accompanying the final July 1995 Directions are available with their original Canada Gazette, Part II publications. The RIAS are not reproduced here.

DTH Satellite Distribution — SOR/95-319

Registration: SOR/95-319 — July 6, 1995
BROADCASTING ACT
P.C. 1995-1105 — July 6, 1995

Order in Council: recitals and making clause

Whereas all classes and types of satellite broadcasting undertakings play a significant role in the implementation of the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act**;

Whereas DTH distribution undertakings will become increasingly important primary and alternative means for the distribution of Canadian programming services, in both official languages, as well as of foreign programming services to subscribers in all parts of Canada;

Whereas DTH distribution undertakings can, if appropriately regulated, develop into an important vehicle for the distribution of Canadian pay-per-view services as well as other new services and thereby make significant contributions to the development of independently-produced Canadian programming;

Whereas DTH distribution undertakings should operate through licensing in a dynamically competitive market, subject to appropriate requirements, including their contribution to the development of programming, in order to provide pay-per-view services and other Canadian and foreign programming services in competition with each other and with other distribution undertakings that provide programming services to Canadians;

Whereas the Canadian Radio-television and Telecommunications Commission should not refuse to issue a DTH distribution undertaking licence on the basis of a concern for economic viability;

Whereas the contribution of DTH distribution undertakings should include a financial contribution of more than five per cent of gross annual revenues to the production of Canadian programming;

Whereas it is in the public interest to have DTH distribution undertakings licensed in Canada as soon as possible, recognizing that the appropriate committee of each House of Parliament has recommended that the licensing process be completed by September 1, 1995;

Whereas the Canadian Radio-television and Telecommunications Commission should ensure the continuing integrity of the Canadian broadcasting system through implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act**;

Whereas, the Minister of Communications has, in accordance with subsection 7(6) of the *Broadcasting Act**, consulted with the Canadian Radio-television and Telecommunications Commission;

Whereas, in accordance with paragraph 8(1)(a) of the *Broadcasting Act**, notice of the proposed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of Direct-to-Home (DTH) Satellite Distribution Undertakings, substantially in the form annexed hereto, was published in the Canada Gazette Part I on April 29, 1995 and interested persons were invited to make representations to the Minister of Communications with respect to the proposed Order;

And whereas, in accordance with paragraph 8(1)(b) of the *Broadcasting Act**, a copy of the proposed Order was laid before each House of Parliament and forty sitting days of Parliament have since expired;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Communications, pursuant to section 7 and subsection 8(3) of the *Broadcasting Act**, is pleased hereby to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of Direct-to-Home (DTH) Satellite Distribution Undertakings.

* S.C. 1991, c. 11

Order Issuing Directions to the Canadian Radio-Television and Telecommunications Commission Respecting Policy for the Licensing of Direct-To-Home (DTH) Satellite Distribution Undertakings

1. This Order may be cited as the Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order.

2. In this Order,

"**CRTC**" means the Canadian Radio-television and Telecommunications Commission; (CRTC)

"**DTH distribution undertaking**" means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (entreprise de distribution par SRD)

"**DTH pay-per-view television programming undertaking**" means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (entreprise de programmation de télévision à la carte par SRD)

other distribution undertakings includes cable distribution, Satellite Master Antenna Television (SMATV) and radiocommunication distribution undertakings that are licensed or exempted by the CRTC from the requirement for a licence under section 9 of the *Broadcasting Act*; (autres entreprises de distribution)

"**pay-per-view television programming undertaking**" means a pay television programming undertaking that provides a pay-per-view service. (entreprise de programmation de télévision à la carte)

3. The CRTC is directed to promote, through licensing, a dynamically competitive market for DTH distribution undertakings.

4. The CRTC is directed to ensure, by appropriate means, that, with respect to the operation of a licensed DTH distribution undertaking,

(a) substantially the same rules that are in effect for other distribution undertakings govern the selection of particular Canadian and foreign programming services that are offered by the undertaking to its subscribers;

(b) the undertaking is subject to the same generally applicable Canadian policy as other broadcasting undertakings in respect of the use of Canadian and foreign satellite facilities;

(c) the undertaking is subject to equitable obligations and makes maximum contributions to Canadian programming, including a significant financial contribution derived from a percentage of gross annual revenues to the production of Canadian programming, and that the financial contribution is administered independently of the undertaking;

(d) the undertaking is not prevented from or impeded in distributing to its subscribers the same or equivalent programming services offered by other distribution undertakings as a result of contracts or arrangements entered into by other licensees for the acquisition of rights to the distribution or exhibition of such programming services via other distribution undertakings within Canada;

(e) the undertaking is prohibited from distributing any pay-per-view service other than that offered by a DTH pay-per-view television programming undertaking;

(f) the undertaking is not prohibited from distributing a pay-per-view service referred to in paragraph (e) for the sole reason that a foreign satellite is to be used for the distribution of the non-Canadian programming of that pay-per-view service, provided that such use is consistent with generally applicable Canadian satellite policy; and

(g) where the undertaking decides to distribute one or more English-language pay-per-view services, the undertaking is required to distribute at least one French-language pay-per-view service as soon as that service becomes licensed for DTH distribution.

5. The CRTC is directed

(a) not to authorize any person or class of persons to carry on a DTH distribution undertaking other than by means of a licence issued by the CRTC for that purpose; and

(b) following the conclusion of the licensing process referred to in section 7, to take all necessary and appropriate steps to ensure that no person is authorized to carry on a DTH distribution undertaking by any means other than a licence.

6. The CRTC is directed not to refuse to issue a licence to an applicant to carry on a DTH distribution undertaking for the sole reason that the applicant holds a licence to carry on a DTH pay-per-view television programming undertaking.

7. The CRTC is directed to call, immediately on the coming into force of this Order, for licence applications to carry on DTH distribution undertakings and, thereafter, to complete the licensing process in respect of those applications at the earliest time practicable and, in the absence of the most compelling of circumstances, not later than November 1, 1995.

DTH Pay-Per-View — SOR/95-320

Registration: SOR/95-320 — July 6, 1995
BROADCASTING ACT
P.C. 1995-1106 — July 6, 1995

Order in Council: recitals and making clause

Whereas pay-per-view services will become an increasingly important vehicle for the exhibition of feature films and other television programming and an increasingly important source of financial contribution to the development of independently-produced Canadian programming;

Whereas pay-per-view television programming undertakings should operate through licensing in a dynamically competitive market, subject to appropriate requirements, including their contribution to the development of programming, in order to provide to their subscribers, in competition with each other, the widest range of Canadian and foreign feature films and other programming;

Whereas the Canadian Radio-television and Telecommunications Commission should not refuse to issue a DTH pay-per-view television programming undertaking licence on the basis of a concern for economic viability;

Whereas the contribution of DTH pay-per-view television programming undertakings should include a financial contribution of more than five per cent of gross annual revenues to the production of Canadian programming;

Whereas the Canadian Radio-television and Telecommunications Commission should ensure the continuing integrity of the Canadian broadcasting system through implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act**;

Whereas, in accordance with subsection 7(6) of the *Broadcasting Act**, the Minister of Communications has consulted with the Canadian Radio-television and Telecommunications Commission;

Whereas, in accordance with paragraph 8(1)(a) of the *Broadcasting Act**, notice of the proposed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of pay-per-view television programming undertakings that provide services through Direct-to-Home (DTH) Satellite Distribution Undertakings, substantially in the form annexed hereto, was published in the Canada Gazette Part I on April 29, 1995 and interested persons were invited to make representations to the Minister of Communications with respect to the proposed Order;

And Whereas, in accordance with paragraph 8(1)(b) of the *Broadcasting Act**, a copy of the proposed Order was laid before each House of Parliament and forty sitting days of Parliament have since expired;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Communications, pursuant to section 7 and subsection 8(3) of the *Broadcasting Act**, is pleased hereby to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of pay-per-view television programming undertakings that provide services through Direct-to-Home (DTH) Satellite Distribution Undertakings.

* S.C. 1991, c. 11

Order Issuing Directions to the Canadian Radio-Television and Telecommunications Commission Respecting Policy for the Licensing of Pay-Per-View Television Programming Undertakings that Provide Services Through Direct-To-Home (DTH) Satellite Distribution Undertakings

1. This Order may be cited as the Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order.

2. In this Order,

CRTC means the Canadian Radio-television and Telecommunications Commission; (CRTC)

DTH distribution undertaking means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (entreprise de distribution par SRD)

DTH pay-per-view television programming undertaking means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (entreprise de programmation de télévision à la carte par SRD)

other pay-per-view television programming undertakings means pay-per-view television programming undertakings that provide pay-per-view television programming via satellite to cable affiliates; (autres entreprises de programmation de télévision à la carte)

pay-per-view television programming undertaking means a pay television programming undertaking that provides a pay-per-view service. (entreprise de programmation de télévision à la carte)

3. The CRTC is directed to promote, through licensing, a dynamically competitive market for DTH pay-per-view television programming undertakings.

4. The CRTC is directed to establish a class of licences in respect of the carrying on of DTH pay-per-view television programming undertakings.

5. The CRTC is directed, in the exercise of its powers in respect of the carrying on of a DTH pay-per-view television programming undertaking,

(a) to prohibit, by appropriate means, the undertaking from acquiring exclusive or other preferential rights to pay-per-view distribution of feature films and other programming within Canada;

(b) to ensure that the undertaking is subject to equitable obligations and makes maximum contributions to Canadian programming, including a significant financial contribution derived from a percentage of gross annual revenues to the production of Canadian programming, and that the financial contribution is administered independently of the undertaking;

(c) taking into consideration the total number of channels over which the undertaking's service is offered, to apply rules that are comparable or equivalent to those rules in effect in respect of other pay-per-view television programming undertakings and that pertain to the annual exhibition ratios of Canadian to foreign films and events, the annual minimum numbers of Canadian films and events to be exhibited and the remittances to be paid by the undertaking to rights holders for the Canadian films and events it exhibits;

(d) to require the undertaking to be subject to the same generally applicable Canadian policy as other broadcasting undertakings in respect of the use of Canadian and foreign satellite facilities;

(e) not to refuse to issue a licence to an applicant for the sole reason that the applicant proposes to use foreign satellites for the distribution of non-Canadian programming to subscribers through a DTH distribution undertaking, provided that such use is consistent with generally applicable Canadian satellite policy; and

(f) not to refuse to issue a licence to an applicant for the sole reason that the applicant holds a licence to carry on a DTH distribution undertaking.

6. The CRTC is directed

(a) not to authorize any person or class of persons to carry on a DTH pay-per-view television programming undertaking other than by means of a licence issued by the CRTC for that purpose; and

(b) to call, immediately on the coming into force of this Order, for licence applications to carry on English-language DTH pay-per-view television programming undertakings and for licence applications to carry on French-language DTH pay-per-view television programming undertakings and, thereafter, to complete the licensing processes in respect of those applications concurrently with the licensing process for DTH distribution undertakings referred to in section 7 of the Directions to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order.

Appendix E – 2006 TPRP Proposed Direction

Telecommunications Policy Review Panel — Proposed Text of Policy Direction (March 2006)

Source: Telecommunications Policy Review Panel, Final Report 2006, Chapter 10, pp. 10-7–10-8 (PDF pp. 321–322). The text below is the Panel's proposal, not the government's June 2006 proposed Direction.

"In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission shall interpret and implement the Canadian telecommunications policy objectives set out in section 7, and particularly in paragraphs 7.(c) and (f), in accordance with the following principles:

(a) Market forces shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives.

(b) Regulatory measures shall be applied only where

  (i) market forces are unlikely to achieve a telecommunications policy objective within a reasonable time frame, and

  (ii) the costs of such measures do not outweigh the benefits.

(c) Regulatory measures shall be efficient and proportionate to their purpose and shall interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

(d) When it is determined that regulatory measures are required, they shall specify the telecommunications policy objective that is advanced by the measure and demonstrate compliance with the foregoing principles.

(e) Economic regulation shall apply only if there is a finding of significant market power in respect of a telecommunications service or class of services provided by a Canadian carrier. The Canadian Radio-television and Telecommunications Commission should continuously review telecommunications markets on a timely basis to ascertain the appropriate degree of regulation or forbearance under section 34 of the *Telecommunications Act*.

(f) To provide increased incentives for innovation, investment in and construction of competing telecommunications network facilities, mandated access to wholesale services shall be limited to essential services provided by a carrier with significant market power, and shall be priced on a basis that encourages investment and innovation in network infrastructure.

(g) Economic regulation, when required, shall neither deter efficient competitive entry nor promote inefficient entry.

(h) Interconnection arrangements and access regimes, including access to buildings, in-building wiring and support structures, shall, to the greatest extent possible, be technologically and competitively neutral; to enable competition from new technologies and not to artificially favour either facilities-based or non-facilities-based carriers or resellers.

(i) Regulatory measures designed to advance non-economic objectives of regulation shall, to the greatest extent possible, be implemented in a symmetrical and competitively neutral manner.

(j) To ensure that regulation, when required, is efficient, the Canadian Radio-television and Telecommunications Commission shall maintain and publish service performance standards for the various forms of regulatory proceedings it undertakes.

(k) To ensure greater efficiency in regulation, ex ante tariff regulation shall be used only when less intrusive and less onerous tariff approval mechanisms, such as price cap mechanisms, are determined to be ineffective means to satisfy the objectives of economic regulation.

(l) The Canadian Radio-television and Telecommunications Commission shall continue to explore and implement new approaches for streamlining its regulatory process to enhance the efficiency and effectiveness of regulation."

Appendix F – June 2006 Proposed Telecommunications Policy Direction

Source: Canada Gazette, Part I, Vol. 140, No. 24 (June 17, 2006), pp. 1608–1610. Proposed regulatory text at pp. 1608–1610; accompanying Regulatory Impact Analysis Statement at pp. 1606–1608 (not reproduced).

PROPOSED REGULATORY TEXT

Notice is hereby given, pursuant to subsection 10(1) of the *Telecommunications Act*, that the Governor in Council proposes, pursuant to section 8 of that Act, to make the annexed Order under Section 8 of the *Telecommunications Act* – Policy Direction to the Canadian Radio-television and Telecommunications Commission.

Interested persons may make representations with respect to the proposed Order within 60 days after the date of publication of this notice. All such representations must cite the Canada Gazette, Part I, and the date of publication of this notice, and be sent to the Director General, Telecommunications Policy Branch, Industry Canada, 16th Floor, 300 Slater Street, Ottawa, Ontario K1A 0C8, or by fax: (613) 998-1256, or to the following e-mail address: telecom@ic.gc.ca.

Ottawa, June 8, 2006

DIANE LABELLE
Acting Assistant Clerk of the Privy Council

ORDER UNDER SECTION 8 OF THE TELECOMMUNICATIONS ACT – POLICY DIRECTION TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission shall interpret and implement the Canadian telecommunications policy objectives set out in section 7, and particularly in paragraphs 7(c) and (f), in accordance with the following principles:

(a) the CRTC should

(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and

(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

(b) when it is determined that regulatory measures are required, then that regulatory measure should satisfy the following criteria:

(i) each regulatory measure should specify the telecommunications policy objective that is advanced by the measure and demonstrate compliance with this policy direction,

(ii) economic regulation, when required, should neither deter efficient competitive entry nor promote inefficient entry,

(iii) regulatory measures designed to advance non-economic objectives of regulation should, to the greatest extent possible, be implemented in a symmetrical and competitively neutral manner, and

(iv) interconnection arrangements and access regimes, including access to buildings, in-building wiring and support structures, should, to the greatest extent possible, be technologically and competitively neutral, in order to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers;

(c) in order to promote efficient, informed and timely operations the Commission should adopt the following operational practices:

(i) provide for maximum efficiency in regulation by using only tariff approval measures that are as minimally intrusive and as minimally onerous as possible,

(ii) with a view to providing increased incentives for innovation, investment in and construction of competing telecommunications network facilities, conduct a review of its regulatory framework regarding mandated access to wholesale services, in order to determine the extent to which mandated access to wholesale services that are not essential services should be phased out and the appropriate pricing of mandated services to encourage investment and innovation in network infrastructure,

(iii) maintain and publish service performance standards for the various forms of regulatory proceedings it undertakes to ensure that regulatory measures, when required, are efficient, and

(iv) continue to explore and implement new approaches for streamlining its regulatory process to enhance the efficiency and effectiveness of regulatory measures; and

2. This Order comes into force on the day on which it is registered.

Official source: https://gazette.gc.ca/rp-pr/p1/2006/2006-06-17/pdf/g1-14024.pdf

Appendix G – December 2006 Final Telecommunications Policy Direction

Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives (SOR/2006-355)

Source: P.C. 2006-1534, December 14, 2006; registered December 14, 2006. Text reproduced from the archived original version of the Department of Justice Canada's Justice Laws Website (version effective December 14, 2006 to February 9, 2023): https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/20061214/P1TT3xt3.html. This Direction was repealed in 2023. The accompanying Regulatory Impact Analysis Statement is not reproduced.

TELECOMMUNICATIONS ACT

Registration 2006-12-14

Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives

P.C. 2006-1534 2006-12-14

Whereas, pursuant to subsection 10(1) of the *Telecommunications Act*[1], the Minister of Industry had a copy of the proposed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives published in the Canada Gazette, Part I, on June 17, 2006, substantially in the annexed form, and a reasonable opportunity was thereby given to interested persons to make representations to the Minister with respect to the proposed Order;

Whereas, pursuant to subsection 10(1) of that Act, the Minister laid the proposed Order before each House of Parliament and forty sitting days of Parliament have elapsed since the proposed Order was tabled in both Houses;

Whereas, pursuant to subsection 10(2) of that Act, the Minister consulted the Canadian Radio-television and Telecommunications Commission with respect to the proposed Order before it was published and laid and consulted the Commission again with respect to the proposed Order in its definitive form;

And whereas, pursuant to section 13 of that Act, the Minister, before making his recommendation to the Governor in Council for the purposes of this Order, notified the minister designated by the government of each province of his intention to make the recommendation and provided an opportunity for each of them to consult with the Minister;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 8 of the *Telecommunications Act*[1], hereby makes the annexed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives.

[1] S.C. 1993, c. 38

Direction

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission (the "Commission") shall implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission should

(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and

(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

(b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that

(i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with this Order,

(ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,

(iii) if they are not of an economic nature, to the greatest extent possible, are implemented in a symmetrical and competitively neutral manner, and

(iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers; and

(c) the Commission, to enable it to act in a more efficient, informed and timely manner, should adopt the following practices, namely,

(i) to use only tariff approval mechanisms that are as minimally intrusive and as minimally onerous as possible,

(ii) with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities, to complete a review of its regulatory framework regarding mandated access to wholesale services, to determine the extent to which mandated access to wholesale services that are not essential services should be phased out and

to determine the appropriate pricing of mandated services, which review should take into account the principles of technological and competitive neutrality, the potential for incumbents to exercise market power in the wholesale and retail markets for the service in the absence of mandated access to wholesale services, and the impediments faced by new and existing carriers seeking to develop competing network facilities,

(iii) to publish and maintain performance standards for its various processes, and

(iv) to continue to explore and implement new approaches for streamlining its processes.

Effect of Order

2. This Order is binding on the Commission beginning on the day on which it comes into force and applies in respect of matters pending before the Commission on that day.

Coming into Force

3. This Order comes into force on the day on which it is registered.

Appendix H – March 2019 Proposed Telecommunications Policy Direction

Source: Canada Gazette, Part I, Vol. 153, No. 10 (March 9, 2019), "Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation." The accompanying Regulatory Impact Analysis Statement is not reproduced; it appears in the same official publication.

Official source and RIAS: https://gazette.gc.ca/rp-pr/p1/2019/2019-03-09/html/reg5-eng.html

PROPOSED REGULATORY TEXT

Notice is given, pursuant to subsection 10(1) of the *Telecommunications Act*[1], that the Governor in Council, pursuant to section 8 of that Act, proposes to make the annexed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation.

Interested persons may make representations concerning the proposed Order within 30 days after the date of publication of this notice. All such representations must cite the Canada Gazette, Part I, and the date of publication of this notice, and be addressed to the Director General, Telecommunications and Internet Policy Branch, Innovation, Science and Economic Development Canada, 235 Queen Street, 10th Floor, Ottawa, Ontario K1A 0H5 (ic.telecomsubmission-soumissiontelecom.ic@canada.ca).

Ottawa, February 26, 2019

Jurica Čapkun
Assistant Clerk of the Privy Council

ORDER ISSUING A DIRECTION TO THE CRTC ON IMPLEMENTING THE CANADIAN TELECOMMUNICATIONS POLICY OBJECTIVES TO PROMOTE COMPETITION, AFFORDABILITY, CONSUMER INTERESTS AND INNOVATION

Direction

Principles

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission, when relying on regulation, should consider how the measures used can promote competition, affordability, consumer interests and innovation, namely the extent to which they

(i) encourage all forms of competition,

(ii) foster affordability and lower prices, particularly when there is potential for telecommunications service providers to exercise market power,

(iii) ensure that affordable access to high quality telecommunications services is available,

(iv) enhance and protect the rights of consumers in their relationships with telecommunications service providers,

(v) reduce barriers to entry and barriers to competition for new and smaller telecommunications service providers,

(vi) enable innovation in telecommunications services, including new technologies and differentiated service offerings, and

(vii) stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services; and

(b) the Commission, when relying on regulation, should demonstrate its compliance with this Order and should specify how the measures used can, as applicable, promote competition, affordability, consumer interests and innovation.

Effect of Order

Effect

2. This Order is binding on the Commission beginning on the day on which it comes into force and applies in respect of matters pending before the Commission on that day.

Coming into Force

Registration

3. This Order comes into force on the day on which it is registered.

[1] S.C. 1993, c. 38

Appendix I – June 2019 Final Telecommunications Policy Direction

SOR/2019-227 | P.C. 2019-803, June 16, 2019 | Registered June 17, 2019

Source: Department of Justice, archived original version (June 17, 2019–February 9, 2023): https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-227/20190617/P1TT3xt3.html. Accompanying Regulatory Impact Analysis Statement not reproduced; consult the original Canada Gazette, Part II publication.

ORDER ISSUING A DIRECTION TO THE CRTC ON IMPLEMENTING THE CANADIAN TELECOMMUNICATIONS POLICY OBJECTIVES TO PROMOTE COMPETITION, AFFORDABILITY, CONSUMER INTERESTS AND INNOVATION

TELECOMMUNICATIONS ACT

Registration 2019-06-17

P.C. 2019-803 2019-06-16

Whereas the Governor in Council, in 2006, issued to the Canadian Radio-television and Telecommunications Commission an order entitled Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives[a] (the "2006 Direction");

Whereas the telecommunications market and its regulation have changed since 2006 and the Governor in Council is of the opinion that additional directions should be issued to the Commission as a result of those changes;

Whereas one of the purposes of the additional directions is to guide the Commission on how the 2006 Direction is to be implemented;

Whereas, pursuant to subsection 10(1) of the *Telecommunications Act*[b], the Minister of Industry had a copy of the proposed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation published in the Canada Gazette, Part I, on March 9, 2019, substantially in the annexed form, and a reasonable opportunity was given to interested persons to make representations to the Minister with respect to the proposed Order;

Whereas, pursuant to subsection 10(1) of that Act, the Minister laid the proposed Order before each House of Parliament and 40 sitting days of Parliament have elapsed since the proposed Order was tabled in both Houses;

Whereas, pursuant to subsection 10(2) of that Act, the Minister consulted the Commission with respect to the proposed Order before it was published and laid and consulted the Commission again with respect to the proposed Order in its definitive form;

And whereas, pursuant to section 13 of that Act, the Minister, before making a recommendation to the Governor in Council for the purposes of this Order, notified the minister designated by the government of each province of the Minister's intention to make the recommendation and provided an opportunity for each of them to consult with the Minister;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 8 of the *Telecommunications Act*[b], makes the annexed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation.

[a] SOR/2006-355 [b] S.C. 1993, c. 38

Direction

Principles

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission should consider how its decisions can promote competition, affordability, consumer interests and innovation, in particular the extent to which they

(i) encourage all forms of competition and investment,

(ii) foster affordability and lower prices, particularly when telecommunications service providers exercise market power,

(iii) ensure that affordable access to high-quality telecommunications services is available in all regions of Canada, including rural areas,

(iv) enhance and protect the rights of consumers in their relationships with telecommunications service providers, including rights related to accessibility,

(v) reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers,

(vi) enable innovation in telecommunications services, including new technologies and differentiated service offerings, and

(vii) stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services; and

(b) the Commission, in its decisions, should demonstrate its compliance with this Order and should specify how those decisions can, as applicable, promote competition, affordability, consumer interests and innovation.

Effect of Order

Effect

2. This Order is binding on the Commission beginning on the day on which it comes into force and applies in respect of matters pending before the Commission on that day.

Coming into Force

Registration

3. This Order comes into force on the day on which it is registered.

Appendix J – June 2022 Proposed Telecommunications Policy Direction

Source: Canada Gazette, Part I, Vol. 156, No. 23 (June 4, 2022), "Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy." The accompanying Regulatory Impact Analysis Statement precedes the proposed regulatory text in the same publication and is not reproduced here.

Official source: https://gazette.gc.ca/rp-pr/p1/2022/2022-06-04/html/reg1-eng.html

PROPOSED REGULATORY TEXT

Notice is given, under subsection 10(1) of the *Telecommunications Act*[a], that the Governor in Council proposes to make the annexed Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy under section 8 of that Act.

Interested persons may make representations concerning the proposed Order within 45 days after the date of publication of this notice. All such representations must cite the Canada Gazette, Part I, and the date of publication of this notice, and be addressed to the Director General, Telecommunications and Internet Policy Branch, Innovation, Science and Economic Development Canada, 235 Queen Street, 10th Floor, Ottawa, Ontario K1A 0H5 (email: telecomsubmission-soumissiontelecom@ised-isde.gc.ca).

[a] S.C. 1993, c. 38

Ottawa, May 24, 2022

Wendy Nixon

Assistant Clerk of the Privy Council

ORDER ISSUING A DIRECTION TO THE CRTC ON A RENEWED APPROACH TO TELECOMMUNICATIONS POLICY

Direction — Direction and Key Objectives

Direction

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act in accordance with this Order.

Key objectives

2. The Commission should consider how its decisions can promote competition, affordability, consumer interests and innovation, in particular the extent to which they

(a) encourage all forms of competition and investment;

(b) foster affordability and lower prices, particularly when telecommunications service providers exercise market power;

(c) ensure that affordable access to high-quality telecommunications services is available in all regions of Canada, including rural areas;

(d) enhance and protect the rights of consumers in their relationships with telecommunications service providers, including rights related to accessibility;

(e) reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers;

(f) enable innovation in telecommunications services, including new technologies and differentiated service offerings; and

(g) stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services.

Principles of Effective Regulation

Transparency, predictability and coherence

3. The Commission should ensure that its proceedings and decisions are transparent, predictable and coherent.

Efficiency and proportionality

4. The Commission should ensure that the measures that it imposes through its decisions are efficient and proportionate to their purpose.

Market monitoring, research and strategic foresight

5. The Commission should further develop strong and timely market monitoring, research and strategic foresight skills and use the results that it obtains from these activities in the exercise of its powers and the performance of its duties.

Decisions based on sound and recent evidence

6. The Commission should base its decisions on sound and recent evidence and should exercise its powers to obtain necessary evidence.

Timely proceedings and decisions

7. The Commission should conduct proceedings and issue decisions in a timely manner, in recognition of the need for market clarity. The Commission should consider whether adopting new processes or engaging external experts would help reach this objective.

Decisions of an economic nature

8. In making decisions of an economic nature, the Commission should balance the objectives of

(a) fostering competition;

(b) promoting investment in high-quality networks;

(c) improving consumer choice;

(d) supporting the provision of innovative services; and

(e) encouraging the provision of services at reasonable prices for consumers.

Considerations for Fixed Internet Competition

Regulatory framework

9. In order to foster fixed Internet competition, the Commission must

(a) maintain a regulatory framework mandating access to wholesale services for fixed Internet;

(b) monitor the effectiveness of the framework; and

(c) adjust the framework as necessary and in a timely manner, including by making proactive adjustments.

Aggregated wholesale high-speed access service

10. The Commission must mandate the provision of an aggregated wholesale high-speed access service until it determines that broad, sustainable and meaningful competition will persist if the service is no longer mandated.

Variety of access speeds and costs

11. The Commission must mandate the provision of wholesale high-speed access services with a variety of speeds, including low-cost options in all regions, and should not allow the discontinuance of such services if this would eliminate affordable options for consumers.

Tariff setting

12. The Commission should set interim and final tariffs more expediently, including by reforming the tariff-setting process and considering external expertise or international best practices.

Equitable application of regulatory framework

13. The Commission should ensure that its regulatory framework mandating wholesale high-speed access services applies equitably to carriers that are subject to the framework.

Considerations for Mobile Wireless Competition

Mobile wireless competition

14. In order to foster mobile wireless competition, the Commission must

(a) monitor and assess the effectiveness of its approach to a mandated wholesale facilities-based mobile virtual network operator access service, considering factors such as the specific characteristics of lower-density or remote regions and how these characteristics affect the time needed to deploy wireless networks; and

(b) adjust the approach, including by extending the duration of the mandate to provide the service, if the Commission determines that it is necessary.

Revision to approach

15. The Commission should revise its approach to encourage broader service-based competition if the effectiveness of the approach in fostering mobile wireless competition is lessened due to changes in the mobile wireless market structure or circumstances of competition.

Periodic review and adjustments

16. The Commission should

(a) periodically review the effectiveness of its mobile wireless services regulatory framework in meeting its objectives and, in doing so, consider factors that could harm competition, such as coordinated conduct between carriers; and

(b) make any necessary adjustments to the framework.

Approach to Consumer Matters

Consumer rights

17. The Commission must enhance and protect the rights of consumers in telecommunications markets by

(a) strengthening the ability of the Commission for Complaints for Telecom-television Services to better fulfill its mandate, including by

(i) increasing its operational capacity,

(ii) ensuring that the perspectives of consumer and civil-society groups are better reflected in its governance,

(iii) improving compliance with its rules, and

(iv) increasing public awareness of its complaint-resolution process;

(b) strengthening the position of consumers in their relationships with service providers, including by

(i) taking additional measures to protect consumers from unacceptable sales practices, such as the measures identified in the Commission's Report on Misleading or Aggressive Communications Retail Sales Practices,

(ii) harmonizing the provisions of the Commission's codes if doing so would be advantageous to consumers,

(iii) taking measures to promote clarity and transparency of pricing information and service plan characteristics in service providers' marketing materials, and

(iv) taking measures to ensure that consumers can promptly, affordably and easily cancel, downgrade, transfer or otherwise change their services;

(c) proactively identifying, removing and preventing barriers relating to telecommunications services, in particular for persons with disabilities; and

(d) collecting, reporting publicly and making available to consumers information about services, including in relation to performance and mobile coverage, by

(i) requiring that service providers regularly test the performance of their fixed Internet services, including services based on commonly used technologies in rural areas, and

(ii) developing and implementing a standardized and robust approach for reporting mobile wireless coverage.

Measures Supporting Deployment and Universal Access

Universal access

18. The Commission should continue to take measures, in concert with other government measures, to support the objective of universal access to high-quality fixed Internet and mobile wireless services, including:

(a) continuing to administer a funding mechanism, making any adjustments that the Commission determines are necessary; and

(b) mandating improved access to support structures, such as telephone poles and conduits, as well as identifying and addressing other barriers to timely deployment of telecommunications networks.

Funding mechanism

19. When the Commission reviews its funding mechanism, it must consider whether to prioritize funding for mobile wireless services and operating costs of telecommunications networks in order to promote

(a) improved access to, and more affordable prices for, retail telecommunications services in underserved areas; and

(b) better coordination of public funding.

Considerations

20. In considering measures to take under sections 18 and 19, the Commission must take into account evolving

(a) technologies;

(b) service-performance needs; and

(c) gaps in telecommunications network services.

Effect of Order

Effect

21. This Order is binding on the Commission beginning on the day on which it comes into force and applies in respect of matters pending before the Commission on that day.

Repeals

22. The following Orders are repealed:

(a) the Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives[7]; and

(b) the Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation[8].

Coming into Force

Registration

23. This Order comes into force on the day on which it is registered.

[7] SOR/2006-355

[8] SOR/2019-227

Appendix K – February 2023 Final Telecommunications Policy Direction

Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy (SOR/2023-23)

Source: Department of Justice Canada, official text, SOR/2023-23; registered February 10, 2023; P.C. 2023-110, February 9, 2023. The accompanying Regulatory Impact Analysis Statement is not reproduced. Official text: https://laws-lois.justice.gc.ca/eng/regulations/SOR-2023-23/page-1.html

Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy

SOR/2023-23 — TELECOMMUNICATIONS ACT — Registration 2023-02-10

P.C. 2023-110 2023-02-09

Whereas the Governor in Council, in 2006, issued to the Canadian Radio-television and Telecommunications Commission an order entitled Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives[a] (the "2006 Direction");

[a]SOR/2006-355

Whereas the Governor in Council, in 2019, issued to that Commission an order entitled Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation[b], one of the purposes of which was to guide the Commission on how the 2006 Direction is to be implemented;

[b]SOR/2019-227

Whereas the telecommunications market and its regulation have changed since 2019 and the Governor in Council is of the opinion that new directions should be issued to the Commission as a result of those changes;

Whereas, under subsection 10(1) of the *Telecommunications Act*[c], the Minister of Industry had a copy of the proposed Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy, published in the Canada Gazette, Part I, on June 4, 2022, substantially in the annexed form, and a reasonable opportunity was given to interested persons to make representations to the Minister with respect to the proposed Order;

[c]S.C. 1993, c. 38

Whereas, under subsection 10(1) of that Act, the Minister laid the proposed Order before each House of Parliament and 40 sitting days of Parliament have elapsed since the proposed Order was tabled in both Houses;

Whereas, under subsection 10(2) of that Act, the Minister consulted the Commission with respect to the proposed Order before it was published and laid and consulted the Commission again with respect to the proposed order in its definitive form;

And whereas, under section 13 of that Act, the Minister, before making a recommendation to the Governor in Council for the purposes of this Order, notified the minister designated by the government of each province of the Minister's intention to make the recommendation and provided an opportunity for each of them to consult with the Minister;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry makes the annexed Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy under section 8 of the *Telecommunications Act*[c].

Direction

Direction and Key Objectives

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act in accordance with this Order.

2. The Commission should consider how its decisions would promote competition, affordability, consumer interests and innovation, in particular the extent to which they would

(a) encourage all forms of competition and investment;

(b) foster affordability and lower prices, particularly when telecommunications service providers exercise market power;

(c) ensure that affordable access to high-quality, reliable and resilient telecommunications services is available in all regions of Canada, including rural areas, remote areas and Indigenous communities;

(d) enhance and protect the rights of consumers in their relationships with telecommunications service providers, including rights related to accessibility;

(e) reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers;

(f) enable innovation in telecommunications services, including new technologies and differentiated service offerings; and

(g) stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services.

Principles of Effective Regulation

3. The Commission should ensure that its proceedings and decisions are transparent, predictable and coherent.

4. The Commission should ensure that the measures that it imposes through its decisions are efficient and proportionate to their purpose.

5. The Commission should further develop strong and timely market monitoring, research and strategic foresight skills and use the results that it obtains from these activities in the exercise of its powers and the performance of its duties.

6. The Commission should base its decisions on sound and recent evidence and should exercise its powers to obtain necessary evidence.

7. The Commission should conduct proceedings and issue decisions in a timely manner, in recognition of the need for market clarity. The Commission should consider whether adopting new processes or engaging external experts would help reach this objective.

8. In making decisions of an economic nature, the Commission should balance, in addition to any other objectives that the Commission considers relevant in the circumstances, the objectives of

(a) fostering competition;

(b) promoting investment in high-quality networks;

(c) improving consumer choice;

(d) supporting the provision of innovative services; and

(e) encouraging the provision of services at reasonable prices for consumers.

Considerations for Fixed Internet Competition

9. In order to foster fixed Internet competition that is sufficient to protect the interests of users, the Commission must

(a) maintain a regulatory framework mandating the provision — at just and reasonable rates — of wholesale services for fixed Internet;

(b) monitor the effectiveness of the framework; and

(c) adjust the framework as necessary and in a timely manner, including by making proactive adjustments.

10. The Commission must mandate the provision of an aggregated wholesale high-speed access service — that is additional to any other types of wholesale high-speed access services that are mandated — until it determines that broad, sustainable and meaningful competition will persist even if the provision of an aggregated service is no longer mandated.

11. The Commission must mandate the provision of wholesale high-speed access services with a variety of speeds, including low-cost options, for the purpose of ensuring affordable options for consumers while allowing for the modernization of networks.

12. The Commission should set interim and final tariffs expediently, including by reforming the tariff-setting process and considering external expertise or international best practices.

13. The Commission should ensure that its regulatory framework mandating the provision of wholesale services for fixed Internet applies equitably to carriers that are subject to the framework.

Considerations for Mobile Wireless Competition

14. In order to foster mobile wireless competition that is sufficient to protect the interests of users, the Commission must

(a) maintain a regulatory framework mandating access — at just and reasonable rates — to wholesale roaming services;

(b) monitor and assess the effectiveness of its approach to a mandated wholesale facilities-based mobile virtual network operator access service, considering factors such as the specific characteristics of lower-density or remote regions and how these characteristics affect the time needed to deploy wireless networks; and

(c) adjust the facilities-based approach referred to in paragraph (b), including by extending the duration of the mandate to provide the service, if the Commission determines that it is necessary.

15. The Commission should revise its approach to encourage broader service-based competition if the effectiveness of the approach in fostering mobile wireless competition is lessened due to changes in the mobile wireless market structure or circumstances of competition.

16. The Commission should

(a) periodically review the effectiveness of its mobile wireless services regulatory framework in meeting its objectives and, in doing so, consider factors that could harm competition, such as coordinated conduct between carriers; and

(b) make any necessary adjustments to the framework.

Approach to Consumer Matters

17. The Commission must enhance and protect the rights of consumers in telecommunications markets by

(a) strengthening the ability of the Commission for Complaints for Telecom-television Services to better fulfill its mandate, including by

(i) increasing its operational capacity,

(ii) ensuring that the perspectives of consumer and civil-society groups are better reflected in its governance,

(iii) improving compliance with its rules, and

(iv) increasing public awareness of its complaint-resolution process;

(b) strengthening the position of consumers in their relationships with service providers, including by

(i) taking additional measures to protect consumers from unacceptable sales practices, such as the measures identified in the Commission's Report on Misleading or Aggressive Communications Retail Sales Practices,

(ii) adjusting its consumer codes by harmonizing the provisions of its codes if doing so would be advantageous to consumers and providing for consumer protection measures in the event of a service outage or disruption,

(iii) taking measures to promote clarity and transparency of pricing information and service plan characteristics in service providers' marketing materials, and

(iv) taking measures to ensure that consumers can promptly, affordably and easily cancel, downgrade, transfer or otherwise change their services;

(c) proactively identifying, removing and preventing barriers relating to telecommunications services, in particular for persons with disabilities; and

(d) regularly collecting, reporting publicly and making available to consumers information relating to mobile wireless coverage and fixed Internet services, including service quality metrics during peak periods and any other information that the Commission considers to be in the public interest, by

(i) requiring that service providers participate in the testing of the performance of their fixed Internet services, including services based on commonly used technologies in rural areas, and

(ii) developing and implementing a standardized and robust approach for reporting mobile wireless coverage.

Measures Supporting Deployment and Universal Access

18. The Commission should continue to take measures, in concert with other government measures, to support the objective of universal access to high-quality, reliable and resilient fixed Internet and mobile wireless services, including the following measures:

(a) continuing to administer a funding mechanism, making any adjustments that the Commission determines are necessary; and

(b) mandating improved access to support structures, such as telephone poles and conduits, as well as identifying and addressing other barriers to timely

deployment of telecommunications networks, such as exclusionary practices and unreasonable administrative practices.

19. The Commission must, when it reviews its funding mechanism, consider whether to prioritize funding for mobile wireless services and operating costs of telecommunications networks in order to foster

(a) improved access to, and more affordable prices for, retail telecommunications services in underserved areas; and

(b) better coordination of public funding.

20. For the purposes of sections 18 and 19, the Commission must take into account evolving

(a) technologies;

(b) service-performance needs and user needs; and

(c) gaps in telecommunications network services.

Effect of Order

21. This Order is binding on the Commission beginning on the day on which it comes into force and applies in respect of matters pending before the Commission on that day.

Repeals

22. The following Orders are repealed:

(a) the Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives[1]; and

[1]SOR/2006-355

(b) the Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation[2].

[2]SOR/2019-227

Coming into Force

23. This Order comes into force on the day on which it is registered.

Appendix L – 2023 Proposed Online Streaming Direction

Source: Canada Gazette, Part I, Vol. 157, No. 23 (June 10, 2023), proposed regulatory text. Accompanying Regulatory Impact Analysis Statement (not reproduced): https://gazette.gc.ca/rp-pr/p1/2023/2023-06-10/html/reg1-eng.html

PROPOSED REGULATORY TEXT

Notice is given, under paragraph 8(1)(a) of the *Broadcasting Act*[a], that the Governor in Council proposes to make the annexed Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework) under subsection 7(1) of that Act.

Interested persons may make representations, which are to be published under paragraph 8(2)(b)[b] of that Act, concerning the proposed Order within 45 days after the date of publication of this notice.

They are strongly encouraged to use the online commenting feature that is available on the Canada Gazette website but if they use email, mail or any other means, the representations should cite the Canada Gazette, Part I, and the date of publication of this notice, and be sent to Marketplace and Legislative Policy, Department of Canadian Heritage, 25 Eddy Street, Gatineau, Quebec J8X 4B5 (email: decretdinstructions-policydirection@pch.gc.ca).

Ottawa, June 2, 2023

Wendy Nixon

Assistant Clerk of the Privy Council

Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)

Interpretation

Definitions

1. The following definitions apply in this Order.

"**Act**" means the *Broadcasting Act*. (Loi)

"**social media creator**" means a person who creates programs that are primarily intended for online distribution as user-uploaded programs through social media services. (créateur pour les médias sociaux)

Diversity among Indigenous peoples

2. In applying this Order, the Commission is directed to consider the diversity among Indigenous peoples.

General

Meaningful participation of Indigenous persons

3. In furtherance of the objectives of the United Nations Declaration on the Rights of Indigenous Peoples, the Commission is directed to support the meaningful participation of Indigenous persons in the broadcasting system, including by supporting

(a) their ability to create a wide range of programs;

(b) access to those programs; and

(c) their ownership and control of broadcasting undertakings.

Supporting Canadian programming

4. The Commission is directed to impose requirements on broadcasting undertakings that ensure that the Canadian broadcasting system — which is to be effectively owned and controlled by Canadians and includes foreign broadcasting undertakings that provide programming to Canadians — strongly supports a wide range of Canadian programming and Canadian creators.

The requirements, both financial and non-financial, must be equitable given the size and nature of the undertaking and equitable as between foreign online undertakings and Canadian broadcasting undertakings.

Community broadcasters and broadcasters of exceptional importance

5. The Commission is directed to consider how to encourage innovation by, and support the sustainability of, community broadcasters and broadcasting undertakings that are of exceptional importance to the achievement of the objectives of the broadcasting policy set out in subsection 3(1) of the Act.

Regulation

Discoverability and showcasing

6. The Commission is directed to consider both established and emerging means of discoverability and showcasing to promote a wide range of Canadian programming. In making regulations or imposing conditions in respect of discoverability and showcasing requirements, the Commission is directed to prioritize outcome-based regulations and conditions that minimize the need for broadcasting undertakings to make changes to their computer algorithms that impact the presentation of programs.

Accessibility

7. The Commission is directed to regulate and supervise the Canadian broadcasting system with a view to supporting the provision of programming that is accessible without barriers to persons with disabilities.

Flexible and adaptable regulatory framework

8. To support flexibility and adaptability in its regulatory framework, the Commission is directed to

(a) minimize the regulatory burden on the Canadian broadcasting system;

(b) avoid disruptions to programs and undertakings to which the Act does not apply;

(c) respect audience choice and, where possible, increase the options available;

(d) where appropriate, use tools that are based on incentives and outcomes;

(e) where appropriate, use digital tools and solutions; and

(f) consider other Canadian or foreign regulatory regimes that affect online undertakings.

Use of Canadian human resources

9. In its regulation of the broadcasting sector, the Commission is directed to ensure that the sector maximizes the use of Canadian creative and other human resources in the creation, production and presentation of programming in the Canadian broadcasting system, taking into account the effects of broadcasting undertakings, including online undertakings, on economic opportunities and remuneration for creators.

Social media creators and video games

10. The Commission is directed not to impose regulatory requirements on

(a) online undertakings in respect of the programs of social media creators, including podcasts; and

(b) broadcasting undertakings in respect of the transmission of video games.

Regulations — section 4.2 of the Act

11. In exercising its powers under section 4.2 of the Act, the Commission is directed to set out clear, objective and readily ascertainable criteria, including criteria that ensure that the Act only applies in respect of programs that have been broadcast, in whole or in significant part, by a broadcasting undertaking that is required to be carried on under a licence or that is required to be registered with the Commission but does not provide a social media service.

Regulations and orders — section 11.1 of the Act

12. In exercising its powers under section 11.1 of the Act, the Commission is directed to

(a) regularly review expenditure requirements to ensure that they are proportional to their objectives and that those objectives are clear;

(b) recognize the diversity of services provided by broadcasting undertakings;

(c) consider providing flexibility for all broadcasting undertakings in meeting expenditure requirements;

(d) consider demographic data — including data concerning the participation of Black and other racialized persons in the Canadian broadcasting system — collected from various sources, including broadcasting undertakings, industry organizations and information published under the Employment Equity Act;

(e) where appropriate for a given business model and set of objectives, prioritize the imposition of requirements to make expenditures directly on the creation, production and presentation of Canadian programming;

(f) ensure that expenditure requirements support the creation and availability of programming

(i) by Indigenous creators and broadcasting undertakings, including programming distributed by Indigenous broadcasting undertakings and programming in Indigenous languages, taking into consideration the importance of reconciliation with Indigenous peoples and the challenges and obstacles that they face, including those stemming from historical injustices or the legacies of colonialism,

(ii) by creators from Black and other racialized communities and other equity-seeking groups, taking into consideration the challenges and obstacles that they face, including systemic racism and the obstacles faced by those whose first language is not an official language, and

(iii) in both official languages, including programming by creators from official language minority communities, taking into consideration the minority context of French in Canada and North America, the specific challenges involved with creating and making available original French-language programming and the challenges and obstacles faced by those creators;

(g) consider the need for sustainable and predictable funding to support participation by persons, groups of persons or organizations representing the public interest in proceedings before the Commission under the Act;

(h) support broadcasting undertakings that offer programming services that are of exceptional importance to the achievement of the broadcasting policy set out in subsection 3(1) of the Act;

(i) consider the importance of sustainable support by the entire Canadian broadcasting system for news and current events programming, including a broad range of original local and regional news and community programming; and

(j) support activities and services — including training and development activities, conferences, the activities of organizations that represent creators and the development of digital and open-source tools and solutions — that support Canadian creators of audio or audio-visual programs for broadcasting by broadcasting undertakings, including social media creators.

Determination of Canadian programming

13. In its determination of what constitutes Canadian programming, the Commission is directed to

(a) consult Canadians, the creative and production sectors and other interested parties;

(b) support Canadians holding a broad range of key creative positions, in particular those with a high degree of creative control or visibility;

(c) support Canadian ownership of intellectual property;

(d) recognize the distinctions between broadcasting undertakings that distribute audio programs and those that distribute audio-visual programming;

(e) recognize that the Act applies to foreign broadcasting undertakings;

(f) consider, as it relates to audio-visual programming, the vital role of Canadian independent producers and of the Canadian creative resources that are being used by both Canadian and foreign broadcasting undertakings; and

(g) consider whether its determination of what constitutes a Canadian program complements other Canadian content policies that are applicable to the Canadian broadcasting system, including those pertaining to audio-visual tax credits or government funding.

Engagement

Indigenous peoples

14. In its regulation of the broadcasting sector, the Commission is directed to engage with Indigenous peoples and Indigenous partners, governing bodies, broadcasters, creators, producers, industry organizations and community members and, in doing so, collaborate with relevant federal departments where possible to solicit comments on, among other things,

(a) how to best support Indigenous broadcasting undertakings to help ensure the viability of the Indigenous broadcasting sector;

(b) the use of regulatory conditions that foster the success of business models that provide and reflect Indigenous perspectives;

(c) how to support the discoverability of programs by Indigenous creators;

(d) the most appropriate tools, including funding mechanisms, for supporting Indigenous storytelling and production as well as Indigenous-led organizations that could manage and be responsible for that support; and

(e) the measures that are necessary to ensure its regulatory approach is in furtherance of the objectives of the United Nations Declaration on the Rights of Indigenous Peoples and supports narrative sovereignty in the Canadian broadcasting system.

Equity-seeking groups

15. In its regulation of the broadcasting sector, the Commission is directed to engage with Black and other racialized communities and other equity-seeking groups to solicit comments regarding

(a) the most appropriate tools, including funding mechanisms, to support those communities and groups; and

(b) the development of a framework of measurable targets to support the creation, availability and discoverability of programming made by members of those communities and groups.

Official language minority communities

16. The Commission is directed to engage with official language minority communities to solicit comments regarding the creation of and access to programming by and for those communities, including with respect to funding, distribution and discoverability.

Participation support

17. The Commission is directed to consider how to make the participation in the engagements referred to in sections 14 to 16 as accessible as possible.

Information and Implementation

Information — policy objectives

18. The Commission is directed to provide information to the public on a periodic basis regarding the progress made in achieving the objectives of the broadcasting policy set in subsection 3(1) of the Act, including progress on the inclusion and participation of members of equity-seeking groups in the Canadian broadcasting system.

Implementation

19. The Commission is directed to make changes to its regulatory framework that are necessary for the purposes of the implementation of this Order within two years after the day on which it comes into force. In doing so, the Commission is directed to prioritize the

implementation of sections 13 to 16 and to ensure that changes to its regulatory framework are made as soon as feasible and on a continual basis during that two-year period.

Coming into Force

Registration

20. This Order comes into force on the day on which it is registered.

[a] S.C. 1991, c. 11

[b] S.C. 2023, c. 8, s. 8(1)

Appendix M – November 2023 Final Online Streaming Direction

SOR/2023-239 | Registered November 9, 2023 | P.C. 2023-1125

Source: Canada Gazette, Part II, Vol. 157, No. 24 (November 22, 2023). The accompanying Regulatory Impact Analysis Statement is not reproduced. Official text and RIAS: https://gazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html

BROADCASTING ACT

P.C. 2023-1125 November 9, 2023

Whereas the Minister of Canadian Heritage has, in accordance with subsection 7(6) of the *Broadcasting Act*[a], consulted with the Canadian Radio-television and Telecommunications Commission;

Whereas, in accordance with paragraph 8(1)(a) of that Act, the Minister had a copy of the proposed Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), substantially in the annexed form, published in the Canada Gazette, Part I, on June 10, 2023 and the period given to interested persons to make representations has ended;

And whereas, in accordance with paragraph 8(1)(b) of that Act, the Minister had a copy of the proposed Order laid before each House of Parliament;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, makes the annexed Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework) under subsection 7(1) of the *Broadcasting Act*[a].

ORDER ISSUING DIRECTIONS TO THE CRTC (SUSTAINABLE AND EQUITABLE BROADCASTING REGULATORY FRAMEWORK)

Interpretation

Definitions

1. The following definitions apply in this Order.

Act means the *Broadcasting Act*. (Loi)

social media creator means a person who creates programs that are primarily intended for online distribution as user-uploaded programs through social media services. (créateur pour les médias sociaux)

Diversity among Indigenous peoples

2. In applying this Order, the Commission is directed to consider the diversity among Indigenous peoples.

General

Meaningful participation of Indigenous persons

3. In furtherance of the objectives of the United Nations Declaration on the Rights of Indigenous Peoples, the Commission is directed to support the meaningful participation of Indigenous persons in the Canadian broadcasting system, including by supporting

(a) their ability to create and produce a wide range of programs;

(b) access to those programs; and

(c) their ownership and control of broadcasting undertakings.

Supporting Canadian programming

4. The Commission is directed to impose requirements on broadcasting undertakings that ensure that the Canadian broadcasting system — which is to be effectively owned and controlled by Canadians and includes foreign broadcasting undertakings that provide programming to Canadians — strongly supports a wide range of Canadian programming and Canadian creators. The requirements, both financial and non-financial, must be equitable given the size and nature of the undertaking and equitable as between foreign online undertakings and Canadian broadcasting undertakings.

Community broadcasters and broadcasters of exceptional importance

5. The Commission is directed to consider how to foster collaboration and encourage innovation by, and support the sustainability of, community broadcasters and broadcasting undertakings that are of exceptional importance to the achievement of the objectives of the broadcasting policy set out in subsection 3(1) of the Act.

Regulation

Discoverability and showcasing

6. The Commission is directed to consider both established and emerging means of discoverability and showcasing to promote a wide range of Canadian programming. In making regulations or imposing conditions in respect of discoverability and showcasing requirements, the Commission is directed to prioritize outcome-based regulations and conditions that minimize the need for broadcasting undertakings to make changes to their computer algorithms that impact the presentation of programs.

Accessibility

7. The Commission is directed to regulate and supervise the Canadian broadcasting system with a view to supporting the provision of programming that is accessible without barriers to persons with disabilities.

Flexible and adaptable regulatory framework

8. To support flexibility and adaptability in its regulatory framework, the Commission is directed to

(a) where appropriate, minimize the regulatory burden on the Canadian broadcasting system;

(b) avoid disruptions to programs and undertakings to which the Act does not apply;

(c) respect audience choice and, where possible, increase the options available;

(d) where appropriate, use tools that are based on incentives and outcomes;

(e) where appropriate, use digital tools and solutions;

(f) consider other Canadian or foreign regulatory regimes that affect online undertakings; and

(g) where appropriate, foster collaboration between Canadian and foreign broadcasting undertakings.

Use of Canadian human resources

9. In its regulation of the Canadian broadcasting system, the Commission is directed to ensure that the system maximizes the use of Canadian creative and other human resources in the creation, production and presentation of programming in the Canadian broadcasting system, taking into account the effects of broadcasting undertakings, including online undertakings, on economic opportunities and remuneration for Canadian creators.

Social media creators and video games

10. The Commission is directed not to impose regulatory requirements on

(a) online undertakings in respect of the programs of social media creators, including podcasts; and

(b) broadcasting undertakings in respect of the transmission of video games.

Regulations — section 4.2 of the Act

11. In exercising its powers under section 4.2 of the Act, the Commission is directed to set out clear, objective and readily ascertainable criteria, including criteria that ensure that the Act only applies in respect of programs that have been broadcast, in whole or in significant part, by a broadcasting undertaking that is required to be carried on under a licence or that is required to be registered with the Commission but does not provide a social media service.

Regulations and orders — section 11.1 of the Act

12. In exercising its powers under section 11.1 of the Act, the Commission is directed to

(a) regularly review expenditure requirements to ensure that they are proportional to their objectives and that those objectives are clear;

(b) recognize the diversity of services provided by broadcasting undertakings;

(c) consider providing flexibility for all broadcasting undertakings in meeting expenditure requirements;

(d) consider demographic data — including that concerning the participation in the Canadian broadcasting system of members of equity-seeking and ethnocultural groups, including Black or other racialized communities — collected from various sources, including broadcasting undertakings, industry organizations, production funds certified by the Commission and information published under the Employment Equity Act;

(e) where appropriate for a given business model and set of objectives, prioritize the imposition of requirements to make expenditures directly on the creation, production and presentation of Canadian programming;

(f) ensure that expenditure requirements support the creation and availability of programming in French, in recognition of the minority context of French in Canada and North America and the specific challenges involved with creating and making available original French language programming;

(g) ensure that expenditure requirements support the creation and availability of programming

(i) by Indigenous creators and broadcasting undertakings, including programming distributed by Indigenous broadcasting undertakings and programming in Indigenous languages, taking into consideration the importance of reconciliation with Indigenous peoples and the challenges and obstacles that they face, including those stemming from historical injustices or the legacies of colonialism,

(ii) by creators who are members of equity-seeking and ethnocultural groups, including Black or other racialized communities, taking into consideration the challenges and obstacles that they face, including systemic racism and the obstacles faced by those whose first language is not an official language, and

(iii) in both official languages, including programming by creators from official language minority communities, taking into consideration the challenges and obstacles faced by those creators;

(h) consider the need for sustainable and predictable funding to support participation by persons, groups of persons or organizations representing the public interest in proceedings before the Commission under the Act;

(i) support broadcasting undertakings that offer programming services that are of exceptional importance to the achievement of the broadcasting policy set out in subsection 3(1) of the Act;

(j) consider the importance of sustainable support by the entire Canadian broadcasting system for news and current events programming, including a broad range of original local and regional news and community programming; and

(k) support activities and services — including training and development activities, conferences, the activities of organizations that represent creators and the development of digital and open-source tools and solutions — that support and promote Canadian creators of audio or audio-visual programs for broadcasting by broadcasting undertakings, including social media creators.

Determination of Canadian programming

13. In its determination of what constitutes Canadian programming, the Commission is directed to

(a) consult Canadians, the creative and production sectors and other interested parties;

(b) support Canadians holding a broad range of key creative positions, in particular those with a high degree of creative control or visibility;

(c) support Canadian ownership of intellectual property;

(d) recognize the distinctions between broadcasting undertakings that distribute audio programs and those that distribute audio-visual programming;

(e) recognize that the Act applies to foreign broadcasting undertakings;

(f) consider, as it relates to audio-visual programming, the vital role of Canadian independent producers and of the Canadian creative resources that are being used by both Canadian and foreign broadcasting undertakings; and

(g) consider whether its determination of what constitutes a Canadian program complements other Canadian content policies that are applicable to the Canadian broadcasting system, including those pertaining to audio-visual tax credits or government funding.

Engagement

Indigenous peoples

14. In its regulation of the Canadian broadcasting system, the Commission is directed to engage with Indigenous peoples and Indigenous partners, governing bodies, broadcasters, creators, producers, industry organizations and community members and, in doing so, collaborate with relevant federal departments where possible to solicit comments on, among other things,

(a) how to best support Indigenous broadcasting undertakings to help ensure the viability of the Indigenous broadcasting sector;

(b) the use of regulatory conditions that foster the success of business models that provide and reflect Indigenous perspectives;

(c) how to support the discoverability of programs by Indigenous creators;

(d) the most appropriate tools, including funding mechanisms, for supporting Indigenous storytelling and production as well as Indigenous-led organizations that could manage and be responsible for that support; and

(e) the measures that are necessary to ensure its regulatory approach is in furtherance of the objectives of the United Nations Declaration on the Rights of Indigenous Peoples and supports narrative sovereignty in the Canadian broadcasting system.

Equity-seeking and ethnocultural groups

15. In its regulation of the Canadian broadcasting system, the Commission is directed to engage with members of equity-seeking and ethnocultural groups, including Black or other racialized communities, to solicit comments regarding

(a) the most appropriate tools, including funding mechanisms, to support those groups; and

(b) the development of a framework of measurable targets to support the creation, availability and discoverability of programming made by and broadcasting undertakings carried on by members of those groups.

Official language minority communities

16. The Commission is directed to engage with official language minority communities to solicit comments regarding the creation of and access to programming by and for those communities, including with respect to funding, distribution and discoverability.

Participation support

17. The Commission is directed to consider how to make the participation in the engagements referred to in sections 14 to 16 as accessible as possible.

Information and Implementation

Information — achievement of policy objectives

18. The Commission is directed to provide information to the public on a periodic basis regarding the progress made in achieving the objectives of the broadcasting policy set in subsection 3(1) of the Act, including progress on the inclusion and participation of Indigenous persons, members of official language minority communities and members of equity-seeking groups and ethnocultural groups in the Canadian broadcasting system.

Implementation

19. The Commission is directed to make any changes to its regulatory framework that are necessary for the purposes of the implementation of this Order within two years after the day on which it comes into force. In doing so, the Commission is directed to prioritize the implementation of sections 13 to 16 and to ensure that any changes to its regulatory framework are made as soon as feasible and on a continual basis during that two-year period.

Coming into Force

Registration

20. This Order comes into force on the day on which it is registered.

[a]S.C. 1991, c. 11