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The Broadcasting Act

Incorporating the Online Streaming Act

Text and Commentary

2023

by Peter S. Grant and Grant Buchanan

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COMMENTARY ON THE ENACTMENT OF THE *ONLINE STREAMING ACT*

The *Online Streaming Act*, which significantly amended the *Broadcasting Act*, was proclaimed in force on April 27, 2023. The key objectives of the *Online Streaming Act* were to clarify the scope of the *Broadcasting Act* and how it should apply equitably to online streaming services, to amend the broadcasting policy set out in the Act to better reflect Canada's diversity, and to modernize the oversight and enforcement provisions of the *Broadcasting Act*.

The *Online Streaming Act* was introduced as Bill C-11 and given first reading on February 2, 2022. The Bill was largely based on Bill C-10, which had gone through third reading in the House of Commons but did not go past first reading in the Senate. It died on the order paper when the 43rd Parliament was dissolved on August 18, 2021.

Key elements of the *Online Streaming Act* were based on the recommendations of the Broadcasting and Telecommunications Legislative Review Panel. That panel of six experts was created in June 2018 and published its final report in January 2020. The 235 page report, entitled *Canada's Communications Future: Time to Act*, included a number of recommendations that were later reflected in the *Online Streaming Act*. These include the following:

> Recommendation 56: We recommend that the existing licensing regime in the *Broadcasting Act* be accompanied by a registration regime. This would require a person carrying on a media content undertaking by means of the Internet to register unless otherwise exempt. Those carrying on a media content undertaking by means other than the Internet would continue to require a licence unless otherwise exempt.
>
> Recommendation 57: We recommend that to implement the new registration regime, the *Broadcasting Act* be amended to provide that certain powers of the CRTC in section 9 with respect to licensing also apply to registration. This includes provisions that enable the CRTC to establish classes of registrants, to amend registrations, and impose requirements – whether through conditions of registration or through regulations – on registrants, including the payment of registration fees. This would also include imposing penalties for any failure to comply with the terms and conditions of registration.
>
> Recommendation 60: We recommend that all media content undertakings that benefit from the Canadian media communications sector contribute to it in an equitable manner. Undertakings that carry out like activities should have like obligations, regardless of where they are located.
>
> Recommendation 77: We recommend that to strengthen the compliance regime for both licences and registrations, the *Broadcasting Act* be amended to include provisions for Administrative Monetary Penalties, similar to the general scheme in the *Telecommunications Act*, with maximum thresholds set at a level high enough to create a deterrent for foreign undertakings.

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In the annotations which follow each section of the *Broadcasting Act*, the principal changes from the previous *Broadcasting Act* are highlighted. In addition, a discussion is included of the relevant parts of the Final Report of the Broadcasting and Telecommunications Legislative Review Panel or other government documents that may explain the provision. In the case of the sections of the Act that date back to the 1991 version of the *Broadcasting Act*, references are made to the Task Force Report, Standing Committee Reports, and Government Policy Paper and Response which deal with the issues involved (see further below).

It should be emphasized, of course, that where the words of an Act are plain, the meaning of the legislation must be taken from the language of the statute itself, not from ministerial statements or parliamentary documents. However, in cases of ambiguity, the courts have increasingly referred to parliamentary documents of this kind to understand the context and purpose of statutes. See, e.g.

Tschritter v. Children's Guardian for Alberta, [1989] 4 W.W.R. 175 (Alta. C.A.). For this reason, references have been included to certain government and committee documents that may be useful in aiding in the interpretation of the *Broadcasting Act*.

For a detailed survey of the case law interpreting the *Broadcasting Act*, including cases referring to or interpreting the predecessor legislation, see Peter S. Grant, *Communications Law and the Courts in Canada*, Third Edition (Toronto: McCarthy Tétrault, 2020).

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COMMENTARY ON THE PREVIOUS VERSION OF THE *BROADCASTING ACT*

Prior to the enactment of the *Online Streaming Act* in 2023, the *Broadcasting Act* was in a form that dated back to 1991. The 1991 *Broadcasting Act*, given royal assent on February 1, 1991, and proclaimed in force on June 4, 1991, had been introduced as Bill C-40 and given first reading in the Canadian House of Commons on October 12, 1989. That Bill was largely based on Bill C-136, which had been tabled for first reading in the House of Commons on June 23, 1988. Bill C-136 had gone through third reading in the House of Commons but did not go past first reading in the Senate. It died on the order paper when the 33rd Parliament was dissolved on October 1, 1988.

The 1991 *Broadcasting Act* repealed and replaced the former *Broadcasting Act*, R.S.C.1985, c.B-9. The 1991 Act constituted the first significant revision to the *Broadcasting Act* since the passage of the former Act in 1968.

The 1991 Act was based in substantial part on the recommendations of the Report of the Task Force on Broadcasting Policy which was published in September, 1986. The recommendations of the Task Force (also known as the Caplan-Sauvageau Task Force) were referred to the House of Commons Standing Committee on Communications and Culture, which dealt with them and related matters in a number of reports issued over the next 18 months.

In its *Fourth Report*, issued on February 12, 1987, the Standing Committee dealt with the structure and financial administration of the Canadian Broadcasting Corporation. In its *Fifth Report*, issued on April 18, 1987, the Committee set forth interim recommendations on the licensing of new satellite-delivered specialty programming services and on certain legislative amendments relating to the power of direction and the unauthorized reception of encrypted signals. In its *Sixth Report*, dated May 6, 1987, the Standing Committee focused on recommendations for a new *Broadcasting Act*, including legislative definitions, objectives for the Canadian broadcasting system, legislative provisions related to the CBC, cable television and other distribution undertakings, and CRTC regulatory powers. Finally, the Standing Committee issued its Fifteenth Report of June 9, 1988. Entitled “A Broadcasting Policy for Canada,” this lengthy report incorporated the previous recommendations and added other recommendations on matters of broadcasting policy.

Bill C-136 was tabled for first reading in the House of Commons by Minister of Communications Flora MacDonald on June 23, 1988. At the same time, the Minister released a Policy Paper entitled “Canadian Voices: Canadian Choices -- A New Broadcasting Policy for Canada,” discussing the content and purpose of the proposed legislation. The Minister also tabled a Government Response to the Fifteenth Report on the Standing Committee on Communications and Culture.

[§102-2]

As noted above, Bill C-136 did not become law prior to the dissolution of Parliament on October 1, 1988. However, a revised version of the legislation was tabled for first reading as Bill C-40 on October 12, 1989, by Minister of Communications Marcel Masse. As amended in the House of Commons, this version was passed by the Senate and received royal assent on February 1, 1991.

As tabled for first reading, Bill C-40 was substantially the same as Bill C-136, as amended at the committee stage, except for the following changes: (a) the removal of an exclusion from the definition of “broadcasting” of programs transmitted on demand; (b) new wording in the section 3 broadcasting policy supporting the Canadian independent production sector and referring to educational programming; (c) the addition of arts and culture language to the mandates of the CBC and alternative television programming services; (d) the addition of a mandate that distribution undertakings give priority to the carriage of local Canadian television stations, and originate programming only where the CRTC considers it appropriate; (e) the incorporation of amendments limiting the ability of the CRTC to order commercial substitution that had been made by the *Canada-U.S. Free Trade Agreement Implementation Act*, and (f) a stipulation that the Chairperson of the CBC perform the duties of the office on a part-time basis.

During the committee stage of the consideration of Bill C-40, a number of further amendments were made to the legislation, principally as follows: (a) the meaning of the word “network” was clarified; (b) a reference to the “community element” of the broadcasting system was added to section 3; (c) the CRTC authority to determine questions of fact or law was stated to apply in respect to any matter and not just in making mandatory orders; (d) the time for cabinet review of decisions was reduced from 120 to 90 days; (e) the provision of an international service by the CBC was mandated; and (f) the language of amendments to the *Radiocommunication Act*, prohibiting the unauthorized reception of encrypted signals, was clarified and tightened.

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[CANADA]

Broadcasting Act

[§104-2]

[Statutes of Canada 1991, chapter 11, in force on June 4, 1991. Consolidated as R.S.C. 1985, c.B-9. Amended S.C. 1993, c.38, ss.81 and 82, in force October 25, 1993; S.C. 1994, c.18, ss.18 to 20, in force June 15, 1994; S.C. 1994, c.26, s.10 (French version only), in force on June 23, 1994; S.C. 1995, c.1, s.31 in force March 29, 1995; S.C. 1995, c.11, s.43(a), in force July 12, 1996; S.C. 1995, c.29, ss.4-5, in force January 1, 1996; S.C. 1995, c.44, s.46, in force October 24, 1996; SI/96-71, 1996 *Canada Gazette Part II*, p.2571, in force July 12, 1996; S.C. 1996, c.31, s.57, in force January 31, 1997; S.C. 2001, c.34, s.32(1)(a), in force December 18, 2001; S.C. 2005, c.30, ss.41-43, in force June 29, 2005; S.C. 2009, c.31, s.23, in force December 12, 2009; S.C. 2010, c.12, s.1719, in force March 16, 2012; S.C. 2014, c.39, ss.191-192, in force December 16, 2014; S.C.2019, c.10, in force July 11, 2019; S.C.2020, c.1, in force July 1, 2020; and S.C. 2023, c.8, in force April 27, 2023. Administered by the Department of Canadian Heritage.

This statute, originally enacted in 1991, repealed and replaced the previous *Broadcasting Act*, which had been in effect since 1968. As amended since 1991, it governs the powers and functions of the Canadian Radio-television and Telecommunications Commission respecting broadcasting, and the operations and purpose of the Canadian Broadcasting Corporation. For the membership and structure of the Commission, see the *Canadian Radio-television and Telecommunications Commission Act*, set out below at §106-1.

For a detailed survey of the case law interpreting the *Broadcasting Act*, see Peter S. Grant, *Communications Law and the Courts in Canada*, Third Edition (Toronto: McCarthy Tétrault, 2020), at §76-9 and §76-10.

The *Broadcasting Act* is made up of four Parts. Part I of the Act (ss.2-4), following definitions of terms (s.2), sets out the cornerstone of the Act, a declaration of the "broadcasting policy for Canada" (s.3). This statement sets forth a number of policy objectives which the Commission is to seek to implement. Part I concludes with certain inclusions and exclusions from the application of the Act (s.4). The Act directly applies to four categories of broadcasting undertakings: programming undertakings, online undertakings, distribution undertakings and networks (s.2), but exempts telecommunications carriers and non-program activities (ss.4(4)) except insofar as they affect programming. Programs on social media services are also exempted in certain cases (s.4.1).

Part II of the Act (ss.5-34) sets forth the objects and powers of the CRTC in relation to broadcasting. The Commission is mandated to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3, while having regard to certain regulatory policy objectives (s.5). The Commission is specifically empowered to issue policy guidelines and statements (s.6). The Governor in Council is empowered to issue to the Commission policy directions of general application on broad policy matters (s.7), subject to certain procedural limitations (s.8).

The Commission is given the power to prescribe classes of licences, to issue, amend or renew broadcasting licences, other than online undertakings, and to suspend or revoke licences (s.9). It is given the power to impose conditions on the carrying on of broadcasting undertakings, including online undertakings (s.9.1). In regard to the "core service" licences issued to the CBC, conditions proposed to be imposed by the Commission are subject to directives from the Minister of Canadian Heritage after consultation between the Commission and the CBC (s.23).

The Commission can require licensees of distribution undertakings to give priority to broadcasting and to carry programming services on terms and conditions set by the Commission (s.9). However, except in certain circumstances, commercial deletion may not be ordered (s.9(2)). The Commission is given the power to exempt persons carrying on broadcasting undertakings of any class from all or any part of Part II of the Act (s.9(4)). The Commission may enact regulations applicable to broadcasting undertakings dealing with a number of matters (s.10), and can establish licence fees (s.11).

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The Commission can issue mandatory orders (s.12) and enforce them by filing them with the courts (s.13). Research may be undertaken (s.14) and the Commission is to hear and report on matters if so requested by the Governor in Council (s.15). Provisions relating to the powers and procedures of the Commission respecting hearings are set forth (ss.16-18), including the application of the "those who hear, decide" rule (s.20). Notice of applications and hearings is required to be given (s.19) and the CRTC may make rules of procedure (s.21). No licence may be issued, amended or renewed on contravention of a cabinet direction respecting the eligibility of applicants or unless the Minister of Industry has certified that the technical requirements of the *Radiocommunication Act* will be met (s.22). Except upon consent, no licence may be revoked or suspended except for a breach of a licence condition, regulation or mandatory order, or the failure to comply with an eligibility requirement in a cabinet direction (s.24(1)); in the case of the CBC core services, a contravention is to be the subject of a CRTC report to the Minister (s.24(4)).

The cabinet may issue directions to the Commission on the eligibility of applicants, the broadcasting of programs of urgent importance, or the implementation of the Canada-U.S.-Mexico Free Trade Agreement (ss.26,27). The cabinet may set aside or refer back for reconsideration the issue, amendment or renewal by the Commission of any licence (s.28), subject to procedural rules on petitions (s.29). Decisions and orders of the Commission are final and conclusive (), although an appeal lies upon leave to the Federal Court of Appeal on a question of law or jurisdiction (s.31). Penalties for contravening regulations or orders, or for broadcasting without or contrary to a licence, are set forth (ss.32,33) and a two-year limitation period for prosecutions is prescribed (s.34).

Section 34.1 of the Act, added in 2014, prohibits persons carrying on a broadcasting undertaking from charging a subscriber for providing the subscriber with a paper bill.

Part II.2 of the Act, added in 2023, prescribes administrative monetary penalties for contraventions of the Act. Part II.3 sets out an information requirement for designated persons, while Part II.4 prohibits material misrepresentations of fact to such persons.

Part III of the *Broadcasting Act* (ss.35-71) governs the powers and functions of the Canadian Broadcasting Corporation.

The remainder of the *Broadcasting Act*, comprising Part IV, contains related and consequential amendments to other statutes (ss.77-88), the repeal of the previous *Broadcasting Act* (s.89), and transitional provisions (ss.90-93).]

SHORT TITLE

[§104-3]

1. Short title. – This Act may be cited as the *Broadcasting Act*. [1991, c.11, s.1]

[§104-4]

PART I

GENERAL

Interpretation

[§104-5]

2. (1) **Definitions**. – In this Act,

[§104-6]

"affiliate", in relation to any person, means any other person who controls that first person, or who is controlled by that first person or by a third person who also controls the first person;

[*History:* Added in 2023.

Commentary: This definition is referred to in the definition of "control", below at §104-13. It is used in subsections 2(2.1) and 2(2.2) of the Act, below at §104-30 and §104-31, to limit the application of the

exclusion of persons using a social media service from being considered to be carrying on a broadcasting undertaking for the purposes of the Act.

[§104-7]

"barrier" has the same meaning as in section 2 of the *Accessible Canada Act*;

[*History*: Added in 2023.

Commentary: The word "barrier" is used in section 3(1)(p) of the Act, below at [§104-53], to state that "programming that is accessible without barriers to persons with disabilities should be provided within the Canadian broadcasting system." Section 2 of the *Accessible Canada Act* defines "barrier" to mean "anything – including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice – that hinders the full and equal participation in society of persons with an impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment or a functional limitation."]

[§104-8]

"broadcasting" means any transmission of programs – regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not – by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

[*History*: Based on S.C. 1991, c.11, but with words added by S.C. 2023, c.8, to include a reference to on demand programs as well as scheduled programs.

Commentary: The definition above is largely based on wording introduced in 1991. That wording generally reflected Recommendations 8, 9 and 10 of the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987, which endorsed the recommendation of the Report of the Task Force on Broadcasting Policy (1986) at pp.150-1. Recommendations 8, 9 and 10 in the Sixth Report read as follows:

"Recommendation 8

The Committee endorses the Task Force recommendations:

(a) That the Act should cover all undertakings involved in broadcasting in the widest sense, that is, those that decide what programs to carry, as well as those that are involved in program dissemination to the public and thus in determining program accessibility to Canadians; and

(b) That the Act should broaden the definition of broadcasting and related concepts to cover all forms of program reception and distribution whether by Hertzian waves or through any other technology.

Recommendation 9

The term "broadcasting" should be defined so as to extend to any radiocommunication in which the transmissions are intended for reception by the public, including not only conventional radio and television stations but also satellite operations, where the signals are intended to be received only by cable television systems or other distribution undertakings that redistribute such signals to their subscribers.

Recommendation 10

The term "broadcasting" should be defined so as to extend to pay television, specialty and other program services intended for reception by the public, where the signals are scrambled and the service is intended to be received only by members of the public paying for such services."

The definition makes it clear that encrypted signals can constitute broadcasting, reversing the *dicta* to the contrary in the decision of *CRTC et al. v. Lount Corporation et al*., [1985] 2 F.C. 472, 19 D.L.R.(4th) 304. (For the definition of the word "encrypted", and a further discussion of the rationale for including encrypted signals, see below at §104-17).

A second important change with the 1991 legislation was the concept that broadcasting can involve other forms of transmission besides Hertzian waves. For the definition of the phrase "other means of telecommunication," see subsection 2(2), below at §104-29.

A third change made in 1991 related to the use of the word "program" in the definition of "broadcasting". This term is elsewhere defined in section 2 to include sound or visual images, including commercials, but to exclude images consisting predominantly of alphanumeric text: see below at [§104-24].

Prior to 1991, the definition of broadcasting in the Act applied to all matter transmitted to the general public, including "signs, signals, writing, images, sounds or intelligence of any nature". The 1991 Act focused only on the transmission of programs, leaving non-programming services unregulated under the *Broadcasting Act*.

At the same time, however, non-programming services offered by persons falling under the definition of "telecommunications common carrier" in the *Telecommunications Act*, S.C. 1993, c.38, are subject to regulation by the CRTC under the latter Act. Section 4 of the *Telecommunications Act* states that "This Act does not apply in respect of broadcasting by a broadcasting undertaking," thus carving out broadcasting activities from the *Telecommunications A*ct. For a discussion of the effect of these provisions, see *Regulation of Broadcasting Distribution Undertakings that Provide Non-Programming Services*, Telecom Decision CRTC 96-1, January 30, 1996.

The removal of non-programming activities from the ambit of broadcasting was the subject of comment by the CRTC in a written submission to the Standing Committee on Communications and Culture, January 31, 1990, at p.5:

> "One can reach a number of conclusions from a reading of these sections of the Act. First, broadcasting is programming only. Second, the programming part of a cable system, radio or television station would be regulated by the Commission pursuant to its broadcasting mandate. Third, the non-programming part of the system or station (at least as regards rates) could be regulated either by the Commission pursuant to its telecom mandate or, perhaps, by a provincial regulatory body (it is not clear from the Act). Fourth, the Commission's broadcasting jurisdiction is over the programming part of the system or station and does not extend to any other aspect of it. The Commission will have no control over other uses that could be made of the apparatus. This conclusion is reinforced by the statement found at s.4(3) of the new Act."

The statement that the CRTC has no control over non-programming uses by virtue of its broadcasting mandate is not entirely accurate. To the extent that the non-programming activities of a licensee affect or relate to its programming activities, the Commission could annex appropriate conditions of licence relating thereto that advance the section 3 objectives. This is made explicit in paragraph 9.1(1)(g) of the Act, which empowers the Commission to impose a requirement for "a person carrying on is a distribution undertaking to give priority to the carriage of broadcasting".

The definition of "broadcasting" in the 2023 Act now explicitly includes "on demand" as well as scheduled programming. While the definition in 1991 had not specifically referred to on demand programming, it was always understood that such programming would be included, since in Bill C-136, the definition of "broadcasting" had excluded "any such transmission of programs...made on the demand of a particular person for reception only by that person". However, this exclusion was dropped from Bill C-40, in order to ensure that all so-called "pay-per-view" or video-on-demand systems would be included. With the 2023 Act, on demand programming is now specifically included.

The phrase "for reception by the public" which appears in the definition of "broadcasting" may be compared with the phrase "communications to the public" which appears in paragraph 3(1)(f) of the *Copyright Act.* In *Rogers Communications Inc. v. SOCAN*, 2012 SCC 35, [2012] 2 S.C.R. 283, the

Supreme Court of Canada held that on-demand streaming of a musical work from the Internet was not a private transaction but constituted a communication to the public for the purposes of the *Copyright Act*. See *Communications Law and the Courts in Canada* (Third Edition) at §55-554.

A fourth change made in 1991 from the former Act was the concept that to qualify as "broadcasting", the transmissions must be for reception by means of "broadcasting receiving apparatus", a term defined in somewhat circular terms elsewhere in the section: see below at §104-7.

A fifth change made in the 1991 Act was to replace the phrase "reception by the general public" in the old definition of "broadcasting" with "reception by the public". The old definition had left room for an argument that a service directed to paying subscribers only would not be to the "general" public, although there was *dicta* to the contrary in *R. v. Continental Cablevision Inc. et al*., (1974), 5 O.R. (2d) 523, 19 C.C.C. (2d) 540 (Ont.), noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-143.

The change in definition clearly strengthens the view expressed in *Jennings v. Stephens*, [1939] 1 Ch. 469, per Lord Wright, M.R. at pp.476 and 479, that the "public" includes a portion of the public. Finally, the definition excludes any transmission of programs solely for display or performance in a public place. In the Government Response, June 23, 1988, at p.88, it is noted that this wording would exclude such matters as "championship fights shown in arenas".

Because the definition refers to the "transmission of programs," the question may be asked whether the Act applies to the transmission of a single program, e.g. on a pay-per-view basis. The answer would appear to be in the affirmative, since subsection 33(2) of the *Interpretation Act* stipulates that "words in the plural include the singular". Note also that in section 2 of the *Broadcasting Distribution Regulations*, the Commission defines the term "programming service" to mean "a program that is distributed by a licensee", reflecting the fact that the service could be limited to the offering of a single program.

In Public Notice CRTC 1999-84, May 17, 1999, the CRTC concluded that content that is customizable to a significant degree was not transmitted "for reception by the public" and thus did not constitute "broadcasting".

In *Reference re Broadcasting Act*, 2012 SCC 4 (Supreme Court of Canada), affirming 2010 FCA 178 (Fed.C.A.), the court determined that internet service providers (ISPs) were not "broadcasting undertakings" and were not subject to the *Broadcasting Act*. For further discussion see the note below at §104-10, and *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-545.]

[§104-9]

"broadcasting receiving apparatus" means a device, or combination of devices, intended for or capable of being used for the reception of broadcasting;

[*History:* Added in 1991.

Commentary: In the Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture, June 23, 1988, at p.88, it was suggested that a telephone or teleconference apparatus would not qualify to be a broadcasting receiving apparatus.

The above definition may be contrasted with the definition for "radio apparatus" in section 2 of the *Radiocommunication Act*, [rep.& sub. 1989, c.17, s.3(2), viz. "a device or combination of devices intended for, or capable of being used for, radiocommunication". This definition supplanted an earlier definition in the *Radio Act* in the following terms: "a reasonably complete and sufficient combination of distinct appliances intended for or capable of being used for radiocommunication": *Radio Act*, s.2(1). For cases interpreting the latter definition, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-72 (Messier), §55-171 (Struk), and §55-305 (Lount).

In its 1999 New Media Policy, the CRTC stated that "devices such as personal computers, or televisions equipped with Web TV boxes, fall within the definition of "broadcasting receiving apparatus" to the extent that they are or are capable of being used to receive broadcasting": see below at §379-8. It affirmed its analysis in 2009 in *Review of broadcasting in new media*, Broadcasting Regulatory Policy CRTC 2009-329.]

"broadcasting undertaking" includes a distribution undertaking, an online undertaking, a programming undertaking and a network;

[*History*: Amended in 2023 to add the words "an online undertaking" to the definition. The previous version dates back to 1991. Prior to 1991, the term "broadcasting undertaking" was defined in section 2(1) of the *Broadcasting Act*, R.S.C. 1985, c.B-9, to include "a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada".

Commentary: In the 1991 *Broadcasting Act*, the term "broadcasting transmitting undertaking" was generally replaced with the term "programming undertaking", which was defined more widely. The term "broadcasting receiving undertaking" was also dropped in 1991, to be replaced generally with the concept of a "distribution undertaking", discussed further below in the commentary at §104-11.

The word "undertaking" is not defined in the Act, although subsection 4(3) of the Act, below at §104-59, states that the Act applies in respect of broadcasting undertakings whether or not they are carried on for profit or as part of, or in connection with, any other undertaking of activity. Even in the absence of legislative direction to this effect, the Supreme Court of Canada adopted a wide definition of the word "undertaking" as encompassing projects that are non-commercial as well as commercial in nature: see *Nipawin and District Satellite T.V. Inc. et al. v. The Queen*, [1991] 1 S.C.R. 64, adopting the judgment of Vancise J.A. in [1988] 4 W.W.R. 375, 42 C.C.C. (3d) 32, noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-346.

That judgment specifically applied the following definitions to the word: "something undertaken or attempted; an enterprise" (Shorter Oxford); "something undertaken; a business work or project which one engages in or attempts; enterprise large scale undertakings involving large expenditures of money" (Webster's Third New International).

In the *Radio Reference*, [1932] A.C. 304 at 315, noted *in Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-56, Viscount Dunedin stated that an "'undertaking' is not a physical thing but is an arrangement under which of course physical things are used." This statement was later referred to and applied by Laskin C.J.C. in *Capital Cities Communications Inc. et al. v. CRTC et al.,* [1978] 2 S.C.R. 141, noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-176.

For a case applying the term "arrangement" to a cable television system with its U.S. head end owned by one company and the distribution system owned and operated by a separate company in Canada, see *R. v. Continental Cablevision Inc. et al*. (1974), 5 O.R. 523, 19 C.C.C.(2d) 540, upheld sub nom. *R. v. Maahs and Teleprompter Cable Communications Corp*. (1975), 21 C.C.C.(2d) 497, noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-143 and §55-149.

In *Reference re Broadcasting Act*, 2012 SCC 4 (Supreme Court of Canada), affirming 2010 FCA 178 (Fed.C.A.), the court considered whether internet service providers (ISPs) were "broadcasting undertakings" and thus subject to the *Broadcasting Act*. The court held that the terms "broadcasting" and "broadcasting undertaking," interpreted in the context of the language and purposes of the *Broadcasting Act,* were not meant to capture entities which merely provide the mode of transmission. The *Broadcasting Act* makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. The policy objectives listed under s.3(1) of the Act focus on content. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. The term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the Act's policy objectives. Accordingly, ISPs do not carry on "broadcasting undertakings" under the Broadcasting Act when they provide access through the Internet to "broadcasting" requested by end-users. For further discussion, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-545.

In *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, December 17, 1999, at paragraph 11, the Commission stated the following:

11. The Commission wishes to clarify that, for the purpose of the Act, a single corporate entity (or other person) may carry on more than one distinct broadcasting undertaking. It considers that the new media activities of a company (or any person) involve a separate undertaking from any other type of broadcasting undertaking that the company or person is licensed to operate. For example, the same company may be the licensee of both a television programming undertaking and a separately licensed specialty service programming undertaking and also operate an exempt new media broadcasting undertaking. Another example would be a company licensed to carry on a distribution undertaking and a separately licensed video-on-demand programming undertaking that also operates an exempt new media broadcasting undertaking.

Based on this statement, the Ontario Superior Court of Justice ruled in 2016 that an internet retransmitting service operated by VMedia was not operating under its BDU licence but rather only under the Exemption Order for Digital Media Broadcasting Undertaking. Thus, by virtue of subsection 31(1) of the *Copyright Act*, VMedia was not entitled to the compulsory licence for the retransmission of local and distant signals provided under subsection 31(2) of that Act. See *2251723 Ontario Inc. v. Bell Canada*, 2016 ONSC 7273 (CanLII).]

[§104-11]

"Commission" means the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

[*History:* Unchanged from section 2 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. For the text of the *Canadian Radio-television and Telecommunications Commission Act*, see below at §106-1.]

[§104-12]

"community element" includes the element of the Canadian broadcasting system as part of which members of a community participate in the production of programs that are in a language used in the community including a not-for-profit broadcasting undertaking that is managed by a board of directors elected by the community;

[*History*: Added in 2023.

Commentary: The words "community element" appear in section 3(1)(o) of the Act, below at §104-52, which refers to programming reflecting the Indigenous cultures of Canada.

[§104-13]

"control", in the definition *affiliate,* in paragraph 9.1(1)(m) and in subparagraph 9.1(1)(n)(i), includes control in fact, whether or not through one or more persons;

[*History:* Added in 2023.

Commentary: The inclusion of this definition is relevant to the review by the Commission of the ownership and control of licensed or exempt broadcasting undertakings, where Canadian ownership continues to be required by cabinet direction.]

[§104-14]

"Corporation" means the Canadian Broadcasting Corporation continued by section 34;

[*History:* Unchanged from section 2 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

[§104-15]

"decision" includes a determination made by the Commission in any form;

[*History:* Added in 2023.]

[§104-16]

"distribution undertaking" means any undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary

residence or dwelling unit or to another such undertaking, but does not include such an undertaking that is an online undertaking;

[*History*: Added in 1991, except for the exclusion of online undertakings which occurred in 2023.

Commentary: In 1991, the term "distribution undertaking" generally replaced the term "broadcasting receiving undertaking" which had appeared in the *Broadcasting Act*, R.S.C.1985, c.B-9. The concept that distribution undertakings should be separately treated in the Act originated with Recommendations 11 and 15 of the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987; however, a somewhat different definition was used. There is also a discussion of the status of such undertakings at pp.574-577 of the *Report of the Task Force on Broadcasting Policy* (1986).

In the Government Response, June 23, 1988, at p. 71, the definition is discussed in the following terms:

> "The intention was to create a technology neutral definition that would capture all "distribution undertakings" including conventional cable systems, some satellite direct-to-home services, "mini cable systems" serving a restricted geographic area such as SMATV systems in apartment buildings or condominium complexes, and 'wireless cable systems' such as MMDS and rebroadcasters operating in remote areas. To this end, the definition focuses on the activity undertaken (i.e. the reception and retransmission of programming services of others) rather than the technology used to carry on the activity."

The concept of differentiating programming undertakings from distribution undertakings is not entirely free from practical difficulty, given the fact that certain undertakings can be said to perform both functions. For example, subparagraph 3(1)(t)(iv) of the Act contemplates that a distribution undertaking may itself originate programming, e.g. the transmission of a community channel. In doing so, it would qualify as a programming undertaking as well as a distribution undertaking. Similarly, an off-air television transmitter which qualifies as a programming undertaking would also appear to qualify as a distribution undertaking to the extent it is retransmitting programming received from a network operator or a programming undertaking.

In *New Broadcasting Act Amendments to Classes of Licence*, Public Notice CRTC 1991-63, June 19, 1991, the CRTC attempted to deal with these overlaps by defining its classes of licences under the 1991 Act so as to reflect the "primary function" of the undertaking to be licensed, be it for program origination, program distribution or as a network operation. This approach is obviously somewhat simpler than the other options open to the Commission in dealing with these overlaps, e.g. issuing two separate licences to undertakings carrying out multiple or hybrid functions, or issuing a dual or multiple licence using a form describing the undertaking in hybrid terms. Under the approach adopted by the CRTC, the Commission indicated that it will issue a licence for what it considers to be the primary function of the undertaking, presumably leaving any hybrid attributes to be dealt with through regulations or conditions of licence.

The 2023 definition of "distribution undertaking" now excludes "online undertakings", as defined below at §104-23. Prior to 2023, the Commission had referred to these undertakings as "new media" or "digital media" undertakings. They had been exempted from regulation by the Commission in a number of exemption orders, starting *with Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, December 17, 1999. The exemption order in place at the time the *Online Streaming Act* came into force was the *Exemption Order for Digital Media Broadcasting Undertakings*, Appendix to Broadcasting Order CRTC 2012-409, July 26, 2012.].

[§104-17]

"encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;

[*History:* Added in 1991.

Commentary: The inclusion of encrypted transmissions within the definition of "broadcasting" reflects Recommendation 10 of the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987. The rationale for that conclusion, taken from the Sixth Report at pp.21-22, reads as follows:

"A related issue is whether the term broadcasting' should encompass signals that are scrambled or encrypted, so that only contracting affiliates and/or their subscribers may obtain the services, usually for the payment of a fee. In the Committee's view, there is no reason why these services should not be included in the definition of broadcasting'. They are clearly intended for reception by the public. An analogy might be made to entertainment events that are open to the public, even though admission tickets are required and people not purchasing tickets are precluded from attending. As the Task Force noted in its Report, the important thing is to include all forms of transmission, distribution and reception of signals containing programs intended for the public, whether in scrambled form or not'...

Recommendation 10

The term "broadcasting" should be defined so as to extend to pay television, specialty and other program services intended for reception by the public, where the signals are scrambled and the service is intended to be received only by members of the public paying for such services."

Under the former Act, encrypted signals were very likely outside the definition of "broadcasting", given the dicta of the Federal Court of Appeal in *CRTC v. Lount Corporation*, [1985] 2 F.C. 472, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-305.]

[§104-18]

"Indigenous peoples" has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*;

[*History*: Added in 2023.

Commentary: In subsection 35()2) of the *Constitution Act, 1982*, it is stated that "aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada." Section 3(1)(o) of the *Broadcasting Act*, below at §104-52, refers to programming reflecting the Indigenous cultures of Canada.

[§104-19]

"licence" means a licence to carry on a broadcasting undertaking issued by the Commission under this Act;

[*History:* Comparable to the definition of "licensee" in section 2(1) of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

[§104-20]

"Minister" means such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act; [Note: By virtue of S.C. 1995, c.11, s.15, this is the Minister of Canadian Heritage.]

[§104-21]

"network" includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person, but does not include such an operation that is an online undertaking;

[*History:* Comparable to the definition of "network" in section 2 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Amended in 2023 to exclude online undertakings.

Commentary: The term "network operator", which was used in the old Act to refer to the undertaking or person to whom the delegation of control was made, no longer appears in the *Broadcasting Act*.

In Recommendation 16 of the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987, the Committee urged that the term "network operation" be defined "so as to apply not only to conventional radio and television networks (where there is a delegation of program responsibility from the affiliate to the network) but also to satellite-to-cable networks or other operations where the supplier of a program service gives a right to two or more cable television systems or other distributors to market or exhibit the program service to its subscribers or customers."

The latter part of this recommendation was not incorporated into the definition of a "network" in the 1991 Act, but the expansion of the definition of the new term "programming undertaking" in the Act, as noted below at §104-26, now covered satellite-to-cable networks. See Government Response at p.72. For a decision refusing leave to appeal a CRTC decision applying the term "network" to the operations of CANCOM, on the basis that the definition in the former *Broadcasting Act* was not exhaustive and that it could include arrangements not involving a delegation of control, see *Global Communications Limited v. CRTC et al*., (Federal Court of Appeal, 1987), noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-332.

For CRTC policy statements on television networks, see *Policy Respecting Television Networks*. Public Notice CRTC 1989-2, January 10, 1989.

Under the 1991 Act, the CRTC has indicated that certain operations formerly treated as "networks" will no longer be classified as such but will be treated as programming undertakings or distribution undertakings, depending on the "primary function" of the undertaking to be licensed. See *New Broadcasting Act Amendments to Classes of Licence*, CRTC Public Notice 1991-63, June 19, 1991. In particular, the Commission has indicated that operations such as CANCOM and cable microwave networks are to be classified as (Relay) Distribution Undertakings, pay television networks such as The Movie Network and Super Ecran will be classified as (PayTV) Programming Undertakings and specialty programming services such as MuchMusic or MusiquePlus would be categorized as (Specialty) Programming Undertakings.

More recently, however, the Commission has largely eliminated the distinction between pay and specialty programming undertakings by categorizing them simply as discretionary programming undertakings. See the definition of "licensee" in section 2 of the *Discretionary Services Regulations*.]

[§104-22]

"official language minority community" means English-speaking communities in Quebec and French-speaking communities outside Quebec;

[*History:* Added in 2023.]

[§104-23]

"online undertaking" means an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus;

[*History:* Added in 2023.

Commentary: The inclusion of a definition for "online undertakings" in the *Broadcasting Act* allows the Act to set forth a different regulatory regime for such undertakings, based on registration, compared with the licensing regime applicable to broadcasting undertakings not based on the use of the Internet. The concept of having two regulatory regimes originated with the report of the Broadcasting and Telecommunications Legislative Review Panel, which included the following recommendation:

> Recommendation 56: We recommend that the existing licensing regime in the *Broadcasting Act* be accompanied by a registration regime. This would require a person carrying on a media content undertaking by means of the Internet to register unless otherwise exempt. Those carrying on a media content undertaking by means other than the Internet would continue to require a licence unless otherwise exempt.

Online undertakings, referred to as "new media" or "digital media" undertakings, had been exempted from regulation by the Commission in a number of exemption orders, starting with *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, December 17, 1999. The exemption order in place at the time the *Online Streaming Act* came into force was the *Exemption Order for Digital Media Broadcasting Undertakings,* Appendix to Broadcasting Order CRTC 2012-409, July 26, 2012.]

"program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

[*History:* Added in 1991.

Commentary: A wider definition of the word "program" was urged in Recommendation 18 of the *Sixth Report* of the Standing Committee on Communications and Culture, May 6, 1987. However, the present definition excludes visual images that consist predominantly of alphanumeric text. The term "alphanumeric text" is not defined.

The term "alphanumeric service" was used in an exclusionary sense in the *Cable Television Regulations, 1986*, as amended, which specified rules and priorities for programming services and define the term "programming service" to mean "any combination of images, sounds or images and sounds including a commercial message, other than an alphanumeric service, that is designed to inform or entertain the public...". The term "alphanumeric service" was defined in the Regulations to mean "a service consisting of letters, numbers, graphic designs or still images, or any combination thereof, that may be accompanied by (a) background music, (b) the programming service of a licensed A.M. station or licensed F.M. station other than an educational radio programming service the operation of which is the responsibility of an educational authority, (c) the service of Weather Radio Canada, (d) the Canadian programming service of a licensed national audio network operation, or (e) spoken words that relate to what is represented by the letters, numbers, graphic designs or still images."

In making this exclusion, the Commission's intent was to deregulate services fitting within the alphanumeric definition. In particular, such services did not need to obtain a network licence from the Commission as a prerequisite to being carried, and cable systems were permitted to carry such services under the Regulations without having to seek specific CRTC permission.

The meaning of the Commission's definition was later clarified in *Enquiries and Complaints about the Canadian Home Shopping Network (CHSN) Service Distributed by Some Cable Licensees*, Public Notice CRTC 1988-26, 24 February 1988, where the Commission ruled that the teleshopping service then operated by CHSN [since renamed The Shopping Channel] did not fall within the definition.

CHSN conformed its operations to the Commission's ruling, but later applied for a network licence from the Commission so as to be able to use full motion video. The application was denied in Simon Dean, obci (CHSC/Le Club), Decision CRTC 89-290, May 25, 1989. In 1995, however, the Commission decided to allow the use of full motion video in teleshopping services without the need for a licence, by issuing an exemption order to this effect. See *Exemption Order respecting Teleshopping Programming Service Undertakings*, Public Notice CRTC 1995-14, January 26, 1995.

Under the 1991 Act, the distinction between programming and non-programming services is made on a somewhat different basis. The result is that a service such as an alphanumeric cable wire news service is automatically exempted from the definition of "programming undertaking" in the Act, since its visual images consist predominantly of alphanumeric text. However, an operation such as the Canadian Home Shopping Network, when operated with still images only, while qualifying as an "alphanumeric service" under the CRTC *Cable Television Regulations, 1986* and thereby avoiding the application of the rules applicable to programming services thereunder, would not have qualified under the alphanumeric exclusion in the 1991 legislation since it carried still images which did not consist predominantly of alphanumeric text. Since a service such as CHSN qualified as a "programming undertaking" under the Act, it would normally have needed to obtain a licence under the Act, unless the Commission were to issue an order under subsection 9(4) of the Act exempting the class of alphanumeric services as defined in the Regulations from the requirement to obtain such a licence. In fact, the CRTC issued such an order in 1993: see now *Exemption Order Respecting Still Image Programming Service Undertakings*, Public Notice CRTC 2000-10, January 24, 2000. CHSN then operated under this exemption until the Teleshopping exemption was issued in 1995, allowing it to include moving images without the need for a licence.

Text and Commentary

On January 1, 1998, the *Broadcasting Distribution Regulations* came into force, replacing the *Cable Television Regulations, 1986*. Under these Regulations, the term "alphanumeric service" is not required to be defined, since s.20(1)(i) of the Regulations permits terrestrial distribution undertakings to distribute the programming service of any "exempt programming undertaking," and the definition of the latter embraces the 1995 exemption.

In a written brief filed with the Standing Committee on January 31, 1990, at p.6, the CRTC expressed concern that the exclusion of alphanumeric text from the definition of "program" in the *Broadcasting Act* might apply to the closed-captioning alphanumeric material transmitted on the vertical blanking interval of a television signal for use by the hearing impaired, and that this might lead to a loss of CRTC jurisdiction over this aspect of broadcasting. The concern appears to some extent misplaced, since the CRTC continues to have jurisdiction over the transmission of visual images with which the closed-captioning is ultimately combined on the viewer's television screen, and it could presumably require the transmission of such visual images by its licensees to be accompanied by alphanumeric information for the hearing-impaired, given that such information would not constitute a predominant part of the ultimate visual image received by the viewer.

Note that the term "program" in the 1991 Act clearly includes advertisements and announcements, a conclusion reinforced in the wording of subsection 10(1)(e), below at §104-106. In the former Act, the term "program" was undefined but a number of sections spoke of "programs, advertisements or announcements", supporting the conclusion that the term "program" did not include commercials. In order to ensure that commercials were caught, the CRTC defined the term "programming service" in section 2 of the *Cable Television Regulations*, *1986*, as "including a commercial message." However, the term "programming service" is now defined in the *Broadcasting Distribution Regulations* to mean "a program that is provided by a programming undertaking," automatically importing the statutory definition of "program" now in the Act.

Shortly after the 1991 Act came into force, the Commission was asked to interpret the meaning of the word "predominantly" in the context of a proposed television preview service. The Commission ruled that the term "predominantly" has no special legal definition and is used in its ordinary sense, i.e. that which is more influential or more powerful. Thus, even where a moving image occupies only one quarter of the screen, it may still qualify as broadcasting if the moving image attracts the eye and is the focus of attention. (See Letter from CRTC to Gowling, Strathy & Henderson respecting inquiry on behalf of Prevue Networks, Inc., 19 August 1991. See also Telecom Decision CRTC 97-2, February 5, 1997, Broadcasting Decision CRTC 2003-518, October 23, 2003, and Broadcasting Decision CRTC 2005-120, April 1, 2005, to the same effect.)]

[§104-25]

"programming control" means control over the selection of programs for transmission, but does not include control over the selection of a programming service for retransmission;

[*History*: Added in 2023.

Commentary: The concept of "programming control" is utilized in paragraphs 3(1)(g) and (h) of the *Broadcasting Act*, below at §104-44 and §104-45. Those provisions state that programming should be of high standard and persons carrying on broadcasting undertakings have a responsibility for the programs that they broadcast. However, both provisions only apply to programs over which such persons have programming control, as defined above.]

[§104-26]

"programming undertaking" means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus, but does not include such an undertaking that is an online undertaking;

[*History*: Added in 1991, except for the exclusion of online undertakings which occurred in 2023.

Commentary: This definition, added to the Act in 1991, generally replaced the term "broadcasting transmitting undertaking" found in the previous Act, except that it now included such undertakings even when their transmissions do not go directly to the public but are sent to the public indirectly through a distribution undertaking.

Satellite-to-cable program services, which had formerly been licensed as "network operations" under the Act, now qualified in their own right as "programming undertakings." See *New Broadcasting Act Amendments to Classes of Licence,* CRTC Public Notice 1991-63, June 19, 1991.

The concept of including indirect as well as direct reception by the public in the concept of "broadcasting" reflects in part the definition of "Broadcasting-Satellite Service" added to the ITU *International Radio Regulation*s in 1985. In those Regulations, the term "direct reception" for the purpose of the broadcasting-satellite service was stated to encompass both "individual reception" and "community reception", the latter term itself defined to include reception "by a group of the general public at one location... or through a distribution system covering a limited area."]

[§104-27]

"radio waves" means electromagnetic waves of frequencies lower than 3000 GHz that are propagated in space without artificial guide;

[*History:* Comparable to the definition of "radiocommunication" in section 2 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. This in turn is based on the definition of "radio waves" in Article 1 of the International Telecommunication Union Radio Regulations.

Commentary: In *Regina v. Lougheed Village Holding Ltd.* (1981), 59 C.P.R. (2d) 107 (B.C. County Court), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-246. a prosecution under the *Radio Act* was dismissed on the basis of an argument that a satellite signal did not constitute "radiocommunication" because the satellite "focused" the signal, thus "guiding" it on its way to earth. However, this approach was later dismissed in the judgment of Muldoon J. in *Shuswap Cable Ltd. v. The Queen et al.* (1986), 31 D.L.R. (4th) 349, [1987] 1 F.C. 505 (F.C.T.D.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-320. In that decision, Muldoon J. held that satellite signals constituted radiocommunication since there was no man-made device along with the waves are propagated. Although the electromagnetic waves can be aimed or directed, they cannot be further controlled once propagated in space. The same view was taken by the trial court in *The Queen v. Nipawin and District Satellite T.V. Inc. and Zanyk* (1986), 47 Sask R. 48, upheld on that ground by the Saskatchewan Court of Appeal in [1988] 4 W.W.R. 375, 42 C.C.C. (3d) 32; appeal dismissed, [1991] 1 S.C.R. 64, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-393.]

[§104-28]

"temporary network operation" means a network operation with respect to a particular program or a series of programs that extends over a period not exceeding sixty days.

[*History:* Unchanged from section 2 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, except that the maximum time period for a temporary network operation is extended from one month to sixty days.]

[§104-29]

(2) **Meaning of "other means of telecommunication"**. – For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

[*History:* Added in 1991.

Commentary: This phrase is used in the definition of "broadcasting" in subsection 2(1). The concept of using a new "technology-neutral" definition of broadcasting is commented on extensively in the Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture, June 23, 1988, at pp.87-88.]

[§104-30]

(2.1) **Exclusion — carrying on broadcasting undertaking**. – A person who uses a social media service to upload programs for transmission over the Internet and reception by other users of the service — and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them — does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act.

[§104-31]

(2.2) **Exclusion — social media service and programming control**.- An online undertaking that provides a social media service does not, for the purposes of this Act, exercise programming control over programs uploaded by a user of the service who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them.

[*History*: Subsections 3(2.1) and 3(2.2) were added in 2023.

Commentary: In recommending that the CRTC require internet programming undertakings to contribute to Canadian programming as an interim measure pending the adoption of legislative amendments, the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020) would have excluded undertakings that "primarily provide user-generated programs": see Recommendation 84 at p.173. In a summary of the *Online Streaming Act* published by Canadian Heritage on February 2, 2022, it was stated that "Regulation will not apply to individual creators, streamers or influencers or social media services themselves in respect of the amateur programs posted by their users." The term "social media service" is not defined in the Act. However, Oxford Languages defines "social media" to mean "websites and applications that enable users to create and share content or to participate in social networking".]

[§104-32]

(2.3) **Exclusion — certain transmissions over the Internet**. – A person does not carry on an online undertaking for the purposes of this Act in respect of a transmission of programs over the Internet

(a) that is ancillary to a business not primarily engaged in the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business;

(b) that is part of the operations of a primary or secondary school, a college, university or other institution of higher learning, a public library or a museum; or

(c) that is part of the operations of a theatre, concert hall or other venue for the presentation of live performing arts.

[*History*: Added in 2023.

Commentary: Paragraph (a) in this subsection reflects a discussion in the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020) at p.131, *viz*. "Undertakings that disseminate media content, not for the sake of the media content, but ancillary to a different primary purpose" would not be regulated. "Examples of excluded content include travel sites, real estate sales sites, hospital health provision sites, and the myriad of e-commerce sites that send media content to the public via telecommunications as part of a different business."]

[§104-33]

(3) **Interpretation.** – This Act shall be construed and applied in a manner that is consistent with

(a) the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings and creators;

(b) the right to privacy of individuals; and

(c) the commitment of the Government of Canada to enhance the vitality of official language minority communities in Canada and to support and assist their development, as well as to foster the full recognition and use of both English and French in Canadian society.

[*History*: Paragraph (a) was included in the 1991 Act; paragraph (b) was added in 2023.

Commentary: Paragraph (a), which was added to the Act in 1991, is the only counterpart to the statement in paragraph 3(c) of the *Broadcasting Act*, R.S.C.1985, c.B-9, that "the right to freedom of expression...subject only to generally applicable statutes and regulations, is unquestioned." In a clause-by-clause analysis of Bill C-136 dated August 1988 prepared by the Department of Communications, it was stated that the reference to the right of freedom of expression "has not been carried over into the proposed legislation since the Charter now makes such a provision superfluous." For later provisions of the Act referring to the journalistic and programming independence of the CBC, see subsection 35(2), below at §104-264, subsection 46(5), below at §104-296, and subsection 51(1), below at §104-314.

Paragraph (c) reflected Recommendation 53 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020) which recommended that section 3 be modernized to state that "the media communications sector should… ensure the creation of and access to content by and for official language minority communities." The official language minority communities in Canada are also referred to at subparagraph 3(1)(d)(iii.3) of the Act, below at §104-40.]

[§104-34]

Broadcasting Policy for Canada

[§104-35]

3. (1) **Declaration**. – It is hereby declared as the broadcasting policy for Canada that It is hereby declared as the broadcasting policy for Canada that

[§104-36]

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians, and it is recognized that it includes foreign broadcasting undertakings that provide programming to Canadians;

[*History*: Added in 2023, to replace paragraph 3(1)(a) of the 1991 Act.

Commentary: The words "and it is recognized that it includes foreign broadcasting undertakings that provide programming to Canadians" were added in 2023. This reflected Recommendation 53 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020) which recommended that section 3 be modernized to state that the media communications sector should "consist of Canadian-owned and -controlled companies alongside foreign companies."

For the application of the original wording of this paragraph in the context of the *Direction to the CRTC (Eligible Canadian Corporations)*, C.R.C. 1978, c.376, see *Re Cable Laurentide Ltée. and Canadian Radio-television and Telecommunications Commission et al*. (1980), 114 D.L.R. (3d) 545, [1980] 2 F.C. 441 (Fed.C.A.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-222.

In *Rogers Communications Inc. v. Canada (Attorney General)* (1998), 145 F.T.R. 79 (F.C.T.D.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-382, Nadon J. held that the Direction to the CRTC (Ineligibility of Non-Canadians), permitting subsidiaries of B.C. Telecom, then a foreign-controlled corporation, to apply for and obtain a licence for a broadcasting distribution undertaking, was not *ultra vires* the *Broadcasting Act* by reason of paragraph 3(1)(a). A distinction was to be drawn between the system as a whole and the individual undertakings which comprise the system. "Having two companies not 'effectively owned and controlled by Canadians' out of thousands involved in the industry does not alter the Canadian character and control of the system as a whole."

In *TVA Group Inc. v. Bell Canada*, 2021 FCA 2153 (CanLII), the Federal Court of Appeal noted that sections 3 and 5 of the *Broadcasting Act* are not attributive of jurisdiction and are not sufficient in and of themselves to justify the validity of regulatory provisions.]

[§104-37]

(a.1) each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy set out in this subsection in a manner that is appropriate in consideration of the nature of the services provided by the undertaking;

[*History*: Added in 2023.

Commentary: This reflected Recommendation 60 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020) which recommended that "all media content undertakings that benefit from the Canadian media communications sector contribute to it in an equitable manner. Undertakings that carry out like activities should have like obligations, regardless of where they are located."]

[§104-38]

(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

[*History:* This is a substantially rewritten version of paragraph 3(a) of the *Broadcasting Act*, R.S.C.1985, c.B-9, which reads as follows:

"*(a)* broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;"

Commentary: The general approach taken here is suggested in the Report of the Task Force on Broadcasting Policy (1986), at p.152. In the former *Broadcasting Act*, as well as in the original version of Bill C-40 given first reading, only two "elements" of the system were referred to, viz. public and private. The "public element" is generally considered to refer to undertakings under public ownership, e.g. the CBC, Télé-Québec and TVOntario, while the "private element" is taken to refer to privately-owned (shareholder-controlled) undertakings. The reference to a third component, viz. the "community element", was added to Bill C-40 at the committee stage, reflecting the involvement of licensees without share capital, e.g. licensees that are co-operatives or are member-controlled. The inclusion of a "community element" in section 3 of the Act was recommended at p.502 of the Report of the Task Force on Broadcasting Policy. For the current CRTC policy on community television, see *Policy framework for local and community television*, Broadcasting Regulatory Policy CRTC 2016-224.

The obligations of each "element" in the system are set out in paragraph 3(1)(e) below at §104-41. The programming to be provided by the community element is described in paragraph 3(1)(s) below at §104-57.

The statement that the broadcasting system makes use of radio frequencies that are public property derives from section 3(a) of the former Act, although the formulation in the former Act was that "broadcasting undertakings in Canada make use of radio frequencies that are public property". Since the Act is now stated to be applicable to undertakings transmitting programs by "other means of telecommunication" and neither receiving nor transmitting radio waves, it was necessary to amend the statement so that it applied only to the system as a whole and not necessarily to all undertakings.

The statement that radio frequencies are public property does not mean that the *Broadcasting Act* supersedes the *Copyright Act* so that it prevails over the rights of copyrightholders in programs. As noted by Cattenach J. in *Warner Bros.-Seven Arts Inc. et al. v. CESM-TV Ltd.* (1971), 65 C.P.R. 215, with respect to the predecessor Act, "the section does not go on to say that what is sent out on those carrier radio frequencies is also public property". See *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-115.

In that regard, the relationship between the *Copyright Act* and the *Broadcasting Act* was canvassed in *Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, where the Supreme Court of Canada held (5-4) that the "value for signal" regime established by the CRTC to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations was *ultra vires* the *Broadcasting Act*. For a summary of the case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-562.

The statement that the broadcasting system provides "a public service" was an entirely new concept when it was added to the Act in 1991. In the Report of the Task Force on Broadcasting Policy (1986), at pp.144-5, this concept is related to section 36 of the *Constitution Act, 1982*, which commits the legislatures and governments of Canada to "providing essential public services of reasonable quality to all Canadians".

The wording may also provide an argument for federal jurisdiction over broadcasting as defined more expansively in section 2 of the Act on the basis of the "national dimension" test. Under that test, which has been applied to radiocommunication, if the subject matter of the legislation goes beyond local or provincial concerns or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of Parliament as a matter affecting the peace, order and good government of Canada. See *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452; cf. *Radio Reference*, [1932] A.C. 304, [1932] 2 D.L.R. 81, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-56.]

[§104-39]

(c) while sharing common aspects, English and French language broadcasting operate under different conditions — in particular, the minority context of French in North America— and may have different requirements;

[*History*: Added in 2023 to replace paragraph 3(1)(c) of the 1991 Act.

Commentary: The reference to "the minority context of French in North America" was added in 2023. The concept that English and French language broadcasting operate under different conditions has its roots in Recommendation 65 of the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987, and Recommendation 133 of the Fifteenth Report of the Standing Committee, June 9, 1988. As a regulatory approach, the distinction has been reflected in a number of CRTC policies, e.g. in regard to the licensing of specialty services on November 30, 1987. This concept is also reiterated in paragraph 5(2)(a) of the Act, noted below at §104-73. In Public Notice CRTC 1999-27, February 12, 1999, the CRTC concluded that requiring broadcasting distribution undertakings across Canada to distribute the French-language television service TVA on basic service under section 9(1)(h) of the Act would be consistent with this provision of the Act. Cf. Decision CRTC 2000-72, March 1, 2000, where the Commission in a split decision declined to require cable television systems in Quebec to distribute TFO on a discretionary analog tier. Section 9(1)(h) was replaced with section 9.1(1)(h) in 2023. See below at §104-96.]

[§104-40]

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, and foster an environment that encourages the development and export of Canadian programs globally,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests of all Canadians — including Canadians from Black or other racialized communities and Canadians of diverse ethnocultural backgrounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages — and reflect their circumstances and aspirations, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples and languages within that society,

(iii.1) provide opportunities to Indigenous persons to produce programming in Indigenous languages, English or French, or in any combination of them, and to carry on broadcasting undertakings,

(iii.11) provide opportunities to Black or other racialized persons in Canada by taking into account their specific needs and interests, namely, by supporting the production and broadcasting of original programs by and for Black or other racialized communities,

(iii.2) support the production and broadcasting of original French language programs,

(iii.3) enhance the vitality of official language minority communities in Canada and support and assist their development by taking into account their specific needs and interests, including through supporting the production and broadcasting of original programs by and for those communities,

(iii.4) support community broadcasting that reflects both the diversity of the communities being served, including with respect to the languages in use within those communities and to their ethnocultural and Indigenous composition, and the high engagement and involvement in community broadcasting by members of those communities, including with respect to matters of public concern,

(iii.5) ensure that Canadian independent broadcasting undertakings continue to be able to play a vital role within that system,

(iii.6) support the production and broadcasting of programs in a diversity of languages that reflect Black and other racialized communities and the diversity of the ethnocultural composition of Canadian society, including through broadcasting undertakings that are carried on by Canadians from Black or other racialized communities and diverse ethnocultural backgrounds,

(iii.7) provide opportunities to Canadians from Black or other racialized communities and diverse ethnocultural backgrounds to produce and broadcast programs by and for those communities,

(iv) promote innovation and be readily adaptable to scientific and technological change,

(v) reflect and be responsive to the preferences and interests of various audiences, and

(vi) ensure freedom of expression and journalistic independence;

[*History*: Sub-paragraphs (i) and (ii) appeared in the 1991 Act. The remaining sub-paragraphs -- (iii.3) to (vi) -- were added in 2023.

Commentary: Subparagraph (iii) dealing with employment opportunities was based on an earlier version already in the 1991 Act but specific categories of Canadians were added in the 2023 version. In 1991, the stated intention of the government was for the Commission to enforce the spirit of the *Employment Equity Act.* Thus the Commission would be responsible for seeing that broadcasters "practice equity by employing a broad cross-section of society within the broadcasting industry, thereby ensuring a diversity of views and a healthy respect for differences." However, in response to concerns raised by the Commission in 1990, the *Broadcasting Act* was amended in 1996 to remove the CRTC's powers regarding employment equity in regard to broadcasting undertakings. See subsection 5(4), below at §104-75.]

The inclusion of specific references to Indigenous persons in (iii.1) and to linguistic minority communities in (iii.3) was proposed in Recommendation 53 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020).

[§104-41]

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

[*History*: Added in 1991.

Commentary: For a discussion of the three "elements" in the system, see the commentary under paragraph 3(1)(b), above at §104-38. More specific obligations with respect to the creation and presentation of Canadian programming are set forth in paragraph 3(1)(f) for each broadcasting undertaking, in paragraph 3(1)(m) for the CBC, in paragraph 3(1)(s) for private networks and programming undertakings and in subparagraph 3(1)(t)(i) for distribution undertakings. The Commission referred to paragraph 3(1)(e) to justify its requirement for programming contributions by broadcasting distribution undertakings, see *New Regulatory Framework for Broadcasting Distribution Undertakings*, Public Notice CRTC 1997-25, para.121.

In Broadcasting Regulatory Policy CRTC 2010-167, para.152, the CRTC referred to paragraphs 3(1)(e) and 3(1)(f) of the Act to support its decision to implement a "value for signal" regime, under which private local television stations could choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations. However, in *Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, the Supreme Court of Canada ruled (5-4) that the regime was *ultra vires* the *Broadcasting Act*. For a summary of the case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-562.]

[§104-42]

(f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

[*History*: Added in 2023, to replace paragraph 3(1)(f) of the 1991 Act.

Commentary: This is a rewrite of paragraph 3(1)(f) of the 1991 Act, except that it uses the term "each Canadian broadcasting undertaking" instead of "each broadcasting undertaking". The obligations of foreign online undertakings are set forth in paragraph 3(1)(f.1), below at §104-43.]

[§104-43]

(f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;

[*History*: Added in 2023.

Commentary: This paragraph sets out for the first time the obligations of foreign online undertakings. The term "online undertaking" is defined in section 2 of the Act, above at §104-23.]

[§104-44]

(g) the programming over which a person who carries on a broadcasting undertaking has programming control should be of high standard;

[*History*: Added in 2023, to replace paragraph 3(1)(g) of the 1991 Act.

Commentary: In the 1991 version of this paragraph, the high standard obligation applied to "the programming originated by broadcasting undertakings." The new wording limits the high standard obligation to "programming over which a person who carries on a broadcasting undertaking has programming control". The term "programming control" is defined in section 2 of the Act, above at §104-25.]

[§104-45]

(h) all persons who carry on broadcasting undertakings have a responsibility for the programs that they broadcast and over which they have programming control;

[*History*: Added in 2023, to replace paragraph 3(1)h) of the 1991 Act.

Commentary: The 1991 version of this paragraph stated that "all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast." The new wording widens responsibility to broadcasting undertakings whether or not they have a licence, thus including online undertakings which will not require a licence to operate. However, responsibility is limited to "programs that they broadcast and over which they have programming control." The term "programming control" is defined in section 2 of the Act, above at §104-25.]

[§104-46]

(i) the programming provided by the Canadian broadcasting system should.

(i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for people of all ages, interests and tastes,

(i.1) reflect and support Canada's linguistic duality by placing significant importance on the creation, production and broadcasting of original French language programs, including those from French linguistic minority communities,

(ii) be drawn from local, regional, national and international sources, including, at the local level, from community broadcasters who, through collaboration with local organizations and community members, are in the unique position of being able to provide varied programming to meet the needs of specific audiences,

(ii.1) include programs produced by Canadians that cover news and current events — from the local and regional to the national and international — and that reflect the viewpoints of Canadians, including the viewpoints of Indigenous persons and of Canadians from Black or other racialized communities and diverse ethnocultural backgrounds,

(ii.2) reflect the importance of Indigenous language revitalization by supporting the production and broadcasting of Indigenous language programming, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and in response to the Truth and Reconciliation Commission of Canada's Calls to Action,

(iii) be drawn from local, regional, national and international sources,

(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern and to directly participate in public dialogue on those matters including through the community element, and

(v) include a significant contribution from the Canadian independent production sector;

[*History*: Subparagraphs (i), (i.1), (ii), (ii.1), (iv) and (ii.2) added in 2023.

Commentary: The inclusion of specific references to Indigenous persons and to linguistic minority communities in sub-paragraphs (i.1) and (ii.1) was proposed in Recommendation 53 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020). Recommendation 53 also proposed that section 3 be amended to state that the media communications sector should "promote the development of a strong Canadian independent production sector, including a robust independent production community." Sub-paragraph (v) refers to the contribution to be made from the Canadian independent production sector.]

[§104-47]

(j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;

[*History:* Added in 1991. This was a broadened version of paragraph 3(i) of the *Broadcasting Act*, R.S.C. 1985, c.B-9.

Commentary: This statement was not in Bill C-136 but was added to Bill C-40 at the request of the provincial educational authorities.]

[§104-48]

(k) a range of broadcasting services in English and in French shall be extended to all Canadians;

[*History*: Amended in 2023.

Commentary: The amendment removed the words “as resources become available.”]

[§104-49]

(l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide broadcasting services incorporating a wide range of programming that informs, enlightens and entertains;

[*History*: Amended in 2023.

Commentary: The amendment replaced the words “radio and television services” with “broadcasting services”.]

[§104-50]

(m) the programming provided by the Corporation should

(i) be predominantly and distinctively Canadian,

(ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,

(iii) actively contribute to the flow and exchange of cultural expression,

(iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the specific needs and interests of official language minority communities,

(v) strive to be of equivalent quality in English and in French,

(vi) contribute to shared national consciousness and identity,

(vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and

(viii) reflect the multicultural and multiracial nature of Canada;

[§104-51]

(n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);

[*History*: Paragraphs 3(1)(l), (m) and (n), which set out the mandate of the Canadian Broadcasting Corporation, are based on paragraphs 3(1)(f), (g) and (h) of the previous *Broadcasting Act*, R.S.C.1985, c.B-9, amended and expanded in a number of particulars. Subparagraph (m)(iv) was amended in 2023.

Commentary: In the former *Broadcasting Act*, paragraph 3(1)(f) provided that the CBC should provide "a national broadcasting service that is predominantly Canadian in content and character". In the new Act, the CBC is now described as "the national public broadcaster", distinguishing it from other public broadcasters who could be local, provincial or regional. Subparagraphs 3(1)(m)(v) and (viii) did not appear in the former Act. Subparagraph 3(1)(m)(vi) deletes the concept "contribute to the development of national unity" that had appeared in subparagraph 3(1)(g)(iv) of the former Act, and adds the word "consciousness", picking up a recommendation of the Task Force Report at p.285.

Minister of Communications Marcel Masse explained the reasons for the removal of the phrase in the former Act requiring the CBC to "contribute to the development of national unity" in the following terms in an appearance before the Standing Committee on January 31, 1990 (see Proceedings, at p. 2:11);

> "The primary function of public broadcasting is, first, to reflect our social values, which are above all cultural values.
>
> "I have removed from the CBC its obligation to promote Canadian unity because it is, first maintaining this political value artificially, and second, it was a constraint on freedom of expression. This obligation also opens the door to an intolerable interference. In removing it, we will rather place greater emphasis on the capacity of Canadians to recognize each other through their values."

The Minister elaborated on this in the following exchange with Committee member Ian Waddell (NDP Port Moody-Coquitlam), at pp.2:17-18:

> *Mr. Waddell*: The intolerable interference with the CBC was when the government of the day issued directions that it did not want separatists in the CBC. That is what you mean by intolerable. Is that why you are changing?
>
> *Mr. Masse*: Do you support the government in issuing a directive to Radio-Canada in a sense like that?...
>
> [TRANSLATION] I am on the side of freedom of expression, and the quality of life in our country is directly connected, not to the will of politicians, but to freedom of expression for the population. This is why Canada is a great country. Not because of directives given by previous governments to [Radio-Canada], but because we have the right to express our cultural identity. This is why the Canadian identity, in my opinion, rests more on freedom of expression than on directives issued by previous governments...
>
> [TEXT] Since you raise the question, I think this country will be great the day French Canadians, English Canadians, and Canadians will know each other, because they are great people. It is by the knowledge they have of each other that this country will be great. This is why we have asked Radio-Canada to make sure to have a promotion de notre réalité culturelle. I deeply believe this is my world. The future of Canada will go by a better knowledge of what we are.

Paragraph 3(1)(n) contrasts the objectives of the CBC with the interests of any other broadcasting undertaking, giving preference to the CBC objectives when the public interest is otherwise balanced. In the former Act, this contrast had been with the interests of the "private element" of the system.

In addition, the former Act had stated that "paramount consideration shall be given to the objectives of the national broadcasting service", a formulation no longer present in the Act.

On January 31, 1996, the Mandate Review Committee issued a report examining the mandates of the CBC, Telefilm Canada and the National Film Board: see Making Our Voices Heard: Canadian Broadcasting and Film for the 21st Century, Report of the Mandate Review Committee - CBC, NFB, Telefilm (Ottawa: Department of Canadian Heritage, 1996). Among other recommendations, the Report proposed that paragraphs 3(1)(q) and (r) of the Act, respecting alternative television programming services, be deleted and that provisions that CBC programming should "be innovative", include programming for interests and tastes not adequately provided for," and "include programming devoted to culture and the arts," be added to the CBC's mandate. (See Report, at p.124).

THE *BROADCASTING ACT*

In June 2003, the Standing Committee on Canadian Heritage issued an 872-page report entitled *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*. Chapter 6 of that report, often referred to as the "Lincoln report" after Clifford Lincoln, the chair of the committee, dealt with the CBC, and made the following recommendations:

> 6.1: The Committee recommends that Parliament provide the CBC with increased and stable multi-year funding (3 to 5 years) so that it may adequately fulfill its mandate as expressed in the *Broadcasting Act*.
>
> 6.2: The Committee recommends that for greater clarity the *Broadcasting Act* be amended to recognize the value of new media services as a complementary element of the CBC's overall programming strategy.
>
> 6.3: The Committee recommends that the CBC deliver a strategic plan, with estimated resource requirements, to Parliament within one year of the tabling of this report on how it would fulfill its public service mandate to: (a) deliver local and regional programming. (b) meet its Canadian programming objectives. (c) deliver new media programming initiatives.
>
> 6.4: The Committee recommends that the impacts and outcomes of the CBC's strategic plans (for the delivery of local and regional programming; Canadian programming; and, cross-platform, new media initiatives) be reported on annually and evaluated every two years. These evaluations should meet Government of Canada program evaluation standards.
>
> 6.5: The Committee recommends that the CBC submit a plan to Parliament detailing its needs for the digital transition and that it receive one-time funding to meet these needs.
>
> 6.6: The Committee reaffirms the importance of public broadcasting as an essential instrument for promoting, preserving and sustaining Canadian culture and recommends that the government direct the CRTC to interpret the *Broadcasting Act* accordingly.

Since 2003, three further parliamentary committee reports have addressed the role of the public broadcaster.

In February 2008, the Standing Committee on Canadian Heritage issued a 194-page report entitled *CBC/Radio-Canada: Defining Distinctiveness in the Changing Media Landscape*. The report contained 47 recommendations.

In July 2015, the Standing Senate Committee on Transport and Communications issued a 77-page report entitled *Time for Change: The CBC/Radio-Canada in the Twenty-first Century*. The report contained 22 recommendations.

On June 15, 2017, the Standing Committee on Canadian Heritage issued a 102-page report entitled *Disruption: Change and Churning in Canada's Media Landscape*. Two of the recommendations related to CBC/Radio-Canada: Recommendation 14 stated that "The Committee recommends that CBC/Radio-Canada prioritize the production and dissemination of locally reflective news and programming by expanding its local and regional coverage, including unserved areas across all of its platforms." Recommendation 15 stated that "The Committee recommends that CBC/Radio-Canada eliminate advertising from its digital news platforms."

On September 28, 2017, Minister of Canadian Heritage Mélanie Joly released a 38-page report entitled *Creative Canada: Policy Framework*. Section 3.1 was entitled "Chart the Future Orientation of CBC/Radio-Canada." It stated that the Government of Canada, in reviewing the *Broadcasting Act* and the *Telecommunications Act*, "will work with CBC/Radio-Canada to renew the mandate of the Corporation to strengthen its vital role as a leading partner among Canada's news and culture organizations, and as a key platform for supporting and promoting Canadian culture and content at home and abroad."]

On October 16, 2017, the government released its response to the 2017 Report of the Standing Committee on Canadian Heritage. It stated that the government expected CBC/Radio-Canada to fulfill the programming mandate set out in s.3(1)(m)(ii), (iii), and (vi), and that it trusted that CBC/Radio-Canada will consider the report's recommendations.

Text and Commentary

On January 27, 2020, the Broadcasting and Telecommunications Legislative Review Panel published its report: *Canada's Communications Future: Time to Act*. The report included the following recommendations respecting the role of the CBC:

> 79. We recommend that to ensure the national public broadcaster is able to adapt to a more open, global, and competitive media communications environment, the *Broadcasting Act* be amended to remove the specific reference to radio and television in the mandate of CBC/Radio-Canada. This would ensure that CBC/Radio-Canada is able to provide a wide range of media content that informs, enlightens, and entertains on multiple platforms and media.
>
> 80. We recommend that the *Broadcasting Act* be amended to add the following elements to the mandate of CBC/Radio-Canada:
>
> - reflecting local communities and audiences;
> - providing national, regional, and local news;
> - reflecting Canadian perspectives on international news;
> - reflecting Indigenous Peoples and promoting Indigenous cultures and languages;
> - showcasing Canadian content to international audiences; and
> - taking creative risks.
>
> We further recommend that the Act be amended to ensure that the national public broadcaster has the objects and powers it needs to deliver on its updated mandate.
>
> 81. We recommend that the *Broadcasting Act* be amended to require the federal government to enter into funding commitments of at least 5 years with CBC/Radio-Canada, based on discussions with the Corporation on its funding needs, including those required to carry out its updated mandate and taking into account inflation and projected revenues from advertising and subscriptions. We further recommend that CBC/Radio-Canada gradually eliminate advertising on all platforms over the next five years, starting with news content.
>
> 82. We recommend that the *Broadcasting Act* be amended to enshrine an open, transparent, and competency-based appointment process for Governor in Council appointments of CBC/Radio-Canada's Chair, President, and Board of Directors. This amendment should also require that the appointments process ensure diversity, gender parity, and representation from Indigenous and minority groups.
>
> 83. We recommend that the *Broadcasting Act* be amended to shift the CRTC's role from licensing individual services of CBC/Radio-Canada to overseeing all its content-related activities. We further recommend that the CRTC report to the Minister of Canadian Heritage annually on the status of CBC/Radio-Canada's performance of its mandate.

None of these proposed amendments were reflected in the *Online Streaming Act* which amended the *Broadcasting Act* in 2023. However, on December 16, 2021, the Prime Minister issued a mandate letter to Heritage Minister Pablo Rodriguez that included the following reference to the CBC:

> "To realize these objectives, I ask that you achieve results for Canadians by delivering the following commitments…
>
> - Modernize CBC/Radio-Canada, proceeding in a manner that respects the public broadcaster's independence by:
>
> - Updating CBC/Radio-Canada's mandate to ensure that it meets the needs and expectations of Canadian audiences, with unique programming that distinguishes it from private broadcasters;
> - Reaffirming its role as public broadcaster in protecting and promoting the French language and francophone cultures in Quebec and across the country;
> - Increasing the production of national, regional and local news;
> - Strengthening Radio Canada International, so that it can continue to advocate for peace, democracy and universal values on the world stage;

- Ensuring that Indigenous voices and cultures are present on our screens and radios;
- Bringing Canada's television and film productions to the world stage; and
- Providing additional funding to make it less reliant on private advertising, with a goal of eliminating advertising during news and other public affairs shows."

As part of the CBC's CRTC licence renewal hearing in 2021, the CBC published a 3 year strategic plan entitled "Your Stories, Taken to Heart".

The CRTC also published an international benchmarking study on public broadcasting as part of the CBC renewal process. Reference should also be made to a report entitled "Analysis of the Social, Cultural and Economic Impacts of the Canadian Broadcasting Corporation", which was prepared for the Department of Canadian Heritage by Deloitte LLP in December 2020.

On September 16, 2022, in Order in Council 2022-0995, the Governor in Council referred back to the CRTC the decision contained in Broadcasting Decision CRTC 2022-165 of June 22, 2022, to renew the broadcasting licences for the English- and French-language audiovisual and audio services of CBC/Radio-Canada. The Order in Council stated that the Governor in Council "is of the opinion that it is material to the reconsideration and hearing that the Commission consider how to ensure that, as the national public broadcaster, the Canadian Broadcasting Corporation continue to make a significant contribution to the creation, presentation, and dissemination of local news, children's programming, original French-language programming, and programming produced by independent producers."]

[§104-52]

(o) programming that reflects the Indigenous cultures of Canada and programming that is in Indigenous languages should be provided — including through broadcasting undertakings that are carried on by Indigenous persons — within community elements, which are positioned to serve smaller and remote communities, and other elements of the Canadian broadcasting system in order to serve Indigenous peoples where they live;

[*History*: Added in 2023.

Commentary: The inclusion of a specific reference to "content by and for Indigenous peoples" in section 3 of the Act was proposed in Recommendation 53 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020). The term "Indigenous Peoples" is defined in section 2, above at §104-18.]

[§104-53]

(p) programming that is accessible without barriers to persons with disabilities should be provided within the Canadian broadcasting system, including through community broadcasting, as well as the opportunity for them to develop their own content and voices;

[*History*: Added in 2023.

Commentary: The inclusion of a specific reference to persons with disabilities in section 3 of the Act was proposed in Recommendation 53 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020). The term "barrier" is defined in section 2, above at §104-7.]

[§104-54]

(p.1) programming that is accessible without barriers to persons with disabilities should be provided within the Canadian broadcasting system, including without limitation, closed captioning services and described video services available to assist persons living with a visual or auditory impairment;

[*History*: Added in 2023.]

[§104-55]

(q) online undertakings that provide the programming services of other broadcasting undertakings should

(i) ensure the discoverability of Canadian programming services and original Canadian programs, including original French language programs, in an equitable proportion, and

(ii) when programming services are supplied to them by other broadcasting undertakings under contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services; and

(iii) ensure the delivery of programming at affordable rates;

[*History*: Added in 2023.

Commentary: The inclusion of a discoverability obligation for Canadian content "on all audio or audiovisual entertainment media content undertakings" was proposed in Recommendation 63 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020).]

[§104-56]

(r) online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery;

[*History*: Added in 2023.

Commentary: As noted in the commentary on paragraph 3(1)(q), above at §104-55, the inclusion of a discoverability obligation for Canadian content "on all audio or audiovisual entertainment media content undertakings" was proposed in Recommendation 63 of the Report of the Broadcasting and Telecommunications Legislative Review Panel (2020).]

[§104-57]

(s) the programming provided by the community element should

(i) be innovative and complementary to the programming provided for mass audiences,

(ii) cater to tastes and interests not adequately provided for by the programming provided for mass audiences and include programs devoted to culture, politics, history, health and public safety, local news and current events, local economy and the arts,

(iii) reflect Canada's communities, regions, Indigenous and multicultural nature, including through third-language programming,

(iv) support new and emerging Canadian creative talent, as a cost-effective venue for learning new skills, taking risks and exchanging ideas,

(v) through community participation, strengthen the democratic process and support local journalism, and

(vi) be available throughout Canada so that all Canadians can engage in dialogue on matters of public concern; and

[*History*: Added in 2023.]

[§104-58]

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

[*History:* Added in 1991.

Commentary: This paragraph reflects Recommendations in the *Sixth Report* of the Standing Committee on Communications and Culture, May 6, 1987, to give the CRTC the power to establish conditions regarding the carriage of programming services by distribution undertakings (Recommendation 57 at p.92), to arbitrate terms and conditions of affiliation agreements (Recommendation 52, at p.86) and to require the fees charged by distribution undertakings to be equitable (Recommendation 60, at p.95).

The power of the CRTC under the previous *Broadcasting Act* to fix the maximum basic fees charged by cable television systems as a condition of the right to a territorial monopoly was upheld by the *Supreme Court of Canada in Canadian Broadcasting League v. CRTC et al.*, [1985] 1 S.C.R. 174, affirming [1983] 1 F.C. 182, as noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-302. Conversely, the Commission's authority to deregulate cable basic rates was upheld in *Telecommunications Workers Union v. CRTC*, 2003 FCA 381, [2004] 2 F.C.R., summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-425.

In a clause-by-clause analysis of Bill C-136 dated August 1988 prepared by the Department of Communications, the following comment is made concerning this paragraph:

"For the first time, the role that distribution systems (particularly cable operators) are expected to play in meeting the government's goals for broadcasting is spelled out. This section permits distribution systems to take on some programming activities. It also establishes some rules about how they are to exercise their territorial exclusivity; they are not to use their position as 'gatekeepers' between programming services and consumers to restrict access or impose excessive charges. Most important, it establishes in legislation the priority to be accorded to Canadian signals."

The specific reference to giving priority to "the carriage of local Canadian stations" in subparagraph (i) did not appear in Bill C-136 but was added to Bill C-40 at the urging of the Canadian Association of Broadcasters.

In a written submission dated January 31, 1990, to the Standing Committee, at pp.32-33, the CRTC expressed concern that subparagraph (i) might be read so as to preclude the licensing of television retransmitters in remote or underserved areas which simply retransmit U.S. programming services received off a satellite via a scrambled signal.

The English version of subparagraph (ii) ["should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost"] is not fully reflected in the French text which does not include the concept "at reasonable cost."

The term "affordable" is not defined in the legislation. The older definitions for the word in the Oxford English Dictionary connote a rate that subscribers can spare or "have the means to pay" for. The OED also notes that the term "affordably [priced]" has a more recent U.S. usage of "cheaply, reasonably."

In the French text, the word "affordable" is translated as "abordable." In Harrap's Shorter Dictionary, the phrase "vos prix ne sont pas abordable" is translated as "your prices are not reasonable, are beyond my means."

The issue of the involvement of distribution undertakings in the origination of programming has been a controversial one. The Report of the Task Force on Broadcasting Policy (1986) argued at pp. 575-6 that the "activities of creation, assembly and marketing of programming, other than that which is simply retransmitted [by cable undertakings], should be entrusted to separate organizations." In particular, it recommended, "community programming and any other programming services in which the owners of a cable transmission undertaking may be involved should be the responsibility of separately licensed entities."

The Standing Committee on Communications and Culture took this approach still further in its *Sixth Report*, May 6, 1987, at p.86, when it recommended that while distribution undertakings should continue to be permitted to operate and take responsibility for local community access channels, "the Act should provide that no distribution undertaking may have an ownership interest in, or be in common ownership with, pay television, specialty or another other network programming service distributed on such undertaking on the basis of a contractual relationship...or where the consent of the network or the distribution undertaking is required for such carriage." This was reiterated in Recommendation 68 of the 15th Report of the Standing Committee, June 6, 1988, at p.184.

However, this approach was not adopted by the government. In Bill C-136, as tabled on June 23, 1988, subparagraph (iv) stipulated that distribution undertakings "should where appropriate originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection". In the Government Response, June 23, 1988, at p.278, it was stated that the government "believes that to restrict cable operators to being merely distributors would deny the broadcasting system an important source of funds for programming which should not be ignored."

In the final language of subparagraph (iv), as amended in Bill C-40, the expansive language in Bill C-136 has been limited in certain respects: the provision is expressed with the words "may" rather than "should"; the CRTC is required to make a finding that such origination is deemed appropriate; and the role for such programming is particularized to furnishing access to underserved linguistic and cultural minority communities.

CRTC Decisions: In Decision CRTC 2001-255, May 3, 2001, the Commission ruled that subparagraph 3(1)(t)(i) required that freed up analog capacity on a cable system ought to be used for a licensed Canadian programming service, rather than an exempt programming undertaking. In Decision CRTC 2005-195, May 12, 2005, the Commission determined that it is incorrect to interpret the definition of "programming service" to mean only a particular show broadcast at a given time. The Commission stated that section 3(1)(t)(i) (and section 3(1)(t)(iii)) of the *Broadcasting Act* equates "programming services" to Canadian stations, "that is, the entire broadcasting output of an undertaking".]

[§104-59]

(2) **Further declaration**. – It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

[*History:* This is based on paragraph 3(1)(k) of the *Broadcasting Act*, R.S.C.1985, c.B-9, together with an amended version of the "single system" phrase from paragraph 3(1)(a).

Commentary: In the previous Act, the equivalent statement in paragraph 3(1)(a) was that "broadcasting undertakings in Canada... constitute a single system". This was changed in 1991 to the statement that the "Canadian broadcasting system constitutes a single system".

This change was objected to by the CRTC, which stated in a written submission to the Standing Committee dated January 30, 1990, at p.33, that "[t]he point is not that the system is a system, but rather that all undertakings in sum constitute the entire system and there is no parallel system outside of those undertakings. It was this concept that was relied on by the Saskatchewan Court of Appeal in the case of *R. v. Nipawin and District Satellite T.V. Inc.* This concept is a fundamental one and ensures that all undertakings fall within the Commission's jurisdiction."

Notwithstanding the Commission's concerns, however, the concept that the Canadian broadcasting system is constituted by broadcasting undertakings would appear to be implicit from the general language of subsection 3(1), as well as by specific references such as paragraph 3(1)(n), above at §104-36. The inclusion of non-profit undertakings such as the operation referred to in the Nipawin case is specifically brought under the Act by virtue of subsection 4(3), below at §104-62.

In *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-368, Sharpe J. held that the Ontario Supreme

Court did not have jurisdiction to give declaratory and other relief in respect to cable rate matters, in view of the principle of exclusivity established in s.3(2) of the Act. If the court were to assume jurisdiction, it would violate the spirit, if not the letter, of s.3(2).]

Application

[§104-60]

4. (1) **Binding on Her Majesty**. – This Act is binding on Her Majesty in right of Canada or a province.

[*History:* There was no comparable provision in the former *Broadcasting Act*. However, subsection 3(1) of the *Radio Act*, R.S.C. 1985, c.R-2 [now subsection 3(1) of the *Radiocommunication Act*] made the same statement.

Commentary: This clause reflects Recommendation 19 of the *Sixth Report* of the Standing Committee on Communications and Culture, May 6, 1987, at pp.28-29, which pointed out the anomalous situation where provincial Crown broadcasters were subject to the *Radio Act* but not specifically made subject to the *Broadcasting Act*. Note, however, that provincial Crown broadcasters are exempted from CRTC licence fees by virtue of subsection 11(3) of the Act, below at §104-114.]

[§104-61]

(2) **Application generally**. – This Act applies in respect of broadcasting undertakings carried on in whole or in part within Canada or on board

(a) any ship, vessel or aircraft that is

(i) registered or licensed under an Act of Parliament, or

(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

(b) any spacecraft that is under the direction or control of

(i) Her Majesty in right of Canada or a province,

(ii) a citizen or resident of Canada, or

(iii) a corporation incorporated or resident in Canada; or

(c) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

[*History:* Unchanged from 1991 Act. The opening phrase of this subsection ("carried on in whole or in part within Canada...") is an amended version of language originally appearing in the definition of a "broadcasting undertaking" in the former *Broadcasting Act*, R.S.C. 1985, c.B-9 ("located in whole or in part within Canada..."). Subsection 4(2) of the *Radio Act*, R.S.C.1985, c.R-2, is similar to paragraphs (a) and (b); subsection 4(2) has since been replaced by subsection 3(3) of the *Radiocommunication Act*, which also contains the equivalent of paragraph (c).

Commentary: An undertaking may be prosecuted even if it is carried on in part within Canada and in part outside Canada. For successful prosecutions of cable television systems carried on in part within the United States with a head-end owned by one company and in part within Canada with a cable distribution system owned by another company, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-114 (Acadian), §55-135 (Acadian), §55-143 (Continental), and §55-149 (Maahs). The case law also indicates that U.S. broadcasting stations whose signals reach into Canada but have no physical assets in Canada can be held to be radiocommunicating "in Canada" within the meaning of the *Copyright Act*: see *C.A.P.A.C. v. International Good Music, Inc. et al.*, [1963] S.C.R. 136, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-93; or can be held to be publishing words and thereby committing the tort of defamation "within Canada": see *Jenner v. Sun Oil Co. et al.*, [1952] O.R. 240, [1952] 2 D.L.R. 526, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-79. The use of the word "carried on" instead of

"located" in the opening phrase of subsection 4(2) strengthens the argument that a broadcasting undertaking need not have physical assets in Canada to be carried on in part within Canada.

In *Structural Public Hearing*, Public Notice CRTC 1993-74, June 3, 1993, the Commission stated that it would in certain circumstances have jurisdiction over foreign DBS service providers under subsection 4(2) of the Act, where for example, such a DBS service provider acquired program rights for Canada, solicited subscribers in Canada, or activated and deactivated the decoders of Canadian subscribers.]

[§104-62]

(3) **For greater certainty**. – For greater certainty, this Act applies in respect of broadcasting undertakings whether or not they are carried on for profit or as part of, or in connection with, any other undertaking or activity.

[*History:* Added in 1991.

Commentary: The *Sixth Report* of the Standing Committee on Communications and Culture, May 6, 1987, strongly recommended that this provision be carried into the new Act: see Recommendation 12 at p.24. The amendment was intended to remove the defence accepted by the Federal Court of Appeal in *CRTC v. Lount Corporation*, [1985] 2 F.C. 185, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-305, which held that the term "undertaking" did not include a hotel SMATV system. The inclusion of non-profit operations was also intended to overcome the defence that succeeded at trial in *The Queen v. Nipawin and District Satellite T.V. Inc. et al.*, although this decision was subsequently overturned on appeal: see [1988] 4 W.W.R. 375, 42 C.C.C. (3d) 32; appeal dismissed, [1991] 1 S.C.R. 64; summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-346.]

[§104-63]

(4) **Idem**. – For greater certainty, this Act does not apply to any telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity.

[*History:* Added in 1991.

Commentary: The inclusion of the exemption in subsection 4(4) formed part of Recommendation 11 of the *Sixth Report* of the Standing Committee on Communications and Culture, May 6, 1987, at p.24. The exemption was also included in Clause 2 of Bill C-20, given first reading on December 20, 1984, although this Bill died on the order paper on August 28, 1986.

At the time of the enactment of the 1991 *Broadcasting Act*, there was no definition for the term "telecommunications common carrier" in federal legislation, although the phrase was used as a way to designate certain named carriers in the *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c.12, as amended, and in the former *Telesat Canada Act*. However, in 1993, the term "telecommunications common carrier" was given a new and wider definition in section 2 of the *Telecommunications Act*, S.C. 1993, c.38, as follows:

"telecommunications common carrier" means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation.

This is a very broad definition and because "broadcasting" is a subset of "telecommunications," most broadcasters and distribution undertakings would normally qualify as "telecommunications common carriers" under this wording. However, section 4 of the 1993 *Telecommunications Act* avoids this result by stating that "This Act does not apply in respect of broadcasting by a broadcasting undertaking." In 1996, the CRTC stated that when a broadcasting distribution undertaking provides non-programming services, it is not engaged in "broadcasting" and is not operating as a "broadcasting undertaking" and the exclusion in section 4 of the *Telecommunications Act* would not apply. See *Regulation of Broadcasting Distribution Undertakings that Provide Non-Programming Services*, Telecom Decision CRTC 96-1, January 30, 1996.

THE *BROADCASTING ACT*

In Reference re *Broadcasting Act*, 2012 SCC 4 (Supreme Court of Canada), affirming 2010 FCA 178 (Fed.C.A.), the court considered whether internet service providers (ISPs) were "broadcasting undertakings" and thus subject to the *Broadcasting Act*. The court held that the terms "broadcasting" and "broadcasting undertaking," interpreted in the context of the language and purposes of the *Broadcasting Act*, were not meant to capture entities which merely provide the mode of transmission. The *Broadcasting Act* makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. The policy objectives listed under s.3(1) of the Act focus on content. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. The term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the Act's policy objectives. Accordingly, ISPs do not carry on "broadcasting undertakings" under the *Broadcasting Act* when they provide access through the Internet to "broadcasting" requested by end-users. For a summary of this case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-545,

Reference should also be made to the commentary below at §104-96 for a discussion of the power of the Commission under paragraph 9.1(1)(f) of the Act to require CRTC approval for certain contracts between broadcasting undertakings and telecommunications common carriers.

The carrier exemption stipulated above can be compared with the carrier exemption in section 2.4(1)(b) of the *Copyright Act*, R.S.C. 1985, c.C-42, originally added in S.C. 1988, c.65, s.62(2), and amended by Bill C-32 in 1997:

> "For the purpose of communication to the public by telecommunication... (b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public."

In the United States, the counterpart to this provision is the so-called "passive carrier exemption" set out in section 111(a)(3) of the U.S. *Copyright Act* of 1976. See *Nimmer on Copyright* (1991), at §12.04[B].

In *Bell Mobility Inc. v. Klass*, [2017] 1 FCR 451, 2016 FCA 185 (CanLII), the court reviewed the relationship between subsection 4(4) of the *Broadcasting Act* and section 4 of the *Telecommunications Act*, which states that "This Act does not apply in respect of broadcasting by a broadcasting undertaking." In that case, the court reviewed Broadcasting and Telecom Decision CRTC 2015-26, which had determined that certain billing practices of Bell Mobility in relation to its mobile TV services (providing those services only to customers who also subscribed to a wireless voice plan) were an unjust preference under subsection 28(2) of the *Telecommunications Act*. The court held that deference should be given to the CRTC in regard to the interpretation of these statutes; the standard of review that is applicable is reasonableness, not correctness. Per Webb J.A,: "In my view, it was reasonable for the CRTC to determine that Bell Mobility, when it was transmitting programs as part of a network that simultaneously transmits voice and other data content, was merely providing the mode of transmission thereof – regardless of the type of content – and, in carrying on this function, was not engaging the policy objectives of the *Broadcasting Act*." For a summary of this case see *Communications Law and the Courts Canada* (Third Edition, 2020) at §55-590.]

[§104-64]

4.1 (1) **Non-application — programs on social media service**. – This Act does not apply in respect of a program that is uploaded to an online undertaking that provides a social media service by a user of the service for transmission over the Internet and reception by other users of the service.

[*History:* Added in 2023.

Commentary: In a summary of the *Online Streaming Act* published by Canadian Heritage on February 2, 2022, it was stated that "Regulation will not apply to individual creators, streamers or influencers or social media services themselves in respect of the amateur programs posted by their users." This section of the Act seeks to implement this objective by exempting amateur programs.].

[§104-65]

(2) **Application — certain programs**. – Despite subsection (1), this Act applies in respect of a program that is uploaded as described in that subsection if the program

(a) is uploaded to the social media service by the provider of the service or the provider's affiliate, or by the agent or mandatary of either of them; or

(b) is prescribed by regulations made under section 4.2.

[*History*: Added in 2023.

Commentary: For the Commission's power to make regulations hereunder, see section 4.2, below at §104-68.]

[§104-66]

(3) **Non-application — social media service**. – This Act does not apply in respect of online undertakings whose broadcasting consists only of programs in respect of which this Act does not apply under this section.

[*History*: Added in 2023.

Commentary: For the definition of "online undertaking", see section 2(1) above at §104-23.]

[§104-67]

(4) **For greater certainty**. – For greater certainty, this section does not exclude the application of this Act in respect of a program that, except for the fact that it is not uploaded as described in subsection (1), is the same as a program in respect of which this Act does not apply under this section.

[*History*: Added in 2023.

Commentary: This limits the effect of the exclusion in section 4.1(1), above at §104-64.]

[§104-68]

4.2 (1) **Regulations**. – **Programs to which this Act applies.** – For the purposes of paragraph 4.1(2)(b), the Commission may make regulations prescribing programs in respect of which this Act applies, in a manner that is consistent with freedom of expression.

[*History*: Added in 2023.

Commentary: For paragraph 4.1(2)(b), see above at §104-65.]

[§104-69]

(2) **Matters**. – In making regulations under subsection (1), the Commission shall consider the following matters:

(a) the extent to which a program, uploaded to an online undertaking that provides a social media service, directly or indirectly generates revenues;

(b) the fact that such a program has been broadcast, in whole or in part, by a broadcasting undertaking that

(i) is required to be carried on under a licence, or

(ii) is required to be registered with the Commission but does not provide a social media service; and

(c) the fact that such a program has been assigned a unique identifier under an international standards system.

[*History*: Added in 2023.

Commentary: In a summary of the *Online Streaming Act* published by Canadian Heritage on February 2, 2022, it was stated that the factors for the CRTC to consider included "degree it is monetized; whether it is carried (in whole or in part) by a broadcaster regulated by the CRTC; whether it has an assigned identifier (e.g. ISO number)".]

[§104-70]

(3) **Exclusion.** – The regulations shall not prescribe a program

(a) in respect of which neither the user of a social media service who uploads the program nor the owner or licensee of copyright in the program receives revenues; or

(b) that consists only of visual images.

[*History:* Added in 2023.

Commentary: In a summary of the *Online Streaming Act* published by Canadian Heritage on February 2, 2022, it was stated that "the *Online Streaming Act* will never apply to programs that do not generate revenue."]

[§104-71]

PART II

OBJECTS AND POWERS OF THE COMMISSION
IN RELATION TO BROADCASTING

Objects

[§104-72]

5. (1) **Objects**. – Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

[*History:* Substantially the same as section 5 of the *Broadcasting Act*, R.S.C.1985, c.B-9, except for the reference to the "regulatory policy" set out in subsection (2).

Commentary: In *TVA Group Inc. v. Bell Canada*, 2021 FCA 2153 (CanLII), the Federal Court of Appeal noted that sections 3 and 5 of the *Broadcasting Act* are not attributive of jurisdiction and are not sufficient in and of themselves to justify the validity of regulatory provisions.]

[§104-73]

(2) **Regulatory policy**. – The Canadian broadcasting system should be regulated and supervised in a flexible manner that is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

(a) takes into account the different characteristics of English, French and Indigenous language broadcasting and the different conditions under which broadcasting undertakings that provide English, French or Indigenous language programming operate — including the minority context of French in North America — and the specific needs and interests of official language minority communities in Canada and of Indigenous peoples;

(a.1) takes into account the nature and diversity of the services provided by broadcasting undertakings, as well as their size, their impact on the Canadian creation and production industry, particularly with respect to employment in Canada and Canadian programming, their

contribution to the implementation of the broadcasting policy set out in subsection 3(1) and any other characteristic that may be relevant in the circumstances;

(a.2) ensures that any broadcasting undertaking that cannot make maximum or predominant use of Canadian creative and other human resources in the creation, production and presentation of programming contributes to those Canadian resources in an equitable manner;

(b) takes into account regional needs and concerns;

(c) promotes innovation and is readily adaptable to scientific and technological change;

(d) facilitates the provision of broadcasting to Canadians;

(e) facilitates the provision to Canadians of Canadian programs created and produced in both official languages, including those created and produced by official language minority communities in Canada, as well as in Indigenous languages;

(e.1) facilitates the provision of programs that are accessible without barriers to persons with disabilities;

(e.2) facilitates the provision to Canadians of programs created and produced by members of Black or other racialized communities;

(f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians;

(g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings;

(g.1) protects the privacy of individuals who are members of the audience for programs broadcast by broadcasting undertakings; and

(h) takes into account the variety of broadcasting undertakings to which this Act applies and avoids imposing obligations on any class of broadcasting undertakings if that imposition will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

[*History*: Subparagraphs (a), (a.1), (a.2), (e), (e.1), (e.2), (g.1) and (h) were added or amended in 2023. The remaining subparagraphs were in the 1991 Act.

Commentary: This subsection sets forth so-called "regulatory policies" for the CRTC, which are intended to be supplemental to the broadcasting policy set out in subsection 3(1). A number of the regulatory policies relate to or are supportive of statements already found in section 3.

Taking the foregoing into account, the only paragraphs that appear to be unique in the regulatory policy are paragraphs 5(2)(f), 5(2)(g), 5(2)(g.1) and 5(2)(h).

Note that the French text of paragraph (f) reads "permettre", i.e. "permits the development of information technologies" rather than "does not inhibit".

In a clause-by-clause analysis of Bill C-136 prepared by the Department of Communications dated August 1988 it was stated that paragraph (f) was intended to indicate that "the development and delivery of non-programming services should not be restrained by the Commission." As for paragraph (g), "[t]his clause serves as a reminder to the CRTC that the administrative burden imposed by regulation should not be so intrusive as to seriously hamper the operation of broadcasting undertakings, or divert significant energies away from, the development of the Canadian broadcasting system."

In Public Notice CRTC 1999-27, February 12, 1999, the CRTC concluded that requiring broadcasting distribution undertakings across Canada to distribute the French-language television service TVA under section 9(1)(h) of the Act would be consistent with this subsection of the Act.

Paragraph 5(2)(h), which was added to the Act in 2023, provides guidance on the use of the exemption power of the Commission under subsection 9(4) of the Act, below at [§104-94]. At p.132 of the Report of the Broadcasting and Telecommunications Legislative Review Panel, it is stated that "Our

recommendations ensure that the CRTC would have the authority to exempt any undertakings that might otherwise be covered but would not affect the achievement of the objectives of the Act."]

[§104-74]

(3) **Conflict**. – The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

[*History:* Added in 1991.

Commentary: As noted in the commentary at §104-73, a number of the regulatory policy objectives set out in subsection 5(2) are simply reiterations of concepts already found in the broadcasting policy in subsection 3(1); thus, no conflict is likely to arise. However, paragraphs 5(2)(f) and (g) appear only in the statement of regulatory policy objectives, and will therefore have lesser significance if found to be in conflict with the broadcasting policy in subsection 3(1).]

[§104-75]

(4) **Employment equity**. – Where a broadcasting undertaking is subject to the *Employment Equity Act*, the powers granted to the Commission under this Act do not extend to the regulation or supervision of matters concerning employment equity in relation to that broadcasting undertaking.

[*History:* Added, effective October 24, 1996.

Commentary: Concerns respecting employment equity in the Canadian broadcasting system are raised in paragraph 3(1)(d)(iii) of the Act, above at [§104-40], a provision that was added to the Act in 1991. The stated intention of the government was for the Commission to enforce the spirit of the *Employment Equity Act*. Thus the Commission would be responsible for seeing that broadcasters "practice equity by employing a broad cross-section of society within the broadcasting industry, thereby ensuring a diversity of views and a healthy respect for differences." In a written submission to the Standing Committee dated January 31, 1990, at pp.17-18, however, the CRTC expressed concern about the overlap between the role of the CRTC and the role of the Canadian Human Rights Commission in administering the *Employment Equity Act* in respect to undertakings with over 100 employees. In particular, the CRTC noted the possibility of inconsistent rulings and additional administrative burdens and costs. It urged that employment equity matters "should be the responsibility of a single expert body -- namely, the Canadian Human Rights Commission." In response to this concern, the *Broadcasting Act* was amended in 1996 to add the above subsection, removing the CRTC's powers regarding employment equity in regard to broadcasting undertakings subject to the *Employment Equity Act*.

For the Commission's employment equity policy, which now applies to undertakings with 100 employees or less, see Implementation of an Employment Equity Policy, Public Notice CRTC 1992-59, September 1, 1992.]

[§104-76]

5.1 Official language minority communities. – In regulating and supervising the Canadian broadcasting system and exercising its powers under this Act, the Commission shall enhance the vitality of official language minority communities in Canada and support and assist their development.

[History: Added in 2023.

Commentary: This supports the policy set out in paragraph 3(1)(d)(iii.3) of the Act, above at §104-40.]

[§104-77]

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

[*History*: Added in 2023.

Commentary: This specific duty to consult is unique in the Act.].

[§104-78]

(2) **Objectives of consultations** – When engaging in consultations required by subsection (1), the Commission shall

(a) gather information to test its policies, decisions and initiatives;

(b) propose policies, decisions and initiatives that have not been finalized;

(c) seek the communities' opinions with regard to the policies, decisions or initiatives that are the subject of the consultations;

(d) provide them with all relevant information on which those policies, decisions or initiatives are based;

(e) openly and meaningfully consider those opinions;

(f) be prepared to alter those policies, decisions or initiatives; and

(g) provide the communities with feedback, both during the consultation process and after a decision has been made.

[History: Added in 2023.

Commentary: This subsection elaborates on the duty to consult set out in subsection 5.2(1), above at §104-77.]

[§104-79]

6. Policy guidelines and statements. – The Commission may from time to time issue guidelines and statements with respect to any matter within its jurisdiction under this Act, but no such guidelines or statements issued by the Commission are binding on the Commission.

[*History:* Added in 1991.

Commentary: The CRTC's practice of issuing policy statements has been upheld and applauded by the Supreme Court of Canada in *Capital Cities Communications. Inc. et al. v. CRTC et al.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, even though no statement equivalent to that above appeared in the former *Broadcasting Act*. In particular, Laskin C.J.C. stated, "[i]n my opinion, having regard to the embracive objects committed to the Commission under s.15 of the Act, objects which extend to the supervision of all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act, it was eminently proper that it lay down guidelines from time to time as it did in respect to cable television... An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance." Case law also indicates that such policy statements cannot be "binding" in the sense that the CRTC cannot fetter its right to change the policy or to grant exemptions, and cannot decline to hear applications arguing that the policy should not apply to the particular circumstances of the application. For a summary of the case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-176,

In the 1991 Act, the right of the CRTC to issue non-binding guidelines and statements is specifically set forth in section 6, although the CRTC stated in a written brief to the Standing Committee dated January 31, 1990, at p.34, that it did not believe that it needed any statutory mandate to issue guidelines. In view of the fact that the Governor in Council is now given the right to issue "directions of general application on broad policy matters" to the CRTC under section 7 of the Act, however, the addition of section 6 may be a useful reminder that the power of the CRTC to issue policy statements is unaffected thereby.

In *Canadian Institute of Public and Private Real Estate Co. v. Bell Canada*, 2004 FCA 243 (CanLII), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-437, the court held that policy guidelines are not the same as decisions and they cannot be appealed under

subsection 31(2) of the *Broadcasting Act*. See, to the same effect, *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217.]

[§104-80]

7. (1) **Policy directions**. – Subject to subsection (2) and section 8, the Governor in Council may, by order, issue to the Commission policy directions of general application on broad policy matters with respect to:

(a) any of the objectives of the broadcasting policy set out in subsection 3(1); or

(b) any of the objectives of the regulatory policy set out in subsection 5(2).

[*History:* Added in 1991.

Commentary: The Governor in Council is also permitted to issue directions to the CRTC on specific matters under sections 26 and 27. However, the concept of allowing the government to issue directions on general policy matters to the CRTC was added in 1991. The idea first originated in 1977, with the introduction of Bill C-43 by Minister of Communications Jeanne Sauvé. Section 9 of that Bill would have empowered the Governor in Council to issue broad policy directions to the CRTC with respect to the national telecommunications policy set out in the proposed Act. Although reintroduced by the Liberal government as Bill C-24 and Bill C-16 in 1978, the proposed legislation never proceeded beyond first reading.

On December 20, 1984, shortly after the Conservative government came into power, Minister of Communications Marcel Masse introduced Bill C-20 for first reading, which would have added a direction power to the *CRTC Act*. However, Bill C-20 died on the order paper when Parliament was prorogued on August 28, 1986.

The power of the government to issue policy directions to the CRTC was recommended at p.175 of the Report of the Task Force on Broadcasting Policy (1986). The Task Force recommendation also stipulated that if the government was to intervene it should either be able to set aside or refer back decisions, or issue policy directives, but it should not have both powers. The objection of the Task Force to tandem powers was picked up by the CRTC which stated the following in a written submission to the Standing Committee on Communications and Culture dated January 31, 1990:

> "We believe that the power of the Governor in Council to issue broad policy directions should be retained but that the power to review and to set aside Commission decisions should not be adopted or, at the very least, not used in any single case already resulting from a Cabinet direction."

In fact, as set out in section 28, the government has retained the power to set aside specific licensing decisions in addition to its power to issue directions, although on a more limited basis than applied under the previous Act. See below at §104-181.

The provisions on policy directions now contained in the *Broadcasting Act* are based on the earlier proposals, but contain a number of limitations and provisos that were not in the earlier versions. For a discussion of the limitations, see the commentary under §104-86 below. Also note that a direction cannot be issued until after a proposed direction has been tabled and considered under subsection 8(1) of the Act.

In Bill C-136, the provision would have simply given the Governor the Council the right to issue "policy directions" to the CRTC with respect to the named objectives. This was amended at the committee stage, however, to take the form now in the Act, viz. to give the Governor in Council the right to issue "directions of general application on broad policy matters." Thus, the intent is now clear that the directions in question should be general rather than specific and broad rather than narrow.

Since the enactment of this provision in 1991, the Governor in Council has issued two policy directions to the CRTC under section 7.]

[§104-81]

(2) **Exception**. – No order may be made under subsection (1) in respect of the issuance of a licence to a particular person or in respect of the amendment, renewal, suspension or revocation of a particular licence.

[*History*: Added in 1991.

Commentary: These limitations were contained in identical form in the direction power proposed in Bill C-20, given first reading on December 20, 1984. Bill C-20 died on the order paper when Parliament was prorogued on August 28, 1986.]

[§104-82]

(3) **Directions binding**. – An order made under subsection (1) is binding on the Commission beginning on the day on which the order comes into force and, subject to subsection (4), shall, if it so provides, apply with respect to any matter pending before the Commission on that day.

[§104-83]

(4) **Exception**. – No order made under subsection (1) may apply with respect to a licensing matter pending before the Commission where the period for the filing of interventions in the matter has expired unless that period expired more than one year prior to the coming into force of the order.

[§104-84]

(5) **Publication and tabling**. – A copy of each order made under subsection (1) shall be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the making of the order.

[§104-85]

(6) **Consultation**. – The Minister shall consult with the Commission before the Governor in Council makes an order under subsection (1).

[§104-86]

[*History*: Subsections 7(3), (4), (5) and (6) were in the 1991 Act.

Commentary: These provisions and the provisions in section 8 reflect in part the following recommendations in the Report of the Task Force on Broadcasting Policy (1986), at p.176:

> "Cabinet, prior to issuing a directive, should be required to consult public opinion in the way the CRTC does when it plans to make or amend regulations. The CRTC should be responsible for such public hearings.

Directives should be used in moderation so as to leave the regulatory authority free of intervention in exercising its day-to-day mandate, and the following rules should be observed:

- directives take the form of regulations and are subject to the provisions of the Statutory Instruments Act;
- directives cannot be retroactive;
- only the government, and not ministers, may issue a directive;
- directives shall be formulated in general terms, like regulations, and the regulatory authority shall be responsible for interpreting them, and monitoring their application."

In the *Fifth Report* of the Standing Committee on Communications and Culture, April 18, 1987, the following recommendations were made:

"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 of the Act which they seek to further.

Recommendation 11

The CRTC should be entitled to request that the Governor in Council issue a direction on a specific matter.

Recommendation 12

Before coming into effect, proposed directions should be tabled in the House of Commons and referred to an appropriate committee of the House for consideration. The committee should consult with interested parties, including the CRTC, and should be required to report on the proposed direction within forty sitting days from the date on which the reference to the Committee is made.

Recommendation 13

Directions should not have retroactive effect and should not be issued in respect of a particular licence."

As will be seen from the text of section 8 discussed further below, the government is required to table a direction in proposed form in Parliament and to allow 40 sitting days for its consideration before it can issue a direction in final form under section 7; however, the government is not obliged to wait for a report of the committee of the House before so proceeding.

The restriction imposed by subsection (4) with regard to pending licensing matters is rather limited. The following timetable may be useful in examining its effect:

Date	*Can Cabinet Issue a Policy Direction to Affect this Proceeding?*
CRTC calls for applications	Yes
CRTC receives and gazettes applications, calling for interventions	Yes
Deadline for interventions has not run out	Yes
Deadline for interventions (usually 30 days after gazette date) has expired	No
CRTC proceeds with public hearing	No
CRTC issues its decision	No (but cabinet can set it aside or refer it back under section 28)
One year has elapsed from deadline for interventions and CRTC has not yet issued its decision	Yes

In considering the time limits above, it must also be borne in mind that the Governor in Council cannot issue a final policy direction under section 7 without first having consulted the CRTC under subsection 8(4), having published the order in proposed form for comment under subsection 8(1) of the Act, having waited at least 40 sitting days of Parliament, and after having consulted again with the CRTC under subsection 7(6) if this step had not been done before.

Given the time needed for these preliminary steps, it would be entirely possible for the Commission to decide to proceed with a major licensing proceeding even where the government had indicated it wanted to issue a policy direction on the general subject-matter first, and for that proceeding to have reached the hearing stage before the government would have time to issue a final policy direction that

could affect the matter. However, in practice, it can be anticipated that where the government has issued a proposed policy direction relating to an upcoming proceeding, the CRTC would normally defer the hearing to give the government sufficient time to complete its consultative process and to issue the direction in final form. To proceed otherwise would risk having the ultimate licensing decisions set aside or referred back under section 28, if the decisions did not take the proposed policy into account.

In a clause-by-clause analysis of Bill C-136 dated August 1988 prepared by the Department of Communications, the following explanation was given for the one-year limit in subsection (4):

"The point of including the one-year limit is to ensure that the Governor in Council is not prevented from issuing a direction on a matter simply because the Commission, at one time in the past, may have instituted an inquiry into the matter. Obvious examples of this occurring are the inquiry into Canadian content begin in 1980-81 but never formally concluded, and the 1971 deferral of a decision for a Montreal transmitter for Global television."]

[§104-87]

8. (1) **Procedure for issuance of policy directions**. – Where the Governor in Council proposes to make an order under section 7, the Minister shall cause the proposed order to be

(a) published by notice in the *Canada Gazette*, which notice shall invite interested persons to make representations to the Minister with respect to the proposed order; and

(b) laid before each House of Parliament.

[§104-88]

(2) **Representations.** – The Minister shall

(a) specify in the notice the period — of at least 30 days from the day on which the notice was published under paragraph (1)(a) — during which interested persons may make representations; and

(b) publish the representations that are made during that period.

[§104-89]

(3) **Implementation of proposal**. – The Governor in Council may, after the period referred to in paragraph (2)(a) has ended and the proposed order has been laid before each House of Parliament, implement the proposal by making an order under section 7, either in the form proposed or revised in the manner that the Governor in Council considers appropriate.

[§104-90]

(4) **Consultation**. – The Minister shall consult with the Commission before a proposed order is published or is laid before a House of Parliament under subsection (1).

[*History*: Subsections 8(1) and 8(4) were in the 1991 Act. Subsections 8(2) and 8(3) were replaced by the text above in 2023.

Commentary: In the procedure for issuing policy directions in the 1991 Act, the proposed order was automatically referred to a House committee, and the order could not be issued until at least forty sitting days of Parliament had elapsed. The new procedure for issuing a policy direction sets up a process where interested persons can make representations to the government and the minimum time within which the direction can be issued is reduced to 30 days from the time the notice is given.

Subsection 8(4) requires the Minister to consult with the Commission before publishing a proposed policy direction. But once the order has been finalized, the Minister is required by subsection 7(6), above at [§104-85], to consult again with the Commission.

In a clause-by-clause analysis of Bill C-136, dated August 1988 prepared by the Department of Communications, it was stated that "[t]hese safeguards ensure that the Commission has the opportunity to bring to the attention of the Governor in Council any concerns it may have about the proposed

direction, whether in terms of the policy behind it, its practicality, the manner of its application, the timing, or any other matter."]

General Powers of Commission

[§104-91]

9. (1) **Licences, etc.** – Subject to this Part, the Commission may, in furtherance of its objects,

(a) establish classes of licences other than for online undertakings;

(b) issue a licence, the term of which may be indefinite or fixed by the Commission;

(c) amend a licence as to its term, on the application of the licensee;

(d) amend a licence other than as to its term, on the application of the licensee or on the Commission's own motion;

(e) renew a licence, the term of which may be indefinite or fixed by the Commission; and

(f) suspend or revoke a licence.

[*History*: Added in 2023.

Commentary: This subsection replaces subsection 9(1) of the 1991 Act which set forth the powers of the Commission over the issuance of licences. By virtue of the new wording of paragraph 9(1)(a), the Commission's licensing power will not apply to online undertakings. However, such undertakings will be subject to the imposition of conditions under subsection 9.1(1) of the Act, below at [§104-96]. They may also be required to be registered with the Commission, pursuant to regulations enacted under subsection 10(1)(i) of the Act, below at §104-106.

Under the 1991 wording, the term of broadcasting licences was limited to seven years. Under paragraph 9(1)(b), the term may be indefinite.]

[§104-92]

(2) [Revoked in 2023]

[§104-93]

(3) [Revoked in 2023]

[§104-94]

(4) **Exemptions**. – The Commission shall, by order, on the terms and conditions that it considers appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part, of an order made under section 9.1 or of a regulation made under this Part if the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

[§104-95]

(5) **Repeal or amendment**. – The Commission shall repeal or amend an exemption order made under subsection (4) if the Commission considers that doing so will contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

[*History*: Subsections 9(4) and 9(5) were added in 2023, to replace the Commission's exemption power in subsection 9(4) of the 1991 Act.

Commentary: The new wording specifically adds that the exemption can apply to an order made under section 9.1 of the Act. The CRTC power to exempt persons carrying on broadcasting undertakings was included in the 1991 Act. It responded to Recommendations 12 and 13 of the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987.]

9.1 (1) **Conditions**. – The Commission may, in furtherance of its objects, make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1), including conditions respecting

(a) the proportion of programs to be broadcast that shall be Canadian programs and the proportion of time that shall be devoted to the broadcasting of Canadian programs;

(b) the proportion of Canadian programs to be broadcast that shall be original French language programs, including first-run programs;

(c) the proportion of programs to be broadcast that shall be original French language programs;

(d) the proportion of programs to be broadcast that shall be devoted to specific genres, in order to ensure the diversity of programming;

(e) the presentation of programs and programming services for selection by the public, including the showcasing and the discoverability of Canadian programs and programming services, such as French language original programs;

(f) a requirement for a person carrying on a broadcasting undertaking, other than an online undertaking, to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier, as defined in the *Telecommunications Act*, for the distribution of programming directly to the public;

(g) a requirement for a person carrying on a distribution undertaking to give priority to the carriage of broadcasting;

(h) a requirement for a person carrying on a distribution undertaking to carry, on the terms and conditions that the Commission considers appropriate, programming services, specified by the Commission, that are provided by a broadcasting undertaking;

(i) a requirement, without terms or conditions, for a person carrying on an online undertaking that provides the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking, to carry programming services, specified by the Commission, that are provided by a broadcasting undertaking;

(j) terms and conditions of service in contracts between distribution undertakings and their subscribers;

(k) access by persons with disabilities to programming, including the identification, prevention and removal of barriers to such access;

(l) the carriage of emergency messages;

(m) any change in the ownership or control of a broadcasting undertaking that is required to be carried on under a licence;

(n) the provision to the Commission, by licensees or persons exempt from the requirement to hold a licence under an order made under subsection 9(4), of information related to

(i) the ownership, governance and control of those licensees or exempt persons, and

(ii) the affiliation of those licensees or exempt persons with any affiliates carrying on broadcasting undertakings;

(o) the provision to the Commission, by persons carrying on broadcasting undertakings, of any other information that the Commission considers necessary for the administration of this Act, including

(i) financial or commercial information,

(ii) information related to programming,

(iii) information related to expenditures made under section 11.1, and

(iv) information related to audience measurement, other than information that could identify any individual audience member; and

(p) continued ownership and control by Canadians of Canadian broadcasting undertakings.

[*History:* Added in 2023.

Commentary: This subsection includes a condition-making power that was formerly in paragraph 9(1)(c) of the Act but only applied to licensees. Subsection 9.1(1) applies to all broadcasting undertakings, including online undertakings which are excluded from the licensing requirement by virtue of paragraph 9(1)(a), above at §104-91.

Paragraphs 9.1(1)(a) to (e) are new, and provide specificity as to the nature of possible conditions to be imposed to implement the broadcasting policy in section 3. The power to impose conditions relating to French language programs in paragraph 9.1(1)(c) is subject to the provision of subsection 9.1(7), below at §104-102. The power to make orders on discoverability in paragraph 9.1(1)(e) is subject to a restriction on the use of a specific computer algorithm or source code: see subsection 9.1(8), below at §104-103.

Paragraphs 9.1(1)(f), (g) and (h) were formerly paragraphs 9(1)(f), (g) and (h) of the 1991 Act.

Paragraph 9.1(1)(h), formerly paragraph 9(1)(h), allows the Commission to make orders imposing conditions requiring persons carrying on distribution undertakings to carry specified programming services. Prior to the coming into force of this section, the Commission last dealt with applications for mandatory carriage in Broadcasting Regulatory Policy CRTC 2013-372, August 8, 2013.

Two court cases have limited the ambit of what was formerly paragraph 9(1)(h). In *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 (CanLII), the court held that paragraph 9(1)(h) cannot be reasonably interpreted as granting the CRTC a general power to regulate the terms and conditions of affiliation agreements. Accordingly, the Court of Appeal struck down the s. 9(1)(h) order that made the *Wholesale Code* (Broadcasting Regulatory Policy CRTC 2015-438, September 24, 2015) binding. However, the court left open whether the CRTC's objective in issuing the Order could have been achieved by some other means, such as through a licence condition imposed under s. 9(1)(b). For a summary of this case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-610. In fact, the Commission has made adherence to the Wholesale Code a condition of licence for discretionary programming services in Broadcasting Regulatory Policy CRTC 2016-436, Appendix 2, and for distribution undertakings in Broadcasting Regulatory Policy CRTC 2016-458, Appendix 2.

In *Bell Canada v. Canada (Attorney General),* 2019 SCC 66 (CanLII), the Supreme Court of Canada struck down a CRTC order prohibiting simultaneous substitution for the Super Bowl by broadcasting distribution undertakings. The court held (7-2) that paragraph 9(1)(h) only authorizes the issuance of mandatory carriage orders, and does not empower the CRTC to impose terms and conditions on the distribution of programming services generally. For a summary of this case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-625.

Paragraphs 9.1(1)(i) to (p) are entirely new in the 2023 Act. Carriage orders issued under paragraph 9.1(1)(i) are subject to a requirement of good faith negotiation under subsection 9.1(9), below at §104-104. Paragraphs 9.1(n) and (o) enhance the Commission's power to gain information from persons carrying on broadcasting undertakings, whether or not they have been otherwise exempted. Paragraphs 9.1(1)(m) and (p) allow the Commission to require online undertakings that are Canadian owned and controlled to maintain that ownership and control, even though such undertakings are not required to be licensed and would not be subject to a cabinet direction on Canadian ownership issued under section 26.]

[§104-97]

(2) **Application.** – An order made under this section may be made applicable to all persons carrying on broadcasting undertakings, to all persons carrying on broadcasting undertakings of any class established by the Commission in the order or to a particular person carrying on a broadcasting undertaking.

[§104-98]

(3) **Non-application**. – The *Statutory Instruments Act* does not apply to orders made under this section.

[§104-99]

(4) **Publication and representations**. – A copy of each order that the Commission proposes to make under this section shall be published on the Commission's website and a reasonable opportunity shall be given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission with respect to the proposed order.

[§104-100]

(5) **Publication**. – The Commission shall publish each order that is made under this section on its website.

[*History*: Subsections 9.1(2), (3), (4) and (5) were added in 2023.

Commentary: These subsections are new, and specify the possible ambit of orders made under subsection 9.1(1) and the process of consultation required.].

[§104-101]

(6) **Programming control**. – Orders made under any of paragraphs (1)(a) to (d) apply only in respect of programs over which a person who carries on a broadcasting undertaking has programming control.

[*History:* Subsection 9.1(6) was added in 2023.

Commentary: The term "programming control" is defined in subsection 2(1) of the Act, above at §104-25.]

[§104-102]

(7) **Canadian original French language programs**. – In making an order under paragraph (1)(c), the Commission shall ensure that Canadian original French language programs represent a significant proportion of the original French language programs to be broadcast.

[§104-103]

(8) **Restriction.- computer algorithm or source code**. – The Commission shall not make an order under paragraph (1)(e) that would require the use of a specific computer algorithm or source code.

[§104-104]

(9) **Good faith negotiation**. – The person carrying on an online undertaking to whom an order made under paragraph (1)(i) applies and the person carrying on the broadcasting undertaking whose programming services are specified in the order shall negotiate the terms for the carriage of the programming services in good faith.

[§104-105]

(10) **Facilitation**. – The Commission may facilitate those negotiations at the request of either party to the negotiations.

[*History*: Subsections 9.1(7) to (10) were added in 2023.

Commentary: These provisions provide clarification as to the application of orders made under paragraphs 9.1(1)(c), 9.1(1)(e) and 9.1(1)(i), above at §104-96.]

[§104-106]

10. (1) **Regulations generally**. – The Commission may, in furtherance of its objects, make regulations

(a) [Repealed];

(b) prescribing what constitutes a Canadian program for the purposes of this Act;

(c) respecting standards for programs over which a person carrying on a broadcasting undertaking has programming control and the allocation of broadcasting time, for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);

(d) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;

(e) respecting, in relation to a broadcasting undertaking other than an online undertaking, the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

(f) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;

(g) respecting the carriage of any foreign or other programming services by distribution undertakings;

(h) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;

(h.1) respecting unjust discrimination by a person carrying on a broadcasting undertaking and undue or unreasonable preference given, or undue or unreasonable disadvantage imposed, by such a person;

(i) respecting the registration of broadcasting undertakings with the Commission;

(j) respecting the audit or examination of records and books of account of persons carrying on broadcasting undertakings by the Commission or persons acting on behalf of the Commission; and

(k) respecting such other matters as it deems necessary for the furtherance of its objects.

[*History*: Based on subsection 6(1) of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Paragraphs (b), (g), (h) and (j) were added in 1991. In 2023, paragraph (a) was repealed, paragraphs (c), (e), (i) and (j) were replaced with new wording, and paragraph (h.1) was added.

Commentary: The CRTC's power to prescribe what constitutes a Canadian program in paragraph 10(1)(b) dates back to the 1991 Act. In the 15th Report of the Standing Committee on Communications and Culture, June 9, 1988, Recommendation 59 at p.173 stated that "[t]he CRTC must ensure that its definition of a Canadian program will result in Canadian performance programming that reflects the objectives of Canadian broadcasting policy as stated in the *Broadcasting Act*."

However, in 2023, the Act was amended to prescribe certain factors the Commission is required to take into account. See subsection 10(1.1), below at §104-107.

Paragraph 10(1)(c) relating to standards of programs was amended in 2023 to limit its ambit to programs "over which a person carrying on a broadcasting undertaking has programming control". For the definition of "programming control", see section 2(1), above at §104-25.

In *Bell Canada v. Canada (Attorney General),* 2016 FCA 217, the court upheld section 5 of the *Simultaneous Programming Service Deletion and Substitution Regulations*. *Per* De Montigny J.A.: "I agree with counsel for the Attorney General that paragraphs 10(1)(c) and 10(1)(g) of the *Broadcasting Act* provide a clear legal foundation for the remedial regime implementing consequences for disruptive simultaneous substitution errors."

Paragraph 10(1)(d) ("respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising") dates back to 1991 and uses the same language as in paragraph 6(1)(b)(ii) of the previous Act. There has always been a question as to whether this paragraph permits the Commission to enact regulations which prohibit the advertising of certain products or services. In a written submission to the Standing Committee dated January 31, 1990, at p.36, the CRTC noted that the wording might preclude it "from pre-clearing and rejecting alcoholic beverage, food and drug advertisements." Apart from the ambit of the wording of paragraph 10(1)(d), it should be noted that pre-clearance systems raise difficult administrative law problems when they substitute a case-by-case discretion for a regulatory regime. See *Verdun v. Sun Oil Limited,* [1952] 1 S.C.R. 222, [1952] 1 D.L.R. 529.

At the same time, under paragraph 10(1)(c) of the Act, the CRTC is authorized to make regulations respecting "standards of programs." The term "programs" has been defined in section 2 widely enough to include "advertising," so that the Commission might arguably prohibit advertising that in its view fell below acceptable standards. See the commentary at §104-24 above.

In that connection, reference should be made to the leading case on the power of the CRTC to enact regulations under the previous Act, namely, *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, 90 D.L.R. (3d) 1 (S.C.C.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-190. That case established that given the policy of the Act that programs should be of high standard, the CRTC could enact regulations to prohibit an undesirable broadcasting technique, i.e. airing a telephone interview without the consent of the interviewee.

Paragraph 10(1)(e) dates back to 1991, but was amended in 2023 to exclude online undertakings.

Paragraphs 10(1)(f) and (g) also date back to 1991.

The concept underlying paragraph 10(1)(h), which also dates back to 1991, was specifically addressed in the Sixth Report of the Standing Committee on Communications and Culture, May 6, 1987, in Recommendation 52, which stated that "[t]he CRTC should be given the power to arbitrate the terms and conditions contained in affiliation agreements between distribution undertakings and network operators." Paragraph 10(1)(h) is in fact a somewhat wider power. In a clause-by-clause analysis of Bill C-136 dated August 1988 prepared by the Department of Communications, the following statement was made on paragraph (h):

> "Gaining access to cable distribution on equitable terms can be a point of contention between the cable industry and some satellite programming services. These disputes become more common as some cable systems approach full utilization of their usable channels.
>
> "Providing the Commission with an explicit mediation power will give programmers a safety valve should negotiations with cable reach a stalemate. It will also enable the CRTC to ensure equitable treatment for all licensed services in those situations where a cable company is allowed to invest in certain programming services and allegations are made that the cable company is giving its services preferential treatment.
>
> "This is one of the responses to the 'cable as gatekeeper' problem, and while it may not be enthusiastically received by the cable industry, it should be seen as preferable to the solution of simply excluding cable from programming activities."

Pursuant to the power given to it in paragraph 10(1)(h), the Commission in 1994 added provisions to the *Cable Television Regulations, 1986*, to create a dispute resolution mechanism. These provisions are now found in ss.12-15 of the *Broadcasting Distribution Regulations.*

In *TVA Group Inc. v. Bell Canada,* 2021 FCA 2153 (CanLII), the Federal Court of Appeal ruled that paragraph 10(1)(h) of the *Broadcasting Act* empowered the CRTC to adopt the dispute resolution mechanism set out in subsection 15(1) of the *Discretionary Services Regulations*, which requires programming and distribution undertakings to continue to provide their respective services (the standstill rule), until an agreement settling their dispute is reached or, where applicable, the CRTC renders a decision.

Paragraph 10(1)(h.1), respecting unjust discrimination, was added in 2023.

Paragraph 10(1)(i), respecting the imposition of a registration requirement on broadcasting undertakings, was also added in 2023. This responds to Recommendation 56 of the Broadcasting and Telecommunications Legislative Review Panel, which stated:

> *Recommendation 56*. We recommend that the existing licensing regime in the *Broadcasting Act* be accompanied by a registration regime. This would require a person carrying on a media content undertaking by means of the Internet to register unless otherwise exempt. Those carrying on a media content undertaking by means other than the Internet would continue to require a licence unless otherwise exempt.

The audit clause in paragraph 10(1)(j) was added in 1991, and amended in 2023 to apply all broadcasting undertakings, including online undertakings, and not just licensees.]

[§104-107]

(1.1) **Regulations — Canadian programs**. – In making regulations under paragraph (1)(b), the Commission shall consider the following matters:

(a) whether Canadians, including independent producers, have a right or interest in relation to a program, including copyright, that allows them to control and benefit in a significant and equitable manner from the exploitation of the program;

(b) whether key creative positions in the production of a program are primarily held by Canadians;

(c) whether a program furthers Canadian artistic and cultural expression;

(d) the extent to which persons carrying on online undertakings or programming undertakings collaborate with independent Canadian producers, with persons carrying on Canadian broadcasting undertakings producing their own programs or with producers associated with Canadian broadcasting undertakings or with any other person involved in the Canadian program production industry, including Canadian owners of copyright in musical works or in sound recordings; and

(e) any other matter that may be prescribed by regulation.

[§104-108]

(1.2) **Regulations**. – The Governor in Council may make regulations prescribing matters that the Commission is required to consider under paragraph (1.1)(e).

[*History*: Subsections 10(1.1) and (1.2) were added in 2023.

Commentary: Canadian content is currently defined in the *Discretionary Services Regulations* and the *Television Broadcasting Regulations, 1987*. The Canadian content rules have been largely in their current form since the issuance of Public Notice CRTC 2000-42 on March 17, 2000. They require a minimum of six points out of 10 for the key creative functions, and at least 75% of the services costs must be paid to Canadians. In addition, at least one of the director or screenwriter positions and at least one of the two lead performers must be Canadian. The current rules also require that the producer "must control and be the central decision-maker of a production from beginning to end. The producer must be prepared to demonstrate full decision-making power by submitting, upon request, ownership documents, contracts or affidavits. The producer must also submit, upon request, an independent legal opinion confirming that financial and creative control of the production is Canadian. Any person fulfilling a producer-related function must be Canadian." To satisfy the requirement of control, Canadian producers ensure that their agreements with directors and writers assign all the rights necessary for the producer to be able to sell and exploit the production in all media and territories for the duration of the copyright.

The 2023 *Broadcasting Act* continues to leave the determination of what constitutes a Canadian program to the Commission. However, subsection 10(1.1) adds a requirement that in making that determination, the CRTC must consider the factors enumerated. In addition, the CRTC is subject to

policy direction from the government under subsection 7(1) of the Act, above at §104-80. A draft policy direction was circulated by the government on March 11, 2021. On the issue of Canadian content, the draft read as follows:

> The CRTC is directed to examine how it defines Canadian programs, in both the audio and audiovisual sectors, for the purposes of broadcasting undertakings' regulatory obligations. This definition is to be flexible, encourage the contribution of Canadians in a broad range of key creative positions, support Canadian ownership of intellectual property, and reflect the fact that global, not just Canadian, broadcasting undertakings are included in the regulatory system.
>
> The CRTC is directed to take into account the government of Canada's other Canadian content policies of relevance to the Canadian broadcasting system as they develop over time, including audiovisual tax credits.]

[§104-109]

(2) **Application**. – A regulation made under subsection (1) may be made applicable to all persons carrying on broadcasting undertakings or to all persons carrying on broadcasting undertakings of any class established by the Commission in the regulation.

[§104-110]

(3) **Publication and representations**. – A copy of each regulation that the Commission proposes to make under subsection (1) shall be published in the *Canada Gazette* and a reasonable opportunity shall be given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission with respect to the regulation.

[*History*: Subsections 10(2) and 10(3) were included in 1991 but amended in 2023.

Commentary: In the 1991 Act, the regulations made under these subsections only applied to persons holding licences. The amended wording now allows the regulations to apply to all persons carrying on broadcasting undertakings, which is defined to include online undertakings.].

[§104-111]

10.1 For greater certainty. – For greater certainty, the Commission shall make orders under subsection 9.1(1) and regulations under subsection 10(1) in a manner that is consistent with the freedom of expression enjoyed by users of social media services that are provided by online undertakings.

[*History*: Added in 2023.

Commentary: For the statement that the Act does not apply to programs uploaded to an online undertaking that provides a social media service by a user for reception by other users, see section 4.1, above at §104-64. See also paragraph 2(3)(a) of the Act, above at §104-33, which states that "This Act shall be construed and applied in a manner that is consistent with (a) the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings".]

[§104-112]

11. (1) **Regulations respecting licence fees**. – The Commission may make regulations.

(a) with the approval of the Treasury Board, establishing schedules of fees to be paid by persons carrying on broadcasting undertakings of any class;

(b) providing for the establishment of classes of broadcasting undertakings for the purposes of paragraph (a);

(c) providing for the payment of any fees payable by a person carrying on a broadcasting undertaking, including the time and manner of payment;

(d) respecting the interest payable by such a person in respect of any overdue fee; and

(e) respecting such other matters as it deems necessary for the purposes of this section.

[§104-113]

(2) **Criteria.** – Regulations made under paragraph (1)(a) may provide for fees to be calculated by reference to any criteria that the Commission considers appropriate, including by reference to

(a) the revenues of the persons carrying on broadcasting undertakings;

(b) the performance of the persons carrying on broadcasting undertakings in relation to objectives established by the Commission, including objectives for the broadcasting of Canadian programs; and

(c) the market served by the persons carrying on broadcasting undertakings.

[§104-114]

(3) **Exceptions.** – No regulations made under subsection (1) shall apply to the Corporation or to persons carrying on programming undertakings on behalf of Her Majesty in right of a province.

[§104-115]

(3.1) **Restriction — non-licensees**. – The only fees that may be established with respect to a broadcasting undertaking shall be fees that relate to the recovery of the costs of the Commission's activities under this Act.

[§104-116]

(4) **Debt due to Her Majesty.** – Fees payable under this section and any interest in respect of them constitute a debt due to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction.

[§104-117]

(5) **Publication and representations.** – A copy of each regulation that the Commission proposes to make under this section shall be published in the *Canada Gazette* and a reasonable opportunity shall be given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission with respect to the regulation.

[*History*: Similar provisions respecting licence fees were included in the 1991 Act. They were replaced with the current wording in 2023.

Commentary: These subsections now allow the Commission to establish fees to be paid by persons carrying on broadcasting undertakings, regardless of whether they are licensed under the Act.]

[§104-118]

11.1 (1) **Regulations — expenditures**. – The Commission may make regulations respecting expenditures to be made by persons carrying on broadcasting undertakings for the purposes of

(a) developing, financing, producing or promoting Canadian audio or audio-visual programs, including independent productions, for broadcasting by broadcasting undertakings;

(b) supporting, promoting or training Canadian creators of audio or audio-visual programs for broadcasting by broadcasting undertakings;

(b.1) supporting broadcasting undertakings offering programming services that, in the Commission's opinion, are of exceptional importance for the achievement of the objectives of the broadcasting policy set out in subsection 3(1);

(c) supporting participation by persons, groups of persons or organizations representing the public interest in proceedings before the Commission under this Act; or

(d) supporting the development of initiatives – including tools – that, in the Commission's opinion, are efficient and necessary for the achievement of the objectives of the broadcasting policy set out in subsection 3(1).

[§104-119]

(2) **Order — particular broadcasting undertaking**. – The Commission may make an order respecting expenditures to be made by a particular person carrying on a broadcasting undertaking for any of the purposes set out in paragraphs (1)(a) to (d).

[§104-120]

(3) **Minimum expenditures — original French language programs**. – Regulations and orders made under this section for the purposes set out in paragraph (1)(a) shall prescribe the minimum share of expenditures that are to be allocated to Canadian original French language programs in the case of broadcasting undertakings that offer programs in both official languages.

[§104-121]

(4) **Application of regulations**. – A regulation made under this section may be made applicable to all persons carrying on broadcasting undertakings or to all persons carrying on broadcasting undertakings of any class established by the Commission in the regulation.

[§104-122]

(5) **Recipients**. – Regulations and orders made under this section may provide that an expenditure is to be paid to any person or organization, other than the Commission, or into any fund, other than a fund administered by the Commission.

[§104-123]

(6) **Criteria**. – Regulations and orders made under this section may provide for expenditures to be calculated by reference to any criteria that the Commission considers appropriate, including by reference to

(a) the revenues of the persons carrying on broadcasting undertakings;

(b) the performance of the persons carrying on broadcasting undertakings in relation to objectives established by the Commission, including objectives for the broadcasting of Canadian programs; and

(c) the market served by the persons carrying on broadcasting undertakings.

[§104-124]

(7) **Publication and representations**. – A copy of each regulation that the Commission proposes to make under this section shall be published in the *Canada Gazette* and a copy of each proposed order shall be published on the Commission's website. A reasonable opportunity shall be given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission with respect to the regulation or order.

[§104-125]

(8) **Non-application**. – The *Statutory Instruments Act* does not apply to orders made under subsection (2).

[*History*: Section 11.1 was added in 2023.

Commentary: This section gives the CRTC specific jurisdiction to require broadcasting undertakings, including online undertakings, to make expenditures on Canadian programs, to support Canadian creators, or to support public interest participation in CRTC proceedings. It responds to Recommendation 61 of the Broadcasting and Telecommunications Legislative Review Panel, which reads in part as follows:

> Recommendation 61. We recommend that the *Broadcasting Act* be amended to ensure that the CRTC may by regulation, condition of licence, or condition of registration:

- impose spending requirements or levies on all media content undertakings, except those whose primary purpose is to provide a service for the dissemination of alphanumeric news content over which it exercises editorial control;

Paragraph 11.1(1)(c), relating to public interest participation, responds to Recommendation 13 of the Broadcasting and Telecommunications Legislative Review Panel, which reads as follows:

Recommendation 13. We recommend that the *Broadcasting Act* and the *Telecommunications Act* be amended to include public interest participation funding in the operational funding requirements of the CRTC, and that this be included in the expenditure plans for Broadcasting Activity and Telecommunications Activity costs recovered under the *Broadcasting Licence Fee Regulations* and *Telecommunications Fee Regulations*, respectively. We further recommend that ISED's operational funding include amounts to be directed to public interest participation.]

[§104-126]

12. (1) **Inquiries**. – The Commission may inquire into, hear and determine a matter if it appears to the Commission that

(a) any person is contravening or has contravened this Part or any regulation, licence, decision or order made or issued by the Commission under this Part;

(b) any person is contravening or has contravened section 34.1;

(c) any person is contravening or has contravened sections 42 to 44 of the *Accessible Canada Act*; or

(d) the circumstances may require the Commission to make any decision or order or to give any approval that it is authorized to make or give under this Part or under any regulation or order made under this Part.

[*History*: Based on subsection 12(1) which was added in 1991, but with a rewording of paragraph (a).

Commentary: See below at §104-128.]

[§104-127]

(2) **Mandatory orders.** – The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part or any regulation, licence, decision or order made or issued by the Commission under this Part or under any of sections 42 to 44 of the *Accessible Canada Act* and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part, to any such regulation, licence, decision or order or to section 34.1.

[History: Added in 1991. Amended in 2019 to add references to the *Accessible Canada Act*.

Commentary: See also below at §104-128. Sections 42 to 44 of the *Accessible Canada Act* require regulated broadcasting undertakings, subject to regulations, to prepare and publish an initial accessibility plan, to be updated three years later. They must also set up a process for feedback and publish a progress report.

In *Bazos v. Bell Media Inc*, 2018 ONSC 6146 (Ontario Superior Court of Justice), Cavanagh J. held that subsection 12(2) gave specific jurisdiction to the CRTC to issue mandatory orders and that the Commission had exclusive jurisdiction in the interpretation and enforcement of the regulations. For a summary of this case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-611.]

[§104-128]

(3) **Referral to Commission**. – Where an inquiry under subsection (1) is heard by a panel established under subsection 20(1) and the panel issues an order pursuant to subsection (2) of this section, any person who is affected by the order may, within thirty days after the making thereof, apply to the Commission to reconsider any decision or finding made by the panel, and the Commission may rescind or

vary any order or decision made by the panel or may rehear any matter before deciding it. [S.C. 1991, c.11, s.12]

[*History:* Added in 1991.

Commentary: This section together with section 13 gives the CRTC a significant new power over licensees and other affected persons, namely, to issue mandatory orders and to enlist the courts in order to enforce such orders.

The model for this approach was sections 49 and 64 of the *National Telecommunications Powers and Procedures Act*, R.S.C. 1985, c.N-20, (later repealed and now reflected in sections 51 and 63 of the *Telecommunications Act*, S.C. 1993, c.38) which gave a similar authority to the CRTC in regard to orders respecting telecommunications carriers made under the *Railway Act*. Sections 49 and 64 have been in the predecessor railway statutes since 1919.

There is a significant difference in the two regimes. Under the Railway Act, any application that was brought to the CRTC could have been said to be brought by virtue of section 49 of the *National Telecommunications Powers and Procedures Act*, and any order or decision of the Commission, whether or not it was made under section 49, could be filed with the court under section 64. All such orders or decisions were subject to Commission review and variance by virtue of section 66; moreover, by virtue of section 52, the Commission could act on its own motion as if an application had been made to it.

The *Broadcasting Act* regime is quite different. Only mandatory orders made under subsection 12(2) can be filed with and enforced by the courts, not any decision or order made by the Commission. Moreover, unlike decisions or orders made by a panel relating to the issuance, amendment, renewal or suspension of licences made under section 9 which are final and conclusive by virtue of subsection 31(1), the Commission can rehear and vary any mandatory orders made by a panel under subsection 12(2).

Despite the broad language of subsections 12(1) and (2), it would not appear that the Commission could issue a mandatory order under subsection 12(2) unless there was a clear requirement or prohibition expressed elsewhere in the Act, e.g. the prohibition of carrying on a broadcasting undertaking without a licence in subsection 32(1), in one of its already issued regulations enacted under sections 10 or 11, or in a licence decision, condition or order already issued or within its capacity to issue under section 9. Recalling that under section 9, the Commission cannot amend a condition of licence or add new conditions of licence during the first 5 years of a licence term except upon application of the licensee, it would not appear that it could issue a mandatory order having the same effect under subsection 12(2) within that 5 year period, unless it could find authority to do so of its own motion elsewhere in the Act.

The phrase “any person” in subsection 12(2) clearly extends to persons other than licensees. For example, the Commission could issue a mandatory order directed towards a person carrying on a broadcasting undertaking without a licence contrary to subsection 32(1) of the Act, or to a person aiding or abetting such a person, since such a person is made an equal party to an offence under section 32(1) by virtue of section 21 of the *Criminal Code*.

CRTC Decisions: In Broadcasting Decision CRTC 2003-176, June 6, 2003, the Commission stated that it had not developed any criteria for dealing with reconsideration and variance applications filed under this subsection. It further concluded that in that particular case, it was not called upon to do so. In Broadcasting Decision CRTC 2005-188, May 5, 2005, the Commission denied the request by MTS Allstream Inc. for the issuance of a mandatory order pursuant to Section 12(2) of the Act that would require Shaw and Videon Câblesystems BDUs to cease and desist the distribution of certain discretionary services as part of a “digital basic” package. The Commission did not find that the distribution of these services contravened the Commission’s distribution and linkage rules.]

[§104-129]

13. (1) **Enforcement of mandatory orders**. – Any order made under subsection 12(2) may be made an order of the Federal Court or of any superior court of a province and is enforceable in the same manner as an order of the court.

[§104-130]

(2) **Procedure**. – To make an order under subsection 12(2) an order of a court, the usual practice and procedure of the court in such matters may be followed or, in lieu thereof, the Commission may file with the registrar of the court a certified copy of the order, and thereupon the order becomes an order of the court.

[§104-131]

(3) **Effect of variation or rescission**. – Where an order that has been made an order of court is rescinded or varied by a subsequent order of the Commission, the order of the court shall be deemed to have been cancelled and the subsequent order may, in the same manner, be made an order of the court.

[*History:* Added in 1991.

Commentary: This section was modelled after section 64 of the *National Telecommunications Powers and Procedures Act*, R.S.C. 1985, c.N-20 (later repealed and now reflected in section 63 of the *Telecommunications Act*, S.C. 1993, c.38). See the commentary under §104-128 above.

Once the CRTC order is filed with the court, persons disobeying the order would be guilty of contempt of court. If the order is filed with the Federal Court, the following provisions of the Federal Court Rules, 1998, SOR/98-106 (in force April 25, 1998) apply:

Rule 429. (1) Where a person who is required by an order to perform an act within a specified time refuses or neglects to do so within that time, or where a person disobeys an order to abstain from doing an act, the order may, with the leave of the Court, be enforced by

(a) a writ of sequestration against the property of the person;

(b) where the person is a corporation, a writ of sequestration against the property of any director or officer of the corporation; and

(c) subject to subsection (2), in respect of an order other than for payment of money, an order of committal against the person or, where the person is a body corporate, against any director or officer of the corporation.

(2) Where under an order requiring the delivery of personal property or movables a person who is liable to execution has the alternative of paying an amount equal to the value of the personal property or movables, the order shall not be enforced by an order of committal.

Rule 466. Subject to rule 467, a person is guilty of contempt of Court who…(b) disobeys a process or order of the Court…

Rule 467. (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

(2) A motion for an order under subsection (1) may be made ex parte.

(3) An order may be made under subsection (1) if the Court is satisfied that there is a prima facie case that contempt has been committed.

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

Rule 469. A finding of contempt shall be based on proof beyond a reasonable doubt.

Rule 470. (1) Unless the Court directs otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.

(2) A person alleged to be in contempt may not be compelled to testify.

Rule 472. Where a person is found to be in contempt, a judge may order that

(a) the person be imprisoned for a period of less than five years or until the person complies with the order;

(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;

(c) the person pay a fine;

(d) the person do or refrain from doing any act;

(e) in respect of a person referred to in rule 429, the person's property be sequestered; and

(f) the person pay costs.

In cases where the CRTC order is filed with a superior court of a province, contempt proceedings to enforce such orders are governed by the Rules of Procedure of the particular court, or by the inherent jurisdiction of the superior courts to punish for contempt.

It is also important to note that section 127(1) of the *Criminal Code* provides as follows:

"Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

It has been held that the inherent power of the court to punish for contempt is not a mode of proceeding expressly provided by law within the meaning of the exception so as to bar a conviction under subsection 127(1) of the *Criminal Code*: *R. v. Clement* (1981), 61 C.C.C. (2d) 449, 23 C.R. (3d) 193, [1981] 2 S.C.R. 468.]

[§104-132]

14. (1) **Research**. – The Commission may undertake, sponsor, promote or assist in research relating to any matter within its jurisdiction under this Act and in so doing it shall, wherever appropriate, utilize technical, economic and statistical information and advice from the Corporation or departments or agencies of the Government of Canada.

[§104-133]

(2) **Review of technical matters**. – The Commission shall review and consider any technical matter relating to broadcasting referred to the Commission by the Minister and shall make recommendations to the Minister with respect thereto.

[*History:* Subsection 14(1) is comparable to section 9(1) of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Subsection 14(2) is based on paragraph 7(1)(f) of the previous Act.]

[§104-134]

15. (1) **Hearings and reports**. – The Commission shall, on request of the Governor in Council, hold hearings or make reports on any matter within the jurisdiction of the Commission under this Act.

(2) **Consultation**. – The Minister shall consult the Commission with regard to any request proposed to be made by the Governor in Council under subsection (1).

[*History:* Added in 1991.

Commentary: There was no comparable provision to this in the *Broadcasting Act*, R.S.C. 1985, c.B-9. The section is based on language first proposed in Bill C-20, introduced on December 20, 1984. Among other matters, Bill C-20 would have added section 14.6 to the *Canadian Radio-television and Telecommunications Commission Act*, as follows:

> "The Governor in Council may require the Commission to hold hearings or to make reports on any matter that comes within the jurisdiction of the Commissions."

Bill C-20 died on the order paper on August 29, 1986.

Since the coming into force of the Act, the Governor in Council has made a number of requests under section 15 to the Commission. They are listed below.

- In Order-in-Council P.C. 1994-1689, October 11, 1994, the CRTC was requested to report to the government on certain information highway issues. This led to the CRTC's report entitled *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition*, May 19, 1995.
- In Order-in-Council P.C. 1995-398, March 14, 1995, the CRTC was requested to report to the government respecting the rules for access by television programming service providers to broadcasting distribution undertakings. This resulted in Public Notice 1996-60, April 26, 1996, and access requirements that were incorporated into the Broadcasting Distribution Regulations.
- In Order-in-Council P.C. 1997-592, April 15, 1997, the CRTC was requested to report on the establishment of additional networks. It reported in Public Notice CRTC 1998-8, February 6, 1998.
- In Order-in-Council P.C. 1999-1454, August 6, 1999, the CRTC was requested to report on the establishment of a national French-language arts television service. The Commission issued its report in Public Notice CRTC 1999-187, November 19, 1999 and subsequently conducted a competitive licensing process that led to the licensing of La Télé des Arts (now known as ARTV) in Decision CRTC 2000-386, September 14, 2000.
- In Order-in-Council PC 2000-511, April 5, 2000, the Commission was asked to report on matters relating to the provision of French-language broadcasting services in French linguistic minority communities. The CRTC reported in Public Notices CRTC 2001-25 and 2001-26, February 12, 2001.
- In Order-in-Council P.C. 2000-1464, September 13, 2000, the Commission was asked to seek comments on matters relating to the provision of radio services to the Greater Toronto Area. The CRTC reported in Public Notice CRTC 2001-10, January 31, 2001 and subsequently issued a call for licence applications in Public Notice CRTC 2001-39, March 22, 2001. That process culminated in several licensing decisions (see Broadcasting Public Notice CRTC 2003-20 and Broadcasting Decisions CRTC 2003-115 to -120, all April 17, 2003).
- In Order-in-Council P.C. 2000-1551, October 4, 2000, the CRTC was asked to report on the earliest possible establishment of over-the-air television services that reflect the multicultural, multilingual and multiracial population of the Greater Vancouver Area. The Commission's report and follow up call for applications are set out in Public Notices CRTC 2001-31 and -32, February 28, 2001 and its licensing decision is set out in Broadcasting Decision CRTC 2002-39, February 14, 2002.
- In Order-in-Council P.C. 2002-1043, June 12, 2002, the CRTC was asked to report on the application of the new media exemption order to persons who retransmit by the Internet the

signals of over-the-air television or radio programming undertakings. The Commission's report is set out in Broadcasting Public Notice CRTC 2003-2, January 17, 2003.

- In Order-in-Council P.C. 2006-519, June 8, 2006, the CRTC was requested to provide a factual report on the future environment facing the broadcasting system. The Commission sought comments from the public in Broadcasting Public Notice CRTC 2006-72, and issued a lengthy report entitled *The Future Environment Facing the Canadian Broadcasting System* on December 14, 2006.
- In Order-in-Council P.C. 2008-289, February 14, 2008, the Commission was requested to report to the government with recommendations on the Canadian Television Fund (CTF). The CRTC report was issued on June 5, 2008. Subsequently, on March 9, 2009, the Minister of Canadian Heritage and Official Languages announced the creation of the Canadian Media Fund (CMF), combining the CTF with the Canada New Media Fund. The CMF commenced operations on April 1, 2010.
- In Order-in-Council P.C. 2008-1293, June 19, 2008, the CRTC was requested to report on the availability of English- and French-language broadcasting services in English and French linguistic minority communities in Canada. The Commission provided its report to the government on March 30, 2009.
- In Order-in-Council P.C. 2009-1569, September 16, 2009, the Commission was requested to hold hearings in the implications and the advisability of implementing a compensation regime for the value of local television signals. Following hearings in December 2009, the Commission released its report to the government on March 23, 2010.
- In Order-in-Council P.C. 2013-1167, November 7, 2013, the Commission was requested to report "how the ability of Canadian consumers to subscribe to pay and specialty television services on a service-by-service basis can be maximized in a manner that most appropriately furthers the implementation of the broadcasting policy for Canada set out in subsection 3(1) of the Act..." The report was to set out "the steps that the Commission intends to take in that respect," having particular regard to a number of considerations specified in the order-in-council. The Commission provided its report to the government on April 24, 2014.
- In Order-in-Council P.C. 2017-1195, September 22, 2017, the Commission was requested to make a report on future distribution and programming models and how they will ensure a vibrant domestic market capable of supporting Canadian production. The Commission provided its report entitled *Harnessing Change: The Future of Programming Distribution in Canada,* on May 31, 2018.
- In Order-in-Council 2022-0183, March 2, 2022, the Commission was requested to hold a hearing to determine whether RT and RT-France should be removed from the *List of Non-Canadian Programming Services and Stations Authorized for Distribution* in order to ensure that television content available to Canadians abides by regulations made by the CRTC under the *Broadcasting Act*. In Broadcasting Decision CRTC 2022-68, March 16, 2022, the Commission removed Russia Today and RT France from the List.]

[§104-136]

16. Powers respecting hearings. – The Commission has, in respect of any hearing under this Part, with regard to the attendance, swearing and examination of witnesses at the hearing, the production and inspection of documents, the enforcement of its orders, the entry and inspection of property and other matters necessary or proper in relation to the hearing, all such powers, rights and privileges as are vested in a superior court of record.

[*History:* Same as subsection 10(7) of the *Broadcasting Act*,. R.S.C. 1985, c.B-9.

Commentary: For the application of this section in the context of a decision by the CRTC to deny intervener status, see *City of Edmonton v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 358 (F.C.T.D.), summarized in *Communications Law and the Courts in*

Canada (Third Edition, 2020), at §55-265. Cf. *Saskatchewan Telecommunications v. Canadian Radio-television and Telecommunications Commission et al.*, [1980] 1 F.C. 505 (F.C.T.D.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-204.]

[§104-137]

17. Authority re questions of fact or law. – The Commission has authority to determine questions of fact or law in relation to any matter within its jurisdiction under this Act.

[*History:* Added in 1991.

Commentary: This section is based on the model found in subsection 49(3) of the *National Telecommunications Powers and Procedures Act*, R.S.C. 1985, c.N-20, (since repealed) which reads as follows:

> "For the purposes of this Part and the Railway Act, the Commission has full jurisdiction to hear and determine all matters whether of law or of fact."

A similar but not identical provision is now found in section 52 of the *Telecommunications Act*, S.C. 1993, c.38.

In Bill C-40, this section was originally proposed as part of what is now section 12 of the Act, and limited to the inquiries and orders arising out of that section. At the suggestion of the CRTC, however, Bill C-40 was amended at the committee stage to move this into a separate section of the Act, and made applicable to all matters within the Commission's jurisdiction under the *Broadcasting Act*.

By virtue of this section, it is clear that the CRTC has the authority to rule on the constitutionality of the *Broadcasting Act* and whether that Act or conditions, orders or regulations issued under it violate the Canadian Charter of Rights and Freedoms, although it can expect no curial deference with respect to constitutional decisions: *Cuddy Chicks Ltd. v. Ontario Labour Relations Board et al.*, [1991] 2 S.C.R. 5 (Supreme Court of Canada).]

Hearings and Procedure

[§104-138]

18. (1) **Where public hearing required**. – Except where otherwise provided, the Commission shall hold a public hearing in connection with

(a) the issuance of a licence, other than a licence to carry on a temporary network operation;

(b) the suspension or revocation of a licence;

(c) the establishing of any performance objectives for the purposes of paragraphs 11(2)(b) and 11.1(6)(b); and

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

[§104-139]

(2) **Public hearings – specific matters**. – The Commission shall also hold a public hearing in connection with the following matters unless it is satisfied that such a hearing is not required in the public interest:

(a) the amendment or renewal of a licence;

(b) the making of an order under subsection 9.1(1) or 11.1(2); and

(c) the making of any regulation under this Act.

[§104-140]

(3) **Where public hearing in Commission's discretion**. – The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or

representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.

[§104-141]

(4) **Place of hearing**. – A public hearing under this section may be held at such place in Canada as the Chairperson of the Commission may designate.

[*History:* This section re-enacts, with only minor changes, provisions found in subsections 10(1), (2), (3) and (6) of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Paragraph 18(1)(c) and 18(2) were amended in 2023.

Commentary: The Act maintains the somewhat confusing dichotomy in the previous Act between "hearing" and "public hearing." The latter term, which is used throughout section 18, appears to mean an oral hearing, particularly in view of the language of subsection 18(4), where a location is specified.

On the other hand, the term "hearing" alone is used in sections 15, 16 and 28 of the Act, suggesting that a hearing might in some cases be in writing, with no witnesses appearing before the Commission and all evidence being received in document form.

In a written submission to the Standing Committee dated January 31, 1990, at pp.36-38, the CRTC suggested that the Act be modified to make it clear that a public hearing may be an oral hearing or a written hearing. However, this change was not made.

The leading case on the meaning of the term "public hearing" in the context of access by the public to information respecting the application is the judgment of Jackett C.J. in *Re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621, 67 D.L.R. (3d) 267 (Fed.C.A.), summarized in *Communications Law and the Courts in Canada* (Second Edition, 2014), at §55-163. That judgment established the right of interveners to financial statements and projections filed by a cable system seeking a rate increase. However, the court declined to order access to certain staff documents, or to require the CRTC to permit cross-examination.

The denial by the Commission of the right to cross-examine in a hearing involving an application to acquire control of a cable television system was later upheld in *Lipkovits, Joy and Association of Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission et al.*, [1983] 2 F.C. 321 (Fed. C.A.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-267. In *Country Music Television Inc. v. Canadian Radio-television and Telecommunications Commission et al.* (1994), 178 N.R. 386 (Fed.C.A.), leave to appeal refused (1995), 185 N.R. 400 (S.C.C.), the court declined to quash a decision terminating CMT's authority to be carried by cable systems, holding that CMT had a reasonable opportunity to be heard before the CRTC made its decision, despite being denied the ability to participate in the oral hearing. For a summary, see *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-267n. And in *Canadian Motion Picture Distributors Association et al. v. Partners of Viewer's Choice Canada et al.* (1996), 199 N.R. 168 (Fed.C.A.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-372, the court held that the "audi alteram partem" rule did not require that notice be provided to parties only indirectly affected by regulatory proceedings.

For a decision in which the CRTC conducted a licence renewal without an oral public hearing, on the basis that it was satisfied that such a hearing was not required in the public interest, see Decision CRTC 98-234, July 29, 1998 (Canal D).]

[§104-142]

19. Notice of hearing. – The Commission shall cause notice of

(a) any application received by it for the issue, amendment or renewal of a licence, other than a licence to carry on a temporary network operation,

(b) any decision made by it to issue, amend or renew a licence, and

(c) any public hearing to be held by it under section 18

to be published in the *Canada Gazette* and in one or more newspapers of general circulation within any area affected or likely to be affected by the application, decision or matter to which the public hearing relates.

[*History:* This section is essentially the same as subsections 11(1) and (2) of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

[§104-143]

20. (1) **Panels of Commission**. – The Chairperson of the Commission may establish panels, each consisting of not fewer than three members of the Commission, to deal with, hear and determine any matter on behalf of the Commission.

[§104-144]

(1.1) **Appointments by Chairperson.** – The Chairperson of the Commission may appoint members of the Commission to a panel if it is determined that the panel would otherwise have fewer than three members.

[*History:* Added in 2023.]

[§104-145]

(1.2) **Exception-conflict of interest.** – Members of the Commission may participate in any panel, unless this participation would place them in a conflict of interest.

[*History:* Added in 2023.]

[§104-146]

(2) **Powers**. – A panel that is established under subsection (1) has and may exercise and perform all the duties and functions of the Commission in relation to any matter before the panel.

[§104-147]

(3) **Decision**. – A decision of a majority of the members of a panel established under subsection (1) is a decision of the panel.

[§104-148]

(4) **Consultation**. – The members of a panel established under subsection (1) shall consult with the Commission, and may consult with any officer of the Commission, for the purpose of ensuring a consistency of interpretation of the broadcasting policy set out in subsection 3(1), the regulatory policy set out in subsection 5(2), the orders made under section 9.1, the regulations made by the Commission under sections 10 and 11 and the regulations and orders made under section 11.1.

[*History:* Based on subsections 10(4) and (5) of the *Broadcasting Act*, R.S.C. 1985, c.B-9, but with significant revisions made in 1991 and 2023.

Commentary: This section introduces the concept that the Commission should decide matters through hearing panels. Under the previous Act, the Commission had the right to have panels of Commissioners hear applications; however, the actual decisions were required to be taken by a majority of the full-time members after consultation with a majority of the part-time members. As held in the leading case of *Canadian Radio-television and Telecommunications Commission v. CTV Television Network Limited et al.*, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193 (S.C.C.), summarized in *Communications Law and the Courts in Canada* (Second Edition, 2014), at §55-257, the rule that “those who hear, decide” did not apply to the Commission because of the specific statutory language stipulating that the quorum for decisions exceeded the quorum for hearings.

This was changed in the 1991 Act. The hearing panel established by the Chairperson to hear a particular matter, now makes the decision on that matter, although before doing so, the panel is required to consult with the full Commission “for the purpose of ensuring a consistency of interpretation” of the policies and regulations.

In its submissions to the Standing Committee, the CRTC opposed the application of the "those who hear, decide" rule to its broadcasting proceedings. In particular, it made the following comments in a written submission dated January 30, 1990, at pp.13-14:

> "The Commission has had experience with the "they who hear, decide" approach and with the collegial approach. Both have advantages and drawbacks. In order to decide which best suits a situation, one has to look at the function being performed. In broadcasting regulation, which is basically cultural regulation, one has to recognize that the broadcasting industry is an evolving one, highly sensitive and complex, and thus each decision must be made in full awareness of its impact on the entire system. Decisions involving individual licensees should find their anchor in, and be consistent with, a national overview.
>
> "The current Act has guaranteed that each applicant will receive the considered judgement of the whole Commission. In arriving at its decisions, the Commission has benefited greatly from the discussion that takes place between all members and this has led to a consistency and quality of decision-making which would otherwise probably not be possible. It has also meant that all Commissioners are responsible for all decisions issued and all feel bound by them. We do not believe that the section of the proposed Act which requires panel members to consult with the Commission and which allows them to consult with officers of the Commission will ensure the consistency and quality of decisions. We believe that a "they who hear, decide" approach makes more sense for a fact finding body where the credibility of the witnesses is the central issue. The approach is more appropriate where there are detailed procedures and explicit rules which limit the scope of the decisions to be made. It makes little sense when applied to a body whose function it is to apply a parliamentary policy in order to ensure that the cultural identity of a nation is preserved and strengthened. In broadcasting matters generally, facts are seldom in issue -- it is the consequences which flow from those facts which must be determined."

Although the "those who hear, decide" rule would apply to public hearings held in regard to adjudicative matters, the CRTC is still free to deal with such matters on a collegial basis where it determines that a public hearing is not required and that it will simply proceed by way of a so-called "paper proceeding". In that event, no panel would have been appointed to deal with the matter under subsection 20(1). In addition, the CRTC can presumably deal with the issuance of policy guidelines and statements on a collegial basis even if a public hearing is called, since such statements are not binding under section 6 of the Act, and do not give rise to adjudicative rights. In the case of regulations or orders of a rule-making character, the CRTC can avoid the application of the "those who hear, decide" rule by conducting a paper proceeding. Alternatively, it may be that the chairman could appoint a panel for the limited purpose of investigating the matter through a public hearing held to hear representations, leaving the ultimate decision on the regulation or rule to the full Commission. However, this is not entirely clear from the wording of the Act.]

[§104-149]

21. Rules. – The Commission may make rules

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

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

[*History:* Unchanged from section 12 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

Licences

[§104-150]

22. (1) **Conditions governing issue, amendment and renewal**. – No licence shall be issued, amended or renewed under this Part

(a) if the issue, amendment or renewal of the licence is in contravention of a direction to the Commission issued by the Governor in Council under subsection 26(1); and

(b) subject to subsection (2), unless the Minister of Industry certifies to the Commission that the applicant for the issue, amendment or renewal of the licence

(i) has satisfied the requirements of the *Radiocommunication Act* and the regulations made under that Act, and

(ii) has been or will be issued a broadcasting certificate with respect to the radio apparatus that the applicant would be entitled to operate under the licence.

[§104-151]

(2) **Exception**. – The requirement set out in paragraph (1)(b) does not apply in respect of radio apparatus, or any class thereof, prescribed under paragraph 6(1)(m) of the *Radiocommunication Act*.

[§104-152]

(3) **Suspension or revocation of broadcasting certificate**. – No licence is of any force or effect during any period when the broadcasting certificate issued under the *Radiocommunication Act* with respect to the radio apparatus that the holder of the licence is entitled to operate under that Act is suspended or revoked.

[§104-153]

(4) **Issue, etc., contravening this section**. – Any licence issued, amended or renewed in contravention of this section is of no force or effect.

[*History:* Section 22 is based on section 13 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, except that the specific list of matters upon which a direction can be issued by the Governor in Council has been moved to section 26, below at §104-173.]

[§104-154]

23. (1) **Consultation between Commission and Corporation**. – The Commission shall, at the request of the Corporation, consult with the Corporation with regard to any conditions that the Commission proposes to impose under subsection 9.1(1) — or with regard to any regulation or order that the Commission proposes to make under section 11.1 — that would apply with respect to the Corporation.

[§104-155]

(2) **Reference to Minister**. – If, despite the consultation provided for in subsection (1), the Commission imposes any condition, or makes any regulation or order, referred to in subsection (1) that the Corporation is satisfied would unreasonably impede the Corporation in providing the programming contemplated by paragraphs 3(1)(l) and (m), the Corporation may, within 30 days after the condition is imposed or the regulation or order is made, refer the condition, regulation or order to the Minister for consideration.

[§104-156]

(3) **Ministerial directive**. – Subject to subsection (4), the Minister may, within 90 days after a condition is referred to the Minister under subsection (2), issue to the Commission a written directive with respect to the condition and the Commission shall comply with any such directive issued by the Minister.

[§104-157]

(4) **Consultation**. – The Minister shall consult with the Commission and with the Corporation before issuing a directive under subsection (3).

[§104-158]

(5) **Publication and tabling of directive**. – A directive issued by the Minister under subsection (3) shall be published forthwith in the *Canada Gazette* and shall be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the directive is issued.

[*History:* Section 23 is based on section 8 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Subsections 23(1), (2) and (3) were amended in 2023.

Commentary: The only material change from the previous Act is that there is now a 30 day time limit for the exercise of a reference to the Minister by the CBC of conditions of licence set by the CRTC.]

[§104-159]

24. (1) **Conditions governing suspension and revocation**. – No licence shall be suspended or revoked under this Part unless the licensee applies for or consents to the suspension or revocation or, in any other case, unless, after a public hearing in accordance with section 18, the Commission is satisfied that

(a) the licensee has contravened or failed to comply with any condition of the licence or with any order made under subsection 9.1(1), 11.1(2) or 12(2) or any regulation made under this Part; or

(b) the licence was, at any time within the two years immediately preceding the date of publication in the *Canada Gazette* of the notice of the public hearing, held by a person to whom the licence could not have been issued at that time by virtue of a direction to the Commission issued by the Governor in Council under this Act.

[§104-160]

(2) **Licences of Corporation**. – No licence issued to the Corporation that is referred to in the schedule may be suspended or revoked under this Part except on application of or with the consent of the Corporation.

[§104-161]

(3) **Publication of decision**. – A copy of a decision of the Commission relating to the suspension or revocation of a licence, together with written reasons for the decision, shall, forthwith after the making of the decision, be forwarded by prepaid registered mail to all persons who were heard at or made any oral representations in connection with the hearing held under subsection (1), and a summary of the decision and of the reasons for the decision shall, at the same time, be published in the *Canada Gazette* and in one or more newspapers of general circulation within any area affected or likely to be affected by the decision.

[*History:* Based on subsections 15(1) and (2) of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Paragraph 24(1)(a) was amended in 2023.

Commentary: There are two material changes in these provisions made in 1991 compared with the 1985 Act. First, in the previous Act suspension or revocation of a licence could only be ordered for a breach of a condition of licence. In the new Act, a licence may also be suspended or revoked for a failure to comply with a mandatory order made under section 12(2) or for a breach of a regulation.

Second, the 1991 Act added subsection 24(2), which sets forth a schedule of licences issued to the CBC which cannot be suspended or revoked. (For the text of the Schedule, see below at §104-350).

Under the 1985 Act, no licence issued to the Corporation could be suspended or revoked. Under the new Act, only the so-called “core services” of the Corporation are so protected. In a clause-by-clause analysis of Bill C-136 dated August 1988 prepared by the Department of Communications, the following statement was made about this provision:

“The schedule of CBC “core service” licences protects these from this clause, but leaves open any non-core services in which the CBC may have chosen to operate. The “core” services listed in the schedule -- and therefore not subject to licence revocation -- are the radio and television main network licences and the radio and television stations owned and operated by the Corporation.

Specialty service licences held by the CBC alone or in concert with others (e.g. TV 5, All-News) would be subject to the same revocation procedures as other private or public (i.e. provincial, educational) licences."

Subsection (3) is the same as subsection 15(2) of the 1985 Act, except that the word "oral" is added before the word "representation." In a written submission dated January 31, 1990, filed with the Standing Committee, the CRTC urged that its obligation to serve a copy of the decision in this subsection be limited to those making oral representations at the hearing. In particular, the Commission expressed concern that the subsection might be read so as to require a copy of the decision to be served on each signatory to any petition filed with the Commission. However, the subsection was not amended as requested.]

[§104-162]

25. (1) **Report of contravention by Corporation**. – If the Commission is satisfied, after a public hearing on the matter, that the Corporation has contravened section 31.1, any order made under subsection 9.1(1), 11.1(2) or 12(2) or any regulation made under this Part, the Commission shall forward to the Minister a report setting out the circumstances of the contravention, the findings of the Commission and any observations or recommendations of the Commission in connection with the contravention.

[§104-163]

(2) **Report to be tabled**. – The Minister shall cause a copy of the report referred to in subsection (1) to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is received by the Minister.

[*History:* Based on subsections 15(3) and (4) of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Amended in 2023.]

[*Commentary*: In the 1991 Act, only contraventions of subsection 12(2) were referred to. In the 2023 Act, references are also made section 31.1 and subsections 9.1(1) and 11.1(2).]

[§104-164]

Provision of Information by Commission

25.1 Minister or Chief Statistician. – The Commission shall, on request, provide the Minister or the Chief Statistician of Canada with any information submitted to the Commission in respect of a broadcasting undertaking.

[§104-165]

25.2 Access to information. – Subject to section 25.3, the Commission shall proactively make available for public inspection any information submitted to the Commission in the course of proceedings before it.

[§104-166]

25.3 (1) Confidential information. – A person who submits any of the following information to the Commission may designate it as confidential:

(a) information that is a trade secret;

(b) financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or

(c) information the disclosure of which could reasonably be expected

(i) to result in material financial loss or gain to any person,

(ii) to prejudice the competitive position of any person, or

(iii) to affect contractual or other negotiations of any person.

[§104-167]

(2) **Information not to be disclosed**. – Subject to subsections (4), (5) and (7), if a person designates information as confidential and the designation is not withdrawn by that person, no person described in subsection (3) shall knowingly disclose the information, or knowingly allow it to be disclosed, to any other person in any manner that is intended or likely to make it available for the use of any person who may benefit from the information or use it to the detriment of any person to whose business or affairs the information relates.

[§104-168]

(3) **Persons who shall not disclose information**. – Subsection (2) applies to any person referred to in any of the following paragraphs who comes into possession of designated information while holding the office or employment described in that paragraph, whether or not the person has ceased to hold that office or be so employed:

(a) a member of, or a person employed by, the Commission;

(b) in respect of information disclosed under paragraph (4)(b) or (5)(b), the Commissioner of Competition appointed under the Competition Act or a person whose duties involve the carrying out of that Act and who is referred to in section 25 of that Act;

(c) in respect of information provided under section 25.1, the Minister, the Chief Statistician of Canada or an agent of or a person employed in the federal public administration.

[§104-169]

(4) **Disclosure of information submitted in proceedings**. – If designated information is submitted in the course of proceedings before the Commission, the Commission may, while protecting the privacy of Canadians,

(a) disclose the information or require its disclosure if the Commission determines, after considering any representations from interested persons, that the disclosure is in the public interest; and

(b) disclose the information or require its disclosure to the Commissioner of Competition on the Commissioner's request if the Commission determines that the information is relevant to competition issues being considered in the proceedings.

[§104-170]

(5) **Disclosure of other information**. – If designated information is submitted to the Commission otherwise than in the course of proceedings before it, the Commission may, while protecting the privacy of Canadians,

(a) disclose the information or require its disclosure if, after considering any representations from interested persons, the Commission considers that the information is relevant to a matter arising in the exercise of its powers or the performance of its duties and functions and determines that the disclosure is in the public interest; and

(b) disclose the information or require its disclosure to the Commissioner of Competition, on the Commissioner's request, if the Commission considers that the information is relevant to competition issues that are related to such a matter.

[§104-171]

(6) **Information disclosed to Commissioner of Competition**. – Neither the Commissioner of Competition nor any person whose duties involve the administration and enforcement of the Competition Act and who is referred to in section 25 of that Act shall use information that is disclosed

(a) under paragraph (4)(b) other than to facilitate the Commissioner's participation in proceedings referred to in subsection (4); or

(b) under paragraph (5)(b) other than to facilitate the Commissioner's participation in a matter referred to in subsection (5).

[§104-172]

(7) **Information inadmissible**. – Designated information that is not disclosed or required to be disclosed under this section is not admissible in evidence in any judicial proceedings except proceedings for failure to submit information required to be submitted under this Act or for forgery, perjury or false declaration in relation to the submission of the information.

[*History*: Added in 2023.

Commentary: Sections 25.1, 25.2 and 25.3, dealing with the disclosure of information and the protection of confidential information, were added in 2023.]

General Powers of the Governor in Council

[§104-173]

26. (1) **Directions**. – The Governor in Council may, by order, issue directions to the Commission

(a) respecting the maximum number of channels or frequencies for the use of which licences may be issued within a geographical area designated in the order;

(b) respecting the reservation of channels or frequencies for the use of the Corporation or for any special purpose designated in the order;

(c) respecting the classes of applicants to whom licences may not be issued or to whom amendments or renewals thereof may not be granted; and

(d) prescribing the circumstances in which the Commission may issue licences to applicants that are agents of a province and are otherwise ineligible to hold a licence, and the conditions on which those licences may be issued.

[Note: In Order-in-Council P.C. 1998-800, May 7, 1998, 1998 *Canada Gazette Part II*, p. 1700, the Commission was directed to reserve frequency 93.5 MHz or any other appropriate FM band frequency and 740 kHz on the AM band "for the use of radio services in Toronto which will contribute to the achievement of the objectives of the Canadian broadcasting policy set out in subparagraph 3(1)(d)(iii) of the *Broadcasting Act*." In response, the CRTC issued a call for applications for a licence to carry on a radio programming undertaking to serve Toronto in Public Notice CRTC 1999-119, July 20, 1999. In Decision CRTC 2000-206, June 16, 2000, the CRTC issued three licences to: a company to be incorporated (Milestone) operating at 93.5 MHz; a company to be incorporated (Aboriginal Voices Radio) operating at 106.5 MHz; and a limited partnership (PrimeTime Radio) operating at 740 kHz. See also Public Notice CRTC 2000-84, June 16, 2000, which introduced these licences.]

[§104-174]

(2) **Idem**. – Where the Governor in Council deems the broadcast of any program to be of urgent importance to Canadians generally or to persons resident in any area of Canada, the Governor in Council may, by order, direct the Commission to issue a notice to licensees throughout Canada or throughout any area of Canada, of any class specified in the order, requiring the licensees to broadcast the program in accordance with the order, and licensees to whom any such notice is addressed shall comply with the notice.

[§104-175]

(3) **Publication and tabling**. – An order made under subsection (1) or (2) shall be published forthwith in the Canada Gazette and a copy thereof shall be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the making of the order.

[§104-176]

(4) **Consultation**. – The Minister shall consult with the Commission with regard to any order proposed to be made by the Governor in Council under subsection (1).

[*History:* Apart from paragraph 26(1)(d) and subsection (4), this section is substantially the same as subsections 18(1), 9(2) and 9(3) of the *Broadcasting Act*, R.S.C. 1985, c.B-9.

Commentary: Section 26 of the 1991 Act sets out specific matters upon which the Governor in Council is authorized to issue directions to the Commission. These are based on the direction powers contained in paragraph 13(1)(a) of the former *Broadcasting Act*, incorporated by reference in section 18 of that Act.

Paragraph 26(1)(d) was added in 1991, permitting the Governor in Council to prescribe circumstances and conditions under which agents of a province who would otherwise be ineligible to hold a licence may do so.

Subsection 26(2) is a carry-over from subsection 9(2) of the former Act. This authority had never been exercised since the provision was added to the *Broadcasting Act* in 1968. However, the provision was utilized in 1995 to require the national television networks to carry an address by the Prime Minister of Canada on the eve of the Quebec referendum. See Order-in-Council P.C. 1995-1761, SOR/95-503, October 24, 1995, *Canada Gazette Part II*, at p.2986.

Subsection 26(4) was added in 1991. It was added to Bill C-136 at the request of the Commission, to ensure that the Commission would have input into the wording of any directions on eligibility issued to it.]

[§104-177]

27. (1) **Directions – Free Trade Agreement**. – The Governor in Council may, on the recommendation of the Minister, issue directions

(a) requiring the Commission to implement paragraphs 1 and 4 of Annex 15-D of the Agreement and specifying the manner in which, and the date on or before which, those paragraphs are to be implemented;

(b) respecting the manner in which the Commission shall apply or interpret paragraph 3 of that Annex; and

(c) requiring the Commission to cancel any measure taken by the Commission in the implementation of paragraph 4 of that Annex on the date the Agreement ceases to have effect, or such later date as the Governor in Council may specify.

[§104-178]

(2) **Consultation**. – The Minister shall consult with the Commission with regard to any direction proposed to be issued by the Governor in Council under subsection (1).

[§104-179]

(3) **Directions binding**. – A direction issued under subsection (1) is binding on the Commission from the time it comes into force.

[§104-180]

(4) **Definition of Agreement**. – In this section, Agreement has the same meaning as in section 2 of the *Canada–United States–Mexico Agreement Implementation Act*.

[*History*: This section was updated in 2020 to reflect the provisions of the Canada–United States–Mexico Agreement.

Commentary: In general, the CRTC is not bound by the provisions of international treaties entered into by the Canadian government save to the extent indicated in its governing legislation, although resort to such treaties may be had in order to interpret ambiguity in such legislation: see *Capital Cities Communications Inc. et al. v. CRTC et al.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-176. This section permits the Government to issue binding directions to the CRTC respecting the manner in which it is to apply certain paragraphs of the Canada-United States-Mexico Agreement. On April 29, 2020, a Direction was

issued to the Commission under this section to implement undertakings made by Canada to fulfill Annex 15-D of CUSMA. See SOR/2020-0077. In particular, Canada agreed to (a) rescind the CRTC order prohibiting simultaneous substitution during the broadcast of the Super Bowl and to not accord that program treatment less favourable than the treatment accorded to other programs that originate in the United States and are retransmitted in Canada; and (b) provide U.S. programming services specializing in home shopping, including modified versions for the Canadian market, access to the Canadian market, and to allow these home shopping services to negotiate affiliation agreements with Canadian cable, satellite, and Internet Protocol television (IPTV) distributors.]

[§104-181]

28. (1) **Setting aside or referring decisions back to Commission**. – Where the Commission makes a decision under section 9 to issue, amend or renew a licence, the Governor in Council may, within 180 days after the date of the decision, on petition in writing of any person received within 45 days after that date or on the Governor in Council's own motion, by order, set aside the decision or refer the decision back to the Commission for reconsideration and hearing of the matter by the Commission, if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1).

[§104-182]

(2) **Order on reference back**. – An order made under subsection (1) that refers a decision back to the Commission for reconsideration and hearing shall set out the details of any matter that, in the opinion of the Governor in Council, may be material to the reconsideration and hearing.

[§104-183]

(3) **Powers on reference back**. – Where a decision is referred back to the Commission under this section, the Commission shall reconsider the matter and, after a hearing as provided for by subsection (1), may

(a) rescind the decision or the issue, amendment or renewal of the licence;

(b) rescind the issue of the licence and issue a licence to another person; or

(c) confirm, either with or without change, variation or alteration, the decision or the issue, amendment or renewal of the licence.

[§104-184]

(4) [Repealed.]

[§104-185]

(5) [Repealed.]

[*History:* Based on section 14 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, with some significant changes. Subsections 28(4) and (5) were repealed in 2023.

Commentary: Section 28 of the new Act constitutes a significant rewrite of the power of the Governor in Council in the previous Act to set aside or refer back CRTC decisions to issue, amend or renew broadcasting licences. In the Report of the Task Force on Broadcasting Policy (1986), at p.175, it was recommended that the power to set aside CRTC decisions should not be included in the new Act if the government also had a general policy direction power.

In the *Fifth Report* of the Standing Committee on Communications and Culture, April 18, 1987, by contrast, the Committee suggested that the power of review should not be eliminated but simply limited to cases of overriding importance or where the CRTC had misinterpreted or ignored a direction. In addition, the *Fifth Report* recommended that notice of any review be given to interested persons, that an opportunity be given for persons to comment, and that reasons should be given by the government where a determination was made to set aside a decision or to refer it back to the CRTC. See *Fifth Report*, Recommendations 14 to 17, at pp.47-49. These recommendations were largely adopted by the government in section 28, along with an extension of the appeal time from 60 days to 90 days. See

Canadian Voices: Canadian Choices, June 23, 1988, at p.57. In Bill C-136 as tabled, the appeal time had been extended from 60 to 120 days. However, this was amended to 90 days when Bill C-40 reached the committee stage. In 2023, this was further amended to 180 days.]

Since 1991, no decisions of the CRTC have been set aside; however, two decisions have been referred back to the Commission under subsection 28(1) of the *Broadcasting Act*.

On August 14, 2017, in Order-in-Council P.C. 2017-1060, the Governor in Council referred back to the CRTC Broadcasting Decision 2017-148 and the accompanying renewal decisions. Those decisions had reduced the Programs of National Interest (PNI) expenditure requirements of the English-language TV broadcast groups to 5% of revenue. In its subsequent decision, Broadcasting Decision CRTC 2018-335, August 30, 2018, the Commission increased the PNI requirements to 7.5% for Bell Media and 8.5% for Corus Group, leaving the PNI level for Rogers Media at 5%.

On September 16, 2022, in Order in Council P.C. 2022-0995, the Governor in Council referred back to the CRTC the decision contained in Broadcasting Decision CRTC 2022-165 of June 22, 2022, to renew the broadcasting licences for the English- and French-language audiovisual and audio services of CBC/Radio-Canada. The Order in Council stated that the Governor in Council "is of the opinion that it is material to the reconsideration and hearing that the Commission consider how to ensure that, as the national public broadcaster, the Canadian Broadcasting Corporation continue to make a significant contribution to the creation, presentation, and dissemination of local news, children's programming, original French-language programming, and programming produced by independent producers."]

[§104-186]

29. (1) **Filing of petitions**. – Every person who petitions the Governor in Council under subsection 28(1) shall at the same time send a copy of the petition to the Commission.

[§104-187]

(2) **Notice**. – On receipt of a petition under subsection (1), the Commission shall forward a copy of the petition by prepaid registered mail to all persons who were heard at or made any oral representation in connection with the hearing held in the matter to which the petition relates.

[§104-188]

(3) **Register**. – The Commission shall establish and maintain a public register in which shall be kept a copy of each petition received by the Commission.

[*History:* Added in 1991; amended in 2023.

Commentary: This section sets up a public register for petitions made to the Governor in Council under section 28. See the commentary at §104-185 above.

In permitting public access to petitions made to the Governor in Council, the Act addresses the problem noted in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-231, which held in the context of petitions to the Governor in Council under section 67 of the *National Telecommunications Powers and Procedures Act* (since repealed) that the Governor in Council did not need to give reasons for its decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition. (Section 67 of the NTPPA has since been replaced by section 12 of the *Telecommunications Act*, S.C. 1993, c.38, which now includes procedures respecting petitions similar to those set out above.)

In a written submission dated January 31, 1990, filed with the Standing Committee, the CRTC urged that its obligation to serve a copy of the petition in subsection (2) be limited to those making oral representations at the hearing. In particular, the Commission expressed concern that the subsection might be read so as to require a copy of the petition to be served on each signatory to any petition filed with the Commission at the hearing. However, the subsection was not amended as requested.]

[§104-189]

30. Amendment of schedule. – The Governor in Council may, on the recommendation of the Minister made on the request of the Commission and with the consent of the Corporation, amend the schedule.

[*History:* Added in 1991.

Commentary: The schedule referred to, set out at §104-363 below, is mentioned in subsection 24(2), above at §104-160.]

Decisions and Orders

[§104-190]

31. (1) **Decisions and orders final**. – Except as provided in this Part, every decision or order of the Commission is final and conclusive.

[§104-191]

(2) **Appeal to Federal Court of Appeal**. – An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

[*Commentary:* In *Centre for Research – Action on Race Relations v. CRTC and Vidéotron Ltée*., 2000 F.C.J. No. 2019, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-397, the Federal Court of Appeal held that a decision by staff officers of the CRTC is not a "decision or order of the Commission" for the purpose of this section of the Act.

In *Canadian Institute of Public and Private Real Estate Co. v. Bell Canada*, 2004 FCA 243 (CanLII), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-437, the court held that policy guidelines are not the same as decisions and they cannot be appealed under subsection 31(2) of the *Broadcasting Act*. See, to the same effect, *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217.

In *Bell Canada v. Canada (Attorney General),* 2016 FCA 217 (CanLII), the Federal Court of Appeal held that a statutory appeal only lies under subsection 31(2) for a final and conclusive decision or order of the Commission. An announced policy cannot be appealed until a binding decision affecting the legal rights of the parties is actually made. In addition, the Commission should be given deference in interpreting its home and closely related statutes and in defining the limits of its own jurisdiction. For a summary of this case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-593.

In *2251723 Ontario Inc. (c.o.b. as VMedia) and Rogers Media Inc.,* 2017 FCA 186, the Federal Court of Appeal stated that the standard of review was reasonableness. The CRTC decision was reversed (2-1) because the Commission's findings were not consistent with its earlier decisions and it failed to explain how sections of the *Broadcasting Act* were applicable. For a summary of this case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-598.

As noted in *Bell Canada v. Canada (Attorney General),* 2019 SCC 66 (CanLII), the applicable standard of review of CRTC orders and decisions must now be determined in accordance with the framework set out in *Canada (Minister of Citizenship and Immigration) v. Vasilov*, 2019 SCC 65. For a summary of the Bell Canada case, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-625.

In *BCE Inc. v. Quebecor Media Inc.* 2022 FCA 152 (CanLII), the Federal Court of Appeal dismissed an application for judicial review of a CRTC decision made under section 28(1)(c) of the *Federal Courts Act*. Questions as to whether a Commission decision is unreasonable on questions of law or jurisdiction can be appealed to the Federal Court of Appeal under subsection 31(2) of the *Broadcasting Act* and so, an application for judicial review on those grounds is precluded by section 18.5 of the *Federal Courts Act*.]

[§104-192]

(3) **Entry of appeal**. – No appeal lies after leave therefor has been obtained under subsection (2) unless it is entered in the Federal Court of Appeal within sixty days after the making of the order granting leave to appeal.

[§104-193]

(4) **Document deemed decision or order**. – Any document issued by the Commission in the form of a decision or order shall, if it relates to the issue, amendment, renewal, revocation or suspension of a licence, be deemed for the purposes of this section to be a decision or order of the Commission.

[*History:* Based on sections 16 and 17 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, without material change except for the omission of the words "minute or other record of the Commission" in describing what is a "decision or order" of the Commission in subsection (4).

Commentary: Subsection 31(1) has the effect of rendering the Commission *functus officio* whenever it has issued a licensing decision; in other words, it is generally unable to rehear and review its own decisions once they are issued. This contrasts with the Commission's jurisdiction over telecommunications carriers, where it is empowered by section 62 of the *Telecommunications Act*, S.C. 1993, c.38 (based on section 66 of the *National Telecommunications Powers and Procedures Act*) to "review and rescind or vary any decision made by it or re-hear a matter before rendering a decision."

There are a number of circumstances, however, where the CRTC may review and rescind or vary its decision or orders. First, where the order is one made under subsection 12(2) of the Act, above at [§104-124]. Second, when the decision has been referred back to the CRTC for reconsideration by the Governor in Council under subsection 28(3) of the Act. Third, when the decision or order has been set aside and referred back to the Commission by the Federal Court of Appeal.

In addition, the *functus officio* limitation may not apply when the decisions or orders do not fall into the class defined in subsection (4), viz. decisions or orders relating to the issue, amendment, renewal, revocation or suspension of a licence.

An example would be an order to the Commission under paragraphs 9(1)(a) and (f) of the Act. If subsection 31(4) is intended to provide an exhaustive definition of what constitutes a decision or order for the purposes of the section, orders made under those paragraphs would not constitute a "decision or order" under section 31; thus, they would not necessarily be final or conclusive, and may be subject to reconsideration by the Commission.

There is support for this view in the structure of the Act. Decisions to issue or renew a licence are inherently time-limited to no more than 7 years, and the prohibition of amendment during the first 5 years of the term except upon the application of a licensee gives some stability and certainty to the licensee. By stipulating that licensing decisions are final and conclusive and that any court appeal thereof requires leave, this stability and certainty is enhanced. By contrast, orders made under paragraphs 9(1)(f), (g) and (h), which affect the relationship between a licensee and a carrier or between one licensee and another, may require adjustment from time to time as carrier tariffs are amended, new licensees emerge or existing licences are renewed or amended. Thus, if such changing circumstances are to be taken into account, Commission orders relating thereto should be able to be issued at any time, and be subject to reconsideration and reissuance at any time. Under this view, judicial review of such orders would not be covered by section 31 of the *Broadcasting Act* but would be available under section 28 of the *Federal Court Act* and would not require leave.

The *functus officio* limitation may also be inapplicable where a decision is made conditional on a latter approval. In a 1979 case, the Commission licensed a new FM station "in principle" but made its approval subject to a condition that the licensee satisfy the Commission of certain programming matters through appropriate changes in its Promise of Performance. When the CRTC later denied the licence after a second public hearing, the Federal Court of Appeal upheld the Commission's decision, stating that its decision was not, in effect, a reconsideration and reversal of the earlier decision. See *Canadian Family Radio Ltd. and Ralph Jacobson v. Canadian Radio-television and Telecommunications*

Commission (Fed. C.A., No. A689-80, October 6, 1981), noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-247.

The Commission has also occasionally issued "Corrections" or "Errata" to its decisions, correcting typographical or clerical errors. For a case involving such a correction notice, see *Association of Canadian Movie Production Companies et al. v. Canadian Radio-television and Telecommunications Commission et al.* (Fed.C.A., Sept. 24, 1982), noted in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-264. However, in *CHUM Limited v. A-G.Canada*, 2005 FCA 142 (Fed.C.A.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-448, an "erratum" decision issued by the CRTC affecting a condition of licence relating to Canadian program expenditures for the Space specialty service was set aside by the Federal Court of Appeal. Per Noël J.A.: "The CRTC not having identified in any way the cause of the error committed in its final decision of January 21, 2004, has failed to bring itself within the exceptions to the principle of *functus officio* set out in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. It follows that it had no authority to revisit its earlier decision and change the conditions of the licence issued to the Appellant."

The omission of the words "minute or other record of the Commission" in subsection 31(4) was requested by the Commission in order that the section would not apply to decisions as referred to in minutes of Executive Committee meetings, but rather to decisions formally issued or released by the Secretary General.

In *National Indian Brotherhood v. Juneau et al.* (No. 2), [1971] F.C. 73, summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-119, Jackett C.J. discussed whether rulings incidental to the conduct of CRTC hearings would constitute a "decision or order" subject to appeal or whether the term was intended to refer to the ultimate decision or order of the Commission. The latter conclusion was reached in In re *Anti-Dumping tribunal Act and in re Danmor Shoe Co. Ltd.*, [1974] F.C. 22.

For a decision holding that applicants did not have standing to seek judicial review under s.18.1(1) of the Federal Court Act of CRTC licensing decisions rendered in proceedings where the applicants chose not to intervene, although had they intervened their interest would probably have been enough to support an appeal to the Federal Court of Appeal under subsection 31(2) of the *Broadcasting Act*, see *Canadian Motion Picture Distributors Association et al. v. Partners of Viewer's Choice Canada et al.* (1996), 199 N.R. 168 (Fed.C.A.)., summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-372.]

[§104-194]

Prohibition

31.1 (1) **Carrying on broadcasting undertaking**. – A person shall not carry on a broadcasting undertaking unless

(a) they do so in accordance with a licence issued to them; or

(b) they are exempt, under an order made under subsection 9(4), from the requirement to hold a licence.

[§104-195]

(2) **Exception — online undertaking**. – Despite subsection (1), a person may carry on an online undertaking without a licence and without being so exempt.

[*History*: Added in 2023.

Commentary: This section applies to broadcasting undertakings other than online undertakings. For the definition of online undertakings, see s.2, above at §104-23.]

[§104-196]

Offences

32. Broadcasting contrary to Act. – Every person who contravenes section 31.1 is guilty of an offence punishable on summary conviction and is liable

(a) in the case of an individual, to a fine of not more than $25,000 for each day that the offence continues; or

(b) in the case of a corporation, to a fine of not more than $250,000 for each day that the offence continues.

[§104-197]

33. Contravention of regulation or order. – Every person who contravenes any regulation or order made under this Part is guilty of an offence punishable on summary conviction and is liable

(a) in the case of an individual, to a fine of not more than $25,000 for a first offence and of not more than $50,000 for each subsequent offence; or

(b) in the case of a corporation, to a fine of not more than $250,000 for a first offence and of not more than $500,000 for each subsequent offence.

[§104-198]

33.1 Defence. – A person is not to be found guilty of an offence under section 32 or 33 if they establish that they exercised due diligence to prevent the commission of the offence.

[§104-199]

34. Limitation. – Proceedings in respect of an offence under section 33 may be instituted within, but not after, two years after the day on which the subject matter of the proceedings arose.

[*History*: Sections 32 to 34 were added in 2023.

Commentary: It should be noted that by virtue of sections 21 and 22 of the *Criminal Code*, a person can be a party to an offence under sections 32 and 33 of the *Broadcasting Act* whether they actually commit the offence, aid or abet someone else to commit it, or counsel someone to commit the offence. Section 21(1) of the *Criminal Code*, R.S.C. 1985, c.C-46, reads as follows:

21. (1) Every one is a party to an offence who…

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

This section and section 22 which deals with counselling is made applicable to offences under the Broadcasting Act by virtue of subsection 34(2) of the *Interpretation Act*, R.S.C. 1985, c.1-21: see R. v.Continental Cablevision Inc. et al. (1974), 19 C.C.C. (2d) 540 at 551, appeal dismissed, (1975), 21 C.C.C. (2d) 497., summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020), at §55-143. In Broadcasting Decision CRTC 2002-319, October 18, 2002, the Commission ruled that an entity that acted as a “grey market” dealer in Canada was not carrying on a broadcasting undertaking.]

[§104-200]

Consultation and Review

34.01 (1) **Regulations and orders**. – Every seven years the Commission shall consult with all interested persons with respect to orders made under section 9.1 and regulations and orders made under section 11.1 and shall publish, on the Internet or otherwise, a report on the consultations that also lists the

orders and regulations that the Commission proposes to review as a result of the consultations and sets out its plan for conducting the review.

[§104-201]

(2) **Publication of report**. – The Commission shall publish the first report within seven years after the day on which this subsection comes into force and, subsequently, within seven years after the day on which the most recent report is published.

[§104-201(a)]

(3) **Idem.** – The Minister shall cause a copy of all reports published under subsections (1) and (2) to be tabled before each House of Parliament.

[*History*: Added in 2023.]

[§104-202]

PART II.1

OFFENCE — PAPER BILL

[§104-203]

34.1 Prohibition. – No person who carries on a broadcasting undertaking shall charge a subscriber for providing the subscriber with a paper bill.

[§104-204]

34.2. Offence. – Every person who contravenes section 34.1 is guilty of an offence punishable on summary conviction and is liable

(a) in the case of an individual, to a fine not exceeding $25,000 for a first offence and not exceeding $50,000 for each subsequent offence; or

(b) in the case of a corporation, to a fine not exceeding $250,000 for a first offence and not exceeding $500,000 for each subsequent offence.

[§104-205]

34.21 Defence. – A person is not to be found guilty of an offence under section 34.2 if they establish that they exercised due diligence to prevent the commission of the offence.

[§104-206]

34.3 Limitation. – No proceedings for an offence under section 34.2 are to be instituted more than two years after the time when the subject-matter of the proceedings arose.

[*History*: Sections 34.1, 34.2 and 34.3 were added in 2014. Section 34.21 was added in 2023.]

[§104-207]

PART II.2

ADMINISTRATIVE MONETARY PENALTIES

[§104-208]

34.4 (1) **Violations**. – Subject to a regulation made under paragraph 34.995(a), a person commits a violation if they

(a) contravene a regulation or order made under Part II;

(b) contravene the requirement to negotiate in good faith under subsection 9.1(9);

(c) carry on a broadcasting undertaking in contravention of section 31.1;

(d) charge a subscriber for providing the subscriber with a paper bill in contravention of section 34.1;

(e) contravene an undertaking that they entered into under section 34.9;

(f) fail to submit information in accordance with a notice issued under section 34.996 to a person designated under paragraph 34.7(a) that the designated person requires by the notice;

(g) knowingly make a material misrepresentation of fact in contravention of section 34.997; or

(h) contravene any of subsections 42(1) to (4) and (7), 43(1) to (3) and 44(1) to (3) and (6) of the *Accessible Canada Act*.

[§104-209]

(2) **Continued violation**. – A violation that is continued on more than one day constitutes a separate violation in respect of each day on which it is continued.

[§104-210]

34.5 (1) **Maximum administrative monetary penalty**. – Subject to a regulation made under paragraph 34.995(b), a person who commits a violation is liable to an administrative monetary penalty

(a) in the case of an individual, of not more than $25,000 for a first violation and of not more than $50,000 for each subsequent violation; or

(b) in any other case, of not more than $10 million for a first violation and of not more than $15 million for each subsequent violation.

[§104-211]

(2) **Criteria for penalty**. – The amount of the penalty is to be determined by taking into account the following factors:

(a) the nature and scope of the violation;

(b) the history of compliance by the person who committed the violation with this Act, the regulations and the decisions and orders made by the Commission under this Act;

(c) the person's history with respect to any previous undertaking entered into under section 34.9;

(d) any benefit that the person obtained from the commission of the violation;

(e) the person's ability to pay the penalty;

(f) any factors established by regulation;

(g) the purpose of the penalty, which is to promote compliance with this Act — or, in the case of a penalty imposed for a violation referred to in paragraph 34.4(1)(h), compliance with the *Accessible Canada Act* — and not to punish; and

(h) any other relevant factor.

[§104-212]

(3) **Purpose of penalty**. – The purpose of the penalty is to promote compliance with this Act — or, in the case of a penalty imposed for a violation referred to in paragraph 34.4(1)(h), compliance with the *Accessible Canada Act* — and not to punish.

[§104-213]

34.6 (1) **Procedures**. – Despite subsection 34.8(1), the Commission may impose a penalty in a decision made in the course of a proceeding before it under this Act in which it finds that a violation referred

to in section 34.4 has been committed by a person other than the person who entered into an undertaking under section 34.9 in connection with the same act or omission giving rise to the violation.

[§104-214]

(2) **For greater certainty**. – For greater certainty, the Commission is not to impose a penalty under subsection (1) on a person who has not been given the opportunity to be heard.

[§104-215]

34.7 Designation. – The Commission may

(a) designate persons or classes of persons who are authorized to issue notices of violation or to accept an undertaking under section 34.9; and

(b) establish, in respect of each violation, a short-form description to be used in notices of violation.

[§104-216]

34.8 (1) **Notice of violation**. – A person who is authorized to issue notices of violation may, if they believe on reasonable grounds that another person has committed a violation, issue a notice of violation and cause it to be served on that other person.

[§104-217]

(2) **Contents**. – The notice of violation shall set out

(a) the name of the person who is believed to have committed a violation;

(b) the act or omission giving rise to the violation, as well as a reference to the provision that is at issue;

(c) the administrative monetary penalty that the person is liable to pay, as well as the time and manner in which the person may pay the penalty;

(d) a statement informing the person that they may pay the penalty or make representations to the Commission with respect to the violation and the penalty and informing them of the time and manner for making such representations; and

(e) a statement informing the person that, if they do not pay the penalty or make representations in accordance with the notice, they will be deemed to have committed the violation and the penalty may be imposed.

[§104-218]

34.9 (1) **Undertaking**. – A person may enter into an undertaking at any time. The undertaking is valid upon its acceptance by the Commission or, if it is entered into by a person other than the Corporation, upon its acceptance by the Commission or the person designated to accept an undertaking.

[§104-219]

(2) **Requirements**. – An undertaking referred to in subsection (1)

(a) shall set out every act or omission that is covered by the undertaking;

(b) shall set out every provision that is at issue;

(c) may contain any conditions that the Commission or the person designated to accept the undertaking considers appropriate; and

(d) may include a requirement to pay a specified amount.

[§104-220]

(3) **Before notice of violation**. – If a person enters into an undertaking, a notice of violation shall not be served on them in connection with any act or omission referred to in the undertaking.

[§104-221]

(4) **After notice of violation**. – If a person enters into an undertaking after a notice of violation is served on them, the proceeding that is commenced by the notice of violation is ended in respect of that person in connection with any act or omission referred to in the undertaking.

[§104-222]

34.91 Powers respecting hearings. – For greater certainty, the Commission has all the powers, rights and privileges referred to in section 16 if, in a proceeding in respect of a violation, it holds a public hearing under subsection 18(3).

[§104-223]

34.92 (1) **Payment of penalty**. – If a person who is served with a notice of violation pays the penalty set out in the notice, they are deemed to have committed the violation and the proceedings in respect of it are ended.

(1.1) **Decision of Commission**. – The Commission shall, in a timely manner, issue a decision with respect to subsection (1) confirming that the person is deemed to have committed the violation

[§104-224]

(2) **Representations to Commission and decision**. – If a person who is served with a notice of violation makes representations in accordance with the notice, the Commission shall decide, on a balance of probabilities, after considering any other representations that it considers appropriate, whether the person committed the violation. If the Commission decides that the person committed the violation, it may

(a) impose the administrative monetary penalty set out in the notice, a lesser penalty or no penalty; and

(b) suspend payment of the administrative monetary penalty subject to any conditions that the Commission considers necessary to ensure compliance with this Act.

[§104-225]

(3) **Penalty**. – If a person who is served with a notice of violation neither pays the penalty nor makes representations in accordance with the notice, the person is deemed to have committed the violation and the Commission may impose the penalty.

[§104-226]

(4) **Copy of decision and notice of rights**. – The Commission shall cause a copy of any decision made under subsection (1.1), (2) or (3) to be issued and served on the person together with a notice of the person's right to apply for leave to appeal under section 31.

[§104-227]

34.93 Evidence. – In a proceeding in respect of a violation, a notice purporting to be served under subsection 34.8(1) or a copy of a decision purporting to be served under subsection 34.92(4) is admissible in evidence without proof of the signature or official character of the person appearing to have signed it.

[§104-228]

34.94 (1) **Defence**. – A person is not to be found liable for a violation, other than a violation under paragraph 34.4(1)(b) or (g), if they establish that they exercised due diligence to prevent its commission.

[§104-229]

(2) **Common law principles**. – Every rule and principle of the common law that makes any circumstance a justification or excuse in relation to a charge for an offence applies in respect of a violation to the extent that it is not inconsistent with this Act.

[§104-230]

34.95 Directors, officers, etc., of corporations. – An officer, director or agent or mandatary of a corporation other than the Canadian Broadcasting Corporation, that commits a violation is liable for the violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against.

[§104-231]

34.96 Vicarious liability. – A person, other than the Corporation, is liable for a violation that is committed by their employee acting within the scope of their employment or their agent or mandatary acting within the scope of their authority, whether or not the employee or agent or mandatary is identified or proceeded against.

[§104-232]

34.97 (1) **Limitation or prescription period**. – Proceedings in respect of a violation may be instituted within, but not after, three years after the day on which the subject matter of the proceedings became known to the Commission.

[§104-233]

(2) **Certificate**. – A document that appears to have been issued by the secretary to the Commission, certifying the day on which the subject matter of any proceedings became known to the Commission, is admissible in evidence without proof of the signature or official character of the person who appears to have signed the document and is, in the absence of evidence to the contrary, proof of the matter asserted in it.

[§104-234]

34.98 Information may be made public. – The Commission may make public

(a) the name of a person who enters into an undertaking under section 34.9, the nature of the undertaking including the acts or omissions and provisions at issue, the conditions included in the undertaking and the amount payable under it, if any; or

(b) the name of a person who is deemed, or is found by the Commission or on appeal, to have committed a violation, the acts or omissions and provisions at issue and the amount of the penalty imposed, if any.

[§104-235]

34.99 (1) **Special case concerning the Corporation — public hearing**. – Despite subsections 34.6(1) and 34.92(2) and (3), the Commission shall not impose a penalty under any of those subsections on the Corporation for a violation other than the one referred to in paragraph 34.4(1)(h) without holding a public hearing on the matter.

[§104-236]

(2) **Place of hearing**. – A public hearing under subsection (1) may be held at any place in Canada designated by the Chairperson of the Commission.

[§104-237]

(3) **Notice of hearing**. – The Commission shall cause notice of any public hearing to be held by it under subsection (1) to be published in the Canada Gazette and in one or more newspapers of general circulation within any area affected or likely to be affected by the matter to which the public hearing relates.

[§104-238]

(4) **Powers respecting hearings**. – The Commission has, in respect of any hearing under subsection (1), with regard to the attendance, swearing and examination of witnesses at the hearing, the production and inspection of documents and other matters necessary or proper in relation to the hearing, all of the powers, rights and privileges that are vested in a superior court of record.

[§104-239]

(5) **For greater certainty**. – For greater certainty, sections 17, 20 and 21 apply in respect of public hearings under subsection (1).

[§104-240]

34.991 (1) **Report of violation**. – If the Commission is satisfied, after holding a public hearing on the matter, that the Corporation has committed a violation referred to in any of paragraphs 34.4(1)(a) to (g), the Commission shall forward to the Minister a report setting out the circumstances of the violation, the findings of the Commission, the amount of any penalty imposed, and any observations or recommendations of the Commission in connection with the violation.

[§104-241]

(2) **Report to be tabled**. – The Minister shall cause a copy of the report referred to in subsection (1) to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the report is received by the Minister.

[§104-242]

34.992 (1) **Violation or offence**. – If an act or omission can be proceeded with either as a violation or as an offence under this Act, proceeding in one manner precludes proceeding in the other.

[§104-243]

(2) **For greater certainty**. – For greater certainty, a violation is not an offence and, accordingly, section 126 of the Criminal Code does not apply.

[§104-244]

34.993 Receiver General. – An administrative monetary penalty paid or recovered in relation to a violation is payable to the Receiver General.

[§104-245]

34.994 (1) **Debt due to Her Majesty**. – The following amounts are debts due to Her Majesty in right of Canada that may be recovered in the Federal Court:

(a) the amount of the penalty imposed by the Commission in a decision made in the course of a proceeding before it under this Act in which it finds that a violation referred to in section 34.4 has been committed;

(b) the amount payable under an undertaking entered into under section 34.9, beginning on the day specified in the undertaking or, if no day is specified, beginning on the day on which the undertaking is accepted;

(c) the amount of the penalty set out in a notice of violation, beginning on the day on which it is required to be paid in accordance with the notice, unless representations are made in accordance with the notice;

(d) if representations are made, either the amount of the administrative monetary penalty that is imposed by the Commission or on appeal, as the case may be, beginning on the day specified by the Commission or the court or, if no day is specified, beginning on the day on which the decision is made; and

(e) the amount of any reasonable expenses incurred in attempting to recover an amount referred to in any of paragraphs (a) to (d).

[§104-246]

(2) **Limitation period or prescription**. – Proceedings to recover a debt may be instituted within, but not after, three years after the day on which the debt becomes payable.

[§104-247]

(3) **Certificate of default**. – The Commission may issue a certificate for the unpaid amount of any debt referred to in subsection (1).

[§104-248]

(4) **Effect of registration**. – Registration of a certificate in the Federal Court has the same effect as a judgment of that Court for a debt of the amount set out in the certificate and all related registration costs.

[§104-249]

34.995 Regulations. – The Governor in Council may make regulations

(a) providing for exceptions to any of paragraphs 34.4(1)(a) to (h);

(b) increasing the maximum administrative monetary penalty amounts set out in subsection 34.5(1);

(c) for the purpose of paragraph 34.5(2)(f), establishing other factors to be considered in determining the amount of the penalty;

(d) respecting undertakings referred to in section 34.9;

(e) respecting the service of documents required or authorized to be served under this Part, including the manner and proof of service and the circumstances under which documents are to be considered to be served; and

(f) generally, for carrying out the purposes and provisions of this Part.

[*History*: PART II.2, comprising sections 34.4 to 34.995 inclusive, was added in 2023.

Commentary: Part II.2 is modelled on the Administrative Monetary Penalties sections of the *Telecommunications Act*, starting at section 72.001. The addition of PART II.2 to the *Broadcasting Act* was recommended by the Broadcasting and Telecommunications Legislative Review Panel in its report in January 2020. Recommendation 77 was as follows: "We recommend that to strengthen the compliance regime for both licences and registrations, the *Broadcasting Act* be amended to include provisions for Administrative Monetary Penalties, similar to the general scheme in the *Telecommunications Act*, with maximum thresholds set at a level high enough to create a deterrent for foreign undertakings."]

[§104-250]

PART II.3

SUBMISSION OF INFORMATION

[§104-251]

34.996 Information requirement. – A person designated under paragraph 34.7(a) who believes that a person is in possession of information that is reasonably considered to be relevant for the purpose of verifying whether a violation referred to in section 34.4 has been committed may, by notice, require that person to submit the information to the designated person in the form and manner and within the reasonable time that is stipulated in the notice. A person to whom any such notice is addressed shall comply with the notice.

[*History*: PART II.3, consisting of section 34.996, was added in 2023.

Commentary: For the CRTC power to designate a person under paragraph 34.7(a), see above at §104-215. The importance of giving the Commission more effective information gathering powers was reflected in Recommendation 76 of the Report of the Broadcasting and Telecommunications Legislative Review Panel, which was as follows: "We recommend that the *Broadcasting Act* be amended to ensure that the CRTC can — by regulation, condition of licence, or condition of registration — impose reporting requirements, including with respect to financial information, consumption data, and technological processes such as algorithms, on all media content undertakings."]

[§104-252]

PART II.4

OFFENCE – MATERIAL MISREPRESENTATION OF FACT

[§104-253]

34.997 Prohibition. – It is prohibited for any person to knowingly make a material misrepresentation of fact to a person designated under paragraph 34.7(a).

[§104-254]

34.998 (1) Offence. – Every person who contravenes section 34.997 is guilty of an offence punishable on summary conviction and is liable

(a) in the case of an individual, to a fine of not more than $10,000 for a first offence and of not more than $25,000 for each subsequent offence; or

(b) in any other case, to a fine of not more than $100,000 for a first offence and of not more than $250,000 for each subsequent offence.

[§104-255]

(2) **Limitation**. – Proceedings in respect of an offence under subsection (1) may be instituted within, but not after, two years after the day on which the subject matter of the proceedings arose.

[*History*: PART II.4, consisting of sections 34.997 and 34.998, was added in 2023.

Commentary: For the CRTC power to designate a person under paragraph 34.7(a), see above at §104-215. The importance of giving the Commission more effective information gathering powers was reflected in Recommendation 76 of the Report of the Broadcasting and Telecommunications Legislative Review Panel, which was as follows: "We recommend that the *Broadcasting Act* be amended to ensure that the CRTC can — by regulation, condition of licence, or condition of registration — impose reporting

requirements, including with respect to financial information, consumption data, and technological processes such as algorithms, on all media content undertakings."]

[§104-256]

PART III

CANADIAN BROADCASTING CORPORATION

Interpretation

[§104-257]

35. (1) **Definitions**. – In this Part,

[§104-258]

"auditor" means the auditor of the Corporation;

[§104-259]

"Board" means the Board of Directors of the Corporation;

[§104-260]

"Chairperson" means the Chairperson of the Board;

[§104-261]

"director" means a director of the Corporation;

[§104-262]

"President" means the President of the Corporation;

[§104-263]

"wholly-owned subsidiary" has the same meaning as in Part X of the *Financial Administration Act*.

[*History:* The definitions for "director" and "President" are taken from section 23 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. The other definitions were added in 1991.]

[§104-264]

(2) **Interpretation**. – This Part shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

[*History:* Added in 1991.

Commentary: Neither the previous *Broadcasting Act* nor its predecessor statutes contained specific language establishing an arm's length relationship between the CBC and the government. Subsection 35(2), taken together with similar language in subsections 46(5) and 52(1), and paragraph 52(2)(b), seeks to provide certain assurances to the CBC of journalistic, programming and creative freedom, within the framework of financial accountability prescribed in the Act.

The issue of the CBC's financial management and accountability was the subject of the *Fourth Report* of the Standing Committee on Communications and Culture, February 12, 1987. Following a review of the CBC's accounting problems, the Standing Committee made the following recommendations, at p.52:

"Recommendation 1

We recommend that on a selective basis, legislative provisions related to financial management and control, similar to those now applied to other Crown corporations under the Financial

> Administration Act, be made applicable to the Canadian Broadcasting Corporation through amendments to the *Broadcasting Act*...
>
> The CBC should remain exempt from the power of direction provisions which are applicable to other Crown corporations under the Financial Administration Act, and from any other provisions which would compromise the "arm's-length" relationship of the CBC with the government.
>
> Recommendation 2
>
> We recommend that the *Broadcasting Act* be amended to provide for a Chairman of the Board, who shall be appointed by the Governor in Council on the recommendation of the Minister after consultation with the members of the CBC Board of Directors; and a President, who shall be appointed by and responsible to the Board of Directors. The Chairman shall be responsible primarily for the Corporation's policies, while the President shall be responsible for policy implementation."

In Canadian Voices: Canadian Choices: A New Broadcasting Policy for Canada, issued by the government on June 23, 1988, the changes made in the new Act to the institutional structure and responsibilities of the CBC were summarized as follows:

- The arm's length principle with respect to the journalistic, creative and programming independence of the CBC is explicitly protected...
- At the end of the term of the current incumbent, the position of President will be split into two distinct roles: Chairman of the Board and Chief Executive Officer (CE)). the CEO will be responsible to the Board for all operations of the Corporation.
- The position of Chairman will be an Order-in-Council appointment, for a term of five years.
- The Chief Executive Officer is to be appointed by the Board, subject to approval by Governor-in-General, to serve for a term of five years.
- Standing committees of the Board are established, one on French-language and one on English-language broadcasting.
- The CBC is subject to financial controls similar to those of the Financial Administration Act (FAA), but without that Act's strategic direction and control mechanisms.
- The power of the Board to approve property acquisitions and leases, without an Order-in-Council for each transaction, is increased substantially.
- The audit procedures for the CBC parallel the requirements of the FAA, particularly with respect to the Auditor General.
- The CBC is responsible for presenting a corporate plan to enable the Government to allocate resources appropriately. A summary of this plan is to be tabled in Parliament, but the plan itself is not for government approval, since that responsibility remains with the CBC Board.
- In tabling its corporate plan summary each year, the CBC will be confirming the amount appropriated for the next year, and will set out its five-year financial planning framework, including a forecast of future government appropriations. This allows the CBC to plan more realistically, and enables the CRTC to set conditions of licence that reflect the resources that are forecast to be available.

The concept of the CBC's journalistic and programming independence is also reflected in subsections 46(5) and 52(1) of the *Broadcasting Act*, and section 68.1 of the *Access to Information Act*. For commentary, see below at §104-296.]

Continuation of Corporation

[§104-265]

35. (1) **Corporation continued**. – The corporation known as the Canadian Broadcasting Corporation is hereby continued and shall consist of those directors who from time to time compose the Board.

[§104-266]

(2) **Board of Directors**. – There shall be a Board of Directors of the Corporation consisting of twelve directors, including the Chairperson and the President, to be appointed by the Governor in Council. [S.C. 1995, c.29, s.4.]

[§104-267]

(3) **Tenure**. – A director shall be appointed to hold office during good behaviour for a term not exceeding five years and may be removed at any time by the Governor in Council for cause.

[§104-268]

(4) **Reappointment**. – Subject to section 38, the Chairperson and the President are eligible for reappointment on the expiration of any term of office but any other director who has served two consecutive terms is not, during the twelve months following completion of the second term, eligible for appointment, except as Chairperson or President.

[§104-269]

(5) **Continuation in office**. – Notwithstanding subsections (3) and (4), if a director is not appointed to take office on the expiration of the term of office of an incumbent director, the incumbent director continues in office until a successor is appointed.

[*History:* This section corresponds to section 24 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, with minor changes.

Commentary: In the 1991 Act, the function of Executive Vice-President was abolished, and the age limit for CBC corporate directors was eliminated.

On January 31, 1996, the Mandate Review Committee published its report, based on a review of the mandates of the CBC, Telefilm Canada and the National Film Board: see Making Our Voices Heard: Canadian Broadcasting and Film for the 21st Century, Report of the Mandate Review Committee - CBC, NFB, Telefilm (Ottawa: Department of Canadian Heritage, 1996). Two of the recommendations of the report focused on the corporate governance of the CBC, as set out below:

Recommendation 28 (p.115):

The *Broadcasting Act* should be amended to specify that the President be chosen by the CBC's Board of Directors and not the Governor in Council, or alternatively, by the Governor in Council on the recommendation of the CBC Board.

Recommendation 29 (p.116):

The *Broadcasting Act* should be amended to clarify the respective roles of the Board of Directors and of the President. The Board should be responsible for approving the goals, policies and long-range plans of the CBC as well as evaluating their implementation. The President should be the Chief Executive Officer and be responsible for general management and supervision of the staff. The President should develop long-term strategies for recommendation to the Board.]

[§104-270]

36. Oath of office. – Every director shall, before entering on the director's duties, take and subscribe, before the Clerk of the Privy Council, an oath or solemn affirmation, which shall be filed in the office of the Clerk, in the following form:

I, ..., do solemnly swear (or affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of ..... (Add, in the case where an oath is taken, "So help me God".)

[*History:* Based on section 25 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

[§104-271]

37. (1) **Outside interests of directors**. – A person is not eligible to be appointed or to continue as a director if the person is not a Canadian citizen who is ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, the person

(a) is engaged in the operation of a broadcasting undertaking;

(b) has any pecuniary or proprietary interest in such a broadcasting undertaking described in subsection (3); or

(c) is principally engaged in the production or distribution of program material that is primarily intended for use by such a broadcasting undertaking.

[§104-272]

(2) **Disposing of interest**. – A director in whom any interest prohibited under subsection (1) vests by will or succession for the director's own benefit shall, within three months thereafter, absolutely dispose of that interest.

[§104-273]

(3) **Application**. – Subsection (1) applies with respect to a broadcasting undertaking that

(a) must be carried on under a licence;

(b) is carried on by a person who is exempt from the requirement to hold a licence, under an order made under subsection 9(4); or

(c) must be registered with the Commission under regulations made under paragraph 10(1)(i).

[*History*: Based on the 1991 Act, subject to an amendment to subsection 38()1) and the addition of subsection 38(3) in 2023.]

[§104-274]

38. Responsibility of directors. – Subject to this Part, the Board is responsible for the management of the businesses, activities and other affairs of the Corporation.

[*History:* Added in 1991.

Commentary: This section mirrors section 109 of the *Financial Administration Act*, R.S.C. 1985, c.F-11.]

[§104-275]

39. Accountability of Corporation to Parliament. – The Corporation is ultimately accountable, through the Minister, to Parliament for the conduct of its affairs.

[*History:* Added in 1991.

Commentary: This provision is routinely included by the Department of Justice in legislation dealing with Crown agencies.]

Chairperson

[§104-276]

40. (1) **Powers, duties and functions**. – The Chairperson shall preside at meetings of the Board and may exercise such powers and shall perform such other duties and functions and may exercise such powers as are assigned to the Chairperson by the by-laws of the Corporation.

[§104-277]

(2) **Part-time**. – The Chairperson shall perform the duties and function of the office on a part-time basis.

[§104-278]

(3) **Absence, incapacity or vacancy of office**. – If the Chairperson is absent or incapacitated or if the office of Chairperson is vacant, the President shall act as Chairperson, and if both are absent or incapacitated or if both those offices are vacant, the Board may authorize a director to act as Chairperson, but no person so authorized by the Board has authority to act as Chairperson for a period exceeding sixty days without the approval of the Governor in Council.

[*History:* Added in 1991.

Commentary: This section replaced section 27 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, which set forth the role of the President. Under the 1991 Act, the functions formerly carried out by the President are split between the new position of Chairman and the President, dealt with below in section 42. When initially introduced in Bill C-136, the role of CBC Chairman was a full-time position. However, this was changed to a part-time position in Bill C-40.]

President

[§104-279]

41. (1) **Powers, duties and functions**. – The President is the chief executive officer of the Corporation and has supervision over and direction of the work and staff of the Corporation and may exercise such powers and shall perform such other duties and functions as are assigned to the President by the by-laws of the Corporation.

[§104-280]

(2) **Full-time**. – The President shall perform the duties and functions of the office on a full-time basis.

[§104-281]

(3) **Absence, incapacity or vacancy of office**. – If the President is absent or incapacitated or if the office of President is vacant, the Board may authorize an officer of the Corporation to act as President, but no person so authorized by the Board has authority to act as President for a period exceeding sixty days without the approval of the Governor in Council.

[*History:* Added in 1991.

Commentary: This section establishes the position of President of the Corporation who is appointed by the Board and serves for a term of up to five years. Under the previous Act, the President was an Order in Council appointment for seven years during good behaviour. Under the present Act, while the appointment and dismissal of the President is subject to approval by the Governor in Council, the position is not an Order in Council appointment.]

Remuneration

[§104-282]

42. (1) **Chairperson's and President's remuneration**. – The Chairperson and the President shall be paid by the Corporation remuneration at the rate fixed by the Governor in Council.

[§104-283]

(2) **Fees of other directors**. – Each director, other than the Chairperson and the President, shall be paid by the Corporation such fees for attendance at meetings of the Board or any committee of directors as are fixed by the by-laws of the Corporation.

[§104-284]

(3) **Expenses**. – Each director is entitled to be paid by the Corporation such travel and living expenses incurred by the director in the performance of the duties of that director as are fixed by the by-laws of the Corporation.

[*History:* Similar to section 28 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

Staff

[§104-285]

43. (1) **Employment of staff**. – The Corporation may, on its own behalf, employ such officers and employees as it considers necessary for the conduct of its business.

[§104-286]

(2) **Terms, etc. of employment**. – The officers and employees employed by the Corporation under subsection (1) shall, subject to any by-laws made under section 51, be employed on such terms and conditions and at such rates of remuneration as the Board deems fit.

[§104-287]

(3) **Not servants of Her Majesty**. – The officers and employees employed by the Corporation under subsection (1) are not officers or servants of Her Majesty.

[*History:* Based on subsections 29(2) and (3) of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

Standing Committees

[§104-288]

44. (1) **English and French language broadcasting committees**. – The Board shall establish a standing committee of directors on English language broadcasting and a standing committee of directors on French language broadcasting, each consisting of the Chairperson, the President and such other directors as the Board may appoint.

[§104-289]

(2) **Chairperson or President shall preside**. – The Chairperson, or in the absence of the Chairperson, the President, shall preside at meetings of each standing committee established pursuant to subsection (1).

[§104-290]

(3) **Absence of Chairperson and President**. – In respect of each standing committee established pursuant to subsection (1), the Chairperson shall designate one of the directors to preside at meetings thereof in the event of the absence of both the Chairperson and the President.

[§104-291]

(4) **Duties of committees**. – The standing committee on English language broadcasting shall perform such duties in relation to English language broadcasting, and the standing committee on French language broadcasting shall perform such duties in relation to French language broadcasting, as are delegated to the committee by the by-laws of the Corporation.

[*History:* Added in 1991.

Commentary: This section creates two standing committees on French-language and English-language activities under the umbrella of the Corporation. The concept may be said to reflect the policy expressed in paragraph 3(1)(c) of the Act, above at §104-39.]

THE *BROADCASTING ACT*

Objects and Powers

[§104-292]

45. (1) **Objects and powers**. – The Corporation is established for the purpose of providing the programming contemplated by paragraphs 3(1)(l) and (m), subject to any applicable orders and regulations of the Commission, and for that purpose the Corporation may

(a) establish, equip, maintain and operate broadcasting undertakings;

(b) make agreements with persons carrying on broadcasting undertakings for the broadcasting of programs;

(c) originate programs, secure programs from within or outside Canada by purchase, exchange or otherwise and make arrangements necessary for their transmission;

(d) make contracts with any person, within or outside Canada, in connection with the production or presentation of programs originated or secured by the Corporation;

(e) make contracts with any person, within or outside Canada, for performances in connection with the programs of the Corporation;

(f) with the approval of the Governor in Council, make contracts with any person for the provision by the Corporation of consulting or engineering services outside Canada;

(g) with the approval of the Governor in Council, distribute or market outside Canada programming services originated by the Corporation;

(h) with the approval of the Minister, act as agent for or on behalf of any person in providing programming to any part of Canada not served by any other licensee;

(i) collect news relating to current events in any part of the world and establish and subscribe to news agencies;

(j) publish, distribute and preserve, whether for a consideration or otherwise, such audio-visual material, papers, periodicals and other literary matter as may seem conducive to the attainment of the objects of the Corporation;

(k) produce, distribute and sell such consumer products as may seem conducive to the attainment of the objects of the Corporation;

(l) acquire copyrights and trade-marks;

(m) acquire and use any patent, patent rights, licences or concessions that the Board considers useful for the purposes of the Corporation;

(n) make arrangements or agreements with any organization for the use of any rights, privileges or concessions that the Board considers useful for the purposes of the Corporation;

(o) acquire broadcasting undertakings either by lease or by purchase;

(p) make arrangements or agreements with any organization for the provision of broadcasting services;

(q) subject to the approval of the Governor in Council, acquire, hold and dispose of shares of the capital stock of any company or corporation that is authorized to carry on any business incidental or conducive to the attainment of the objects of the Corporation; and

(r) do all such other things as the Board deems incidental or conducive to the attainment of the objects of the Corporation.

[§104-292(a)]

(1.1) **Idem.** – Despite subsection (1), the Corporation may not enter into any contract, arrangement or agreement that results in the broadcasting or development of an advertisement or announcement on behalf of an advertiser that is designed to resemble journalistic programming.

[§104-293]

(2) **International service**. – The Corporation shall, subject to any applicable orders and regulations of the Commission, provide an international service that includes the creation, production and presentation of programming intended for audiences outside of Canada and provided in English, French and any other language deemed appropriate, in accordance with any directions as the Governor in Council may issue.

[Note: In Order-in-Council P.C. 2012-0775, June 7, 2012, the Governor in Council issued the following direction to the CBC:

His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, pursuant to subsection 46(2) of the *Broadcasting Act*,

(a) repeals Order in Council P.C. 2003-358 of March 21, 2003; and

(b) directs the Canadian Broadcasting Corporation, when providing an international service under subsection 46(2) of the *Broadcasting Act* within the conditions of licences issued to it by the Canadian Radio-television and Telecommunications Commission and subject to any applicable regulations of the Commission,

(i) to name that service “Radio Canada International”,

(ii) to provide that service through the Internet and, as appropriate, through other means of distribution,

(iii) to produce and distribute programming targeted at international audiences to increase awareness of Canada, its values and its social, economic and cultural activities,

(iv) to establish objectives for that service on an annual basis, and

(v) to report the results with respect to meeting those objectives in the annual report required under section 71 of the *Broadcasting Act*.]

[§104-294]

(3) **Power to act as agent**. – The Corporation may, subject to any applicable orders and regulations of the Commission, act as an agent of Her Majesty in right of Canada or as an agent or mandatory of Her Majesty in right of a province in respect of any broadcasting operations that it may be directed by the Governor in Council to carry out.

[§104-295]

(4) **Extension of services**. – In planning extension of broadcasting services, the Corporation shall have regard to the principles and purposes of the *Official Languages Act*.

[§104-296]

(5) **Independence**. – The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.

[*History:* Based on subsections 30(1) and (2) of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Subsections (2), (4) and (5) were added in 1991. Subsections (1), (2) and (3) were amended in 2023.

Commentary: Subsection 46(1) is the equivalent of subsection 30(1) of the previous Act. Paragraphs 46(1)(f), (g), (k) and (p) are new.

Under subsection 30(2) of the previous Act, the Governor in Council could direct the CBC to provide an international service. Subsection 46(2), as amended at the committee stage, now makes this a mandatory service.

For a discussion of the concept behind subsection (5), see the commentary above at [§104-264].

In 2007, the CBC was brought under the *Access to Information Act*, R.S.C. 1985, c.A-1. However, this was made subject to section 68.1, which reads as follows:

"68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration."

For a discussion of the application of this section to the CBC, see *Canadian Broadcasting Corporation v. Canada (Information Commissioner)*, 2011 FCA 326 (F.C.A.), summarized in *Communications Law and the Courts in Canada* (Third Edition, 2020) at §55-541.]

[§104-297]

46.1 (1) **Debt obligations**. – The Corporation may, with the approval of the Minister of Finance, borrow money by any means, including the issuance and sale of bonds, debentures, notes and any other evidence of indebtedness of the Corporation.

[§104-298]

(2) **Loans to the Corporation**. – At the request of the Corporation, the Minister of Finance may, out of the Consolidated Revenue Fund, lend money to the Corporation on such terms and conditions as that Minister may fix.

[§104-299]

(3) **Total indebtedness**. – The total indebtedness outstanding in respect of borrowings under subsections (1) and (2) shall not exceed

(a) $220,000,000; or

(b) such greater amount as may be authorized for the purposes of this subsection by Parliament under an appropriation Act.

Agent of Her Majesty

[§104-300]

46. (1) **Corporation an agent of Her Majesty**. – Except as provided in subsections 44(1) and 46(2), the Corporation is, for all purposes of this Act, an agent of Her Majesty, and it may exercise its powers under this Act only as an agent of Her Majesty.

[§104-300]

(2) **Contracts**. – The Corporation may, on behalf of Her Majesty, enter into contracts in the name of Her Majesty or in the name of the Corporation.

[§104-301]

(3) **Property**. – Property acquired by the Corporation is the property of Her Majesty and title thereto may be vested in the name of Her Majesty or in the name of the Corporation.

[§104-302]

(4) **Proceedings**. – Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Corporation on behalf of Her Majesty, whether in its name or in the name of Her Majesty, may be brought or taken by or against the Corporation in the name of the Corporation in any court that would have jurisdiction if the Corporation were not an agent of Her Majesty.

[*History:* Based on section 31 of the *Broadcasting Act*, R.S.C. 1985, c.B-9, without material change.

Commentary: For a list of the court cases interpreting this section, see *Communications Law and the Courts in Canada* (Third Edition, 2020) at §76-9 (section 47).]

[§104-303]

47. (1) **Acquisition and disposition of property**. – Subject to subsection (2), the Corporation may purchase, lease or otherwise acquire any real or personal property that the Corporation deems necessary or convenient for carrying out its objects and may sell, lease or otherwise dispose of all or any part of any property acquired by it.

[§104-304]

(2) **Restriction**. – The Corporation shall not, without the approval of the Governor in Council, enter into

(a) any transaction for the acquisition of any real property or the disposition of any real or personal property, other than program material or rights therein, for a consideration in excess of four million dollars or such greater amount as the Governor in Council may by order prescribe; or

(b) a lease or other agreement for the use or occupation of real property involving an expenditure in excess of four million dollars or such greater amount as the Governor in Council may by order prescribe.

[Note: In Order-in-Council P.C. 2002-1582, SOR/2002-351, September 24, 2002, the amount referred to in paragraph 48(2)(b) was raised to $15 million.]

[§104-305]

(3) **Retaining proceeds**. – Subject to subsection (4), the Corporation may retain and use all of the proceeds of any transaction for the disposition of real or personal property.

[§104-306]

(4) **Idem**. – In the case of a transaction for the disposition of real or personal property requiring the approval of the Governor in Council under subsection (2), the Corporation may retain and use all or any part of the proceeds therefrom unless otherwise directed by the Governor in Council.

[*History:* Subsections 48(1) and (2) are based on section 32 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Subsections (3) and (4) are new.

Commentary: The maximum quantum for property transactions without Governor in Council approval has been raised from $250,000 to $4,000,000 or such greater amount as is prescribed by order.]

[§104-307]

48. (1) **Expropriation**. – Where, in the opinion of the Corporation, the taking or acquisition of any land or interest therein by the Corporation without the consent of the owner is required for the purpose of carrying out its objects, the Corporation shall so advise the appropriate Minister in relation to Part I of the Expropriation Act.

[§104-308]

(2) **Application of *Expropriation Act***. – For the purposes of the Expropriation Act, any land or interest therein that, in that opinion of the Minister referred to in subsection (1), is required for the purpose of carrying out the objects of the Corporation shall be deemed to be land or an interest therein that, in the opinion of the Minister, is required for a public work or other public purpose and, in relation thereto, a reference to the Crown in that Act shall be construed as a reference to the Corporation.

[*History:* Based on section 33 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

Head Office and Meetings

[§104-309]

49. (1) **Head office**. – The head office of the Corporation shall be in the National Capital Region as described in the schedule to the National Capital Act or at such other place in Canada as the Governor in Council may specify.

[§104-310]

(2) **Meetings**. – The Board shall meet at least six times in each year.

[§104-311]

(3) **Telephone conferences**. – A director may, subject to the by-laws of the Corporation, participate in a meeting of the Board or a committee of directors by means of such telephone or other communication facilities as permit all persons participating in the meeting to hear each other, and a director who participates in such a meeting by those means is deemed for the purposes of this Part to be present at the meeting.

[*History:* Based on section 34 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Subsection (3) mirrors section 113 of the *Financial Administration Act*, R.S.C. 1985, c.F-11.

Commentary: On January 31, 1996, the Mandate Review Committee published its report, which was based on a review of the mandates of the CBC, Telefilm Canada and the National Film Board: see Making Our Voices Heard: Canadian Broadcasting and Film for the 21st Century, Report of the Mandate Review Committee - CBC, NFB, Telefilm (Ottawa: Department of Canadian Heritage, 1996). One of its recommendations addressed the location of the CBC head office, and read as follows:

Recommendation 27 (p.114):

The *Broadcasting Act* should be amended to designate the head office of the CBC as Montreal. The President, the Chair and key corporate services should move to Montreal as the current head office building in Ottawa is vacated. Office space should be reserved for the Chair and President in the national capital region. Some of the corporate functions that do not move to Montreal should be moved to other production centres across the country. A Parliamentary, Government and CRTC liaison office should remain in the national capital region.]

By-laws

[§104-312]

50. (1) **By-laws**. – The Board may make by-laws

(a) respecting the calling of meetings of the Board;

(b) respecting the conduct of business at meetings of the Board, the establishment of special and standing committees of directors, the delegation of duties to special and standing committees of directors, including the committees referred to in section 45, and the fixing of quorums for meetings thereof;

(c) fixing the fees to be paid to directors, other than the Chairperson and the President, for attendance at meetings of the Board or any committee of directors, and the travel and living expenses to be paid to directors;

(d) respecting the duties and conduct of the directors, officers and employees of the Corporation and the terms and conditions of employment and of termination of employment of officers and employees of the Corporation, including the payment of any gratuity to those officers and employees or any one or more of them, whether by way of retirement allowance or otherwise;

(e) respecting the establishment, management and administration of a pension fund for the directors, officers and employees of the Corporation and their dependants, the contributions thereto to be made by the Corporation and the investment of the pension fund moneys thereof; and

(f) generally for the conduct and management of the affairs of the Corporation.

[§104-313]

(2) **Certain by-laws subject to Minister's approval**. – No by-law made under paragraph (1)(c) or (e), and no by-law made under paragraph (1)(d) that provides for the payment of any gratuity as described in that paragraph, has any effect unless it is approved by the Minister.

[*History:* Substantially the same as section 35 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.]

Financial Provisions

[§104-314]

51. (1) **Independence of the Corporation**. – Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

[§104-315]

(2) **Idem**.–Without limiting the generality of subsection (1), and notwithstanding sections 53 to 70 or any regulation made under any of those sections, the Corporation is not required to

(a) submit to the Treasury Board or to the Minister or the Minister of Finance any information the provision of which could reasonably be expected to compromise or constrain the journalistic, creative or programming independence of the Corporation; or

(b) include in any corporate plan or summary thereof provided to the Minister pursuant to section 54 or 55 any information the provision of which could reasonably be expected to limit the ability of the Corporation to exercise its journalistic, creative or programming independence.

[*History:* Added in 1991.

Commentary: For a general discussion of the arms-length status of the CBC and the purpose of this section, see the commentary at §104-264 above. The concept of the CBC's journalistic and programming independence is also reflected in subsections 35(2) and 46(5) of the *Broadcasting Act*, and section 68.1 of the *Access to Information Act*. For commentary, see above at §104-295.]

[§104-316]

52.1 Part VII of Financial Administration Act not to apply. – Notwithstanding the *Financial Administration Act*, Part VII of that Act does not apply to a debt incurred by the Corporation.

[§104-317]

52. Financial year. – The financial year of the Corporation is the period beginning on April 1 in one year and ending on March 31 in the next year, unless the Governor in Council otherwise directs.

[*History:* Added in 1991.

Commentary: This section authorizes the Corporation's current fiscal year.]

[§104-318]

53. (1) **Corporate plan**. – The Corporation shall annually submit a corporate plan to the Minister.

[§104-319]

(2) **Scope of corporate plan**. – The corporate plan of the Corporation shall encompass all the businesses and activities, including investments, of the Corporation and its wholly-owned subsidiaries, if any.

[§104-320]

(3) **Contents of corporate plan**. – The corporate plan of the Corporation shall include

(a) a statement of

(i) the objects for which the Corporation is incorporated, as set out in this Act,

(ii) the Corporation's objectives for the next five years and for each year in that period and the strategy the Corporation intends to employ to achieve them, and

(iii) the Corporation's expected performance for the year in which the plan is submitted as compared to its objectives for that year, as set out in the last corporate plan;

(b) the capital budget of the Corporation for the next following financial year of the Corporation;

(c) an operating budget for the next following financial year of the Corporation; and

(d) where the Corporation intends to borrow money in the next financial year, a general indication of the borrowing plans and strategies of the Corporation for that year.

[§104-321]

(3.1) **Approval of Minister of Finance**. – Where the Corporation includes a general indication of its plans to borrow money in its corporate plan, the Corporation shall submit that part of its corporate plan to the Minister of Finance for that Minister's approval.

[§104-322]

(4) **Capital budgets**. – The Corporation shall submit the capital budget to the Minister in a corporate plan **pursuant** to paragraph (3)(b) for the approval of the Treasury Board.

[§104-323]

(5) **Notification of business activity**. – Where the Corporation or a wholly-owned subsidiary of the Corporation proposes to carry out a substantial change to business activities in any period in a manner that is not consistent with the last corporate plan of the Corporation in respect of that period, the Corporation shall forthwith notify the Minister in writing of the inconsistency in the manner of carrying on the business activity.

[§104-324]

(6) **Scope of budgets**. – The budgets of the Corporation referred to in paragraphs (3)(b) and (c) shall encompass all the businesses and activities, including investments, of the Corporation and its wholly-owned subsidiaries, if any.

[§104-325]

(7) **Form of budgets**. – The budgets of the Corporation referred to in paragraphs (3)(b) and (c) shall be prepared in a form that clearly sets out information according to the major businesses or activities of the Corporation and its wholly-owned subsidiaries, if any.

[§104-326]

(8) **Approval of multi-year items**. – The Treasury Board may approve any item in a capital budget provided pursuant to paragraph (3)(b) for any financial year or years following the financial year for which the budget is submitted.

[*History:* Added in 1991.

Commentary: Sections 54 to 60 and 62 to 70 of the Act are entirely new. They deal with the financial administration of the CBC and replace the pre-1984 provisions of the *Financial Administration Act*, which had been made applicable to the CBC by section 38 of the *Broadcasting Act*, R.S.C. 1985, c.B-9. Language similar to certain of these provisions appears in sections 122-126, 128-133 and 144-150 of the *Financial Administration Act*, R.S.C. 1985, c.F-11. For a general discussion of the policies sought to be implemented, see the commentary under §104-264 above.]

[§104-327]

54. (1) **Summary of plan**. – The Corporation shall submit to the Minister, in respect of each financial year, a summary of the corporate plan submitted pursuant to section 54 that summarizes the information referred to in subsection 54(3), modified so as to be based on the financial resources proposed to be allocated to the Corporation as set out in the Estimates for that financial year that have been tabled in the House of Commons.

[§104-328]

(2) **Scope of summary**. – A summary shall encompass all the businesses and activities, including investments, of the Corporation and its wholly-owned subsidiaries, if any, and shall set out the major business decisions taken with respect thereto.

[§104-329]

(3) **Form of summary**. – A summary shall be prepared in a form that clearly sets out information according to the major businesses or activities of the Corporation and its wholly-owned subsidiaries, if any.

[§104-330]

(4) **Tabling in Parliament**. – The Minister shall cause a copy of every summary received pursuant to this section to be laid before each House of Parliament.

[§104-331]

(5) **Reference to committee**. – A summary laid before a House of Parliament pursuant to subsection (4) stands permanently referred to such committee of that House or of both Houses of Parliament as may be designated or established to review matters relating to the business and activities of the Corporation.

[*History:* Added in 1991.

Commentary: See the commentary under §104-264 and §104-326 above.]

[§104-332]

55. Regulations. – The Treasury Board may make regulations prescribing the form in which corporate plans and summaries required pursuant to sections 54 and 55 shall be prepared, the information to be included therein, the information to accompany corporate plans, and the time at, before or within which they are to be submitted and summaries are to be laid before each House of Parliament.

[*History:* Added in 1991.

Commentary: See the commentary under §104-264 and §104-326 above.]

[§104-333]

56. (1) **Bank accounts**. – The Corporation shall maintain in its own name one or more accounts with

(a) any member of the Canadian Payments Association;

(b) any local Cooperative Credit Society that is a member of a Central Cooperative Credit Society having membership in the Canadian Payments Association; and

(c) subject to the approval of the Minister of Finance, any financial institution outside Canada.

[§104-334]

(2) **Administration of Corporation funds**. – All moneys received by the Corporation through the conduct of its operations or otherwise shall be deposited to the credit of the accounts established pursuant to subsection (1) and shall be administered by the Corporation exclusively in the exercise of its powers and the performance of duties and functions.

[§104-335]

(3) **Investments**. – The Corporation may invest any moneys administered by it in bonds or other securities of, or guaranteed by, the Government of Canada.

[§104-336]

(4) **Proprietor's Equity Account**. – The Corporation shall, in its books of account, establish a Proprietor's Equity Account and shall credit thereto the amount of all money paid to the Corporation for capital purposes out of parliamentary appropriations. [S.C. 1991, c.11, s.57]

[*History:* Added in 1991.

Commentary: See the commentary under §104-264 and §104-326 above.]

[§104-337]

57. (1) **Receiver General account**. – The Corporation shall, if so directed by the Minister of Finance with the concurrence of the Minister, and may, if the Minister of Finance and the Minister approve, pay or cause to be paid all or any part of the money of the Corporation or of a wholly-owned subsidiary of the Corporation to the Receiver General to be paid into the Consolidated Revenue Fund and credited to a special account in the accounts of Canada in the name of the Corporation or subsidiary, and the Receiver General, subject to such terms and conditions as the Minister of Finance may prescribe, may pay out, for the purposes of the Corporation or subsidiary, or repay to the Corporation or subsidiary, all or any part of the money credited to the special account.

[§104-338]

(2) **Interest**. – Interest may be paid in respect of moneys credited to a special account pursuant to subsection (1), in accordance with and at rates fixed by the Minister of Finance with the approval of the Governor in Council.

[*History:* Added in 1991.

Commentary: See the commentary under §104-264 and §104-326 above.]

[§104-339]

58. Payment over surplus money. – Subject to any other Act of Parliament, where the Minister and the Minister of Finance, with the approval of the Governor in Council, so direct, the Corporation shall pay or cause to be paid to the Receiver General so much of the money of the Corporation or of a wholly-owned subsidiary of the Corporation as those Ministers consider to be in excess of the amount required for the purposes of the Corporation or subsidiary, and any money so paid may be applied toward the discharge of any obligation of the Corporation or subsidiary to the Crown or may be applied as revenues of Canada.

[*History:* Added in 1991.

Commentary: See the commentary under §104-264 and §104-326 above.]

[§104-340]

59. (1)-(7) [Repealed.]

[§104-341]

(8) **Reports to Minister**. – The Board shall make to the Minister such reports of the financial affairs of the Corporation as the Minister requires.

[§104-342]

61-69. [Repealed.]

[§104-343]

70. Report on wholly-owned subsidiaries. – The Corporation shall forthwith notify the Minister and the President of the Treasury Board of the name of any corporation that becomes or ceases to be a wholly-owned subsidiary of the Corporation.

[*History:* Added in 1991.

Commentary: See the commentary under §104-264 and §104-326 above.]

Report to Parliament

[§104-344]

71. (1) **Annual report**. – The Corporation shall, as soon as possible after, but in any case within three months after, the end of each financial year, submit an annual report on the operations of the Corporation in that year concurrently to the Minister and to the President of the Treasury Board, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister receives it.

[§104-345]

(2) **Reference to committee**. – An annual report laid before a House of Parliament pursuant to subsection (1) stands permanently referred to such committee of that House or of both Houses of Parliament as may be designated or established to review matters relating to the business and activities of the Corporation.

[§104-346]

(3) **Form and contents**. – The annual report of the Corporation shall include

(a) the financial statements of the Corporation referred to in section 60,

(b) the annual auditor's report referred to in subsection 62(1),

(c) a statement on the extent to which the Corporation has met its objectives for the financial year,

(d) quantitative information respecting the performance of the Corporation, including its wholly-owned subsidiaries, if any, relative to the Corporation's objectives, and

(e) such other information in respect of the financial affairs of the Corporation as is required by this Part or by the Minister to be included therein,

(f) and shall be prepared in a form that clearly sets out information according to the major businesses or activities of the Corporation and its wholly-owned subsidiaries, if any.

[*History:* Expanded version of section 39 of the *Broadcasting Act*, R.S.C. 1985, c.B-9.

Commentary: The form and content requirements prescribed by subsection (2) were added in 1991.]

[§104-347]

PART IV

RELATED AND CONSEQUENTIAL AMENDMENTS, REPEAL, TRANSITIONAL REVIEW AND COMING INTO FORCE PROVISIONS

Related and Consequential Amendments

[§104-348]

[NOTE: Sections 72 to 93 of Bill C-40 contained related and consequential amendments to certain other statutes as well as repeal, transitional coming into force provisions. These amendments and provisions are omitted.]

[§104-349]

60. [Note: Sections 31.1 to 54 of the *Online Streaming Act* contain related and consequential amendments to certain statutes and a coming into force provision relating to a related statute. These amendments and provisions are omitted.]

[§104-350]

SCHEDULE

(Sections 24, 25 and 30)

1. Any licence issued pursuant to C.R.T.C. Decision No. 87-140 of February 23, 1987.

2. Any licence issued pursuant to C.R.T.C. Decision No. 88-181 of March 30, 1988.

3. Any licence issued in connection with the operation of any radio or television station owned and operated by the Corporation.

[*History:* Added in 1991.

Commentary: For a discussion of this Schedule, see the commentary under §104-161 above.]

[§106-1]

CANADA]

Canadian Radio-television and Telecommunications Commission Act

[§106-2]

[R.S.C. 1985, c.C-22; as amended by R.S.C. 1985, c.28 (3rd Supp.), s.282; S.C. 1991, c.11, ss.75-80, in force June 4, 1991; S.C. 1993, c.38, ss.83-85, in force October 25, 1993; S.C. 1995, c.11, s.43(b), in force July 12, 1996; SI/96-72, 1996 *Canada Gazette Part II*, p.2572, in force July 12, 1996; S.C. 2001, c.34, ss.30-31, in force December 18, 2001; S.C. 2003, c.22, ss.224 (z.11) and 225(n), in force April 11, 2005, SI/2005-24, 2005 *Canada Gazette Part II*, p.523; S.C.2010, c.12, ss.1700 to 1709, in force March 16, 2012, SI/2012-14(o), 2012 *Canada Gazette Part II*, S.C. 2010, c.23, s.69; and S.C. 2023, c.8, s.37. Administered by the Department of Canadian Heritage.

For a detailed survey of the case law interpreting the CRTC Act, see Peter S. Grant, *Communications Law and the Courts in Canada*, Third Edition (Toronto: McCarthy Tétrault, 2020), at §76-18.

This statute, first enacted in S.C.1974-75-76, c.49, established the Canadian Radio-television and Telecommunications Commission in 1976. The Commission inherited the powers in relation to broadcasting formerly exercised by the Canadian Radio-Television Commission under the *Broadcasting Act*, and the powers in relation to the federally-regulated telephone and telegraph companies formerly exercised by the Telecommunication Committee of the Canadian Transport Commission under the *Railway Act*, the *Telegraphs Act* and the *National Transportation Act*. (These statutes as amended were superseded by the *Telecommunications Act*, S.C. 1993, c.38, proclaimed in force on October 25, 1993.)

As amended by Bill C-40 in 1991, the Commission has up to thirteen full-time members (an increase from nine) (s.3(1)). (At that time, the Commission also had up to six part-time members (a decrease from ten); however, the role of part-time members was eliminated in 2012.) The *CRTC Act* deals with the tenure of office, reappointment and termination of members (s.3), and the disqualification of members from holding outside interests (s.5). The duties of Chairperson are specified (s.6) and provisions are set forth relating to salaries, fees and expenses of members (s.7), appointment of staff (s.8), superannuation of members (s.9), head office, frequency of meetings and quorum of the Commission (s.10), and the Commission's power to enact by-laws (s.11). The Governor in Council may direct the CRTC to establish regional offices (s.10(1.1)).

The members of the Commission collectively exercise all the powers of the Commission relating to telecommunications (s.12(2)), and they can make by-laws delegating their powers to sub-committees (s.12(3)).

The objects and powers of the Commission in the broadcasting field are as stipulated in the *Broadcasting Act* (s.12(1)), set forth at §104-1 above.

In 2010, the government enacted S.C. 2010, c.12, sections 1700-1709 of which eliminated the role of part-time members to the Commission, none of whom had been appointed at that time. The provisions came into force on March 16, 2012. In S.C.2010, c.23, s.69, the government gave the CRTC powers to administer the *Canadian Anti-Spam Legislation (*CASL).]

AN ACT TO ESTABLISH THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

SHORT TITLE

[§106-3]

1. Short title. – This Act may be cited as the Canadian Radio-television and Telecommunications Commission Act.

INTERPRETATION

[§106-4]

2. Definitions. – In this Act,

[§106-5]

"broadcasting" has the same meaning as the *Broadcasting Act*;

[§106-6]

"Chairperson" means the Chairperson of the Commission designated by the Governor in Council under subsection 6(1);

[§106-7]

"Commission" means the Canadian Radio-television and Telecommunications Commission;

[§106-8]

"member" means a member of the Commission.

[§106-9]

"Minister" means such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act;

[Note: In SI/96-72, the Prime Minister designated the Minister of Canadian Heritage as the Minister for the purposes of this Act.]

[§106-10]

"telecommunications undertaking" means an undertaking in the field of telecommunication that is carried on in whole or in part within Canada or on a ship or aircraft registered in Canada.

[§106-11]

"Vice-Chairperson" means any Vice-Chairperson of the Commission designated by the Governor in Council under subsection 6(1).

ESTABLISHMENT AND CONSTITUTION OF COMMISSION

[§106-12]

3. (1) **Commission established**. – There is established a commission, to be known as the Canadian Radio-television and Telecommunications Commission, consisting of not more than 13 members, to be appointed by the Governor in Council.

[§106-13]

(2) **Tenure of office**. – A member shall be appointed to hold office during good behaviour for a term not exceeding five years but may be removed at any time by the Governor in Council for cause.

[§106-14]

(3) **Reappointment**. – Subject to section 5, a member is eligible for reappointment.

[Note: In *Shoan v. Canada (Attorney General)*, 2012 FC 426 (CanLII), Strickland J. quashed a decision of the Governor in Council in Order-in-Council P.C. 2016-0651, terminating for cause the appointment of Raj Shoan as a Commissioner of the CRTC. In announcing that decision, the Minister of Canadian Heritage had relied in part on a decision of the CRTC Chairperson finding that Shoan had been guilty of harassment. However, in *Shoan v. Canada (Attorney General)*, 2016 FC 1003 (CanLII), Zinn J. quashed this decision, ruling that the harassment investigator had a closed mind, had exceeded her mandate and that the Chairperson's involvement in the decision was procedurally unfair. Following the judgment of the court

quashing the Governor in Council decision, the Governor in Council issued Order in Council P.C. 2017-456, May 4, 2017, again terminating Shoan's appointment, but this time excluding from consideration the harassment complaint. In that Order in Council, the GIC stated that "Raj Shoan's actions with respect to inappropriate contact with CRTC stakeholders and his lack of recognition of and disregard for the impact of that contact on the reputation and integrity of the CRTC (the inappropriate contact ground) are fundamentally incompatible with his position", and that his "responses related to his refusal to respect internal CRTC processes and practices for meeting its obligations under the Access to Information Act and his negative public statements about the CRTC are fundamentally incompatible with his position". Accordingly he no longer "enjoyed the confidence of the Governor in Council to be a Commissioner of the CRTC".]

[§106-15]

4. Duties of members. – A member shall devote the whole of his or her time to the performance of his or her duties under this Act.

[§106-16]

5. (1) **Disqualifications**. – A person is not eligible to be appointed or to continue as a member of the Commission if the person is not a Canadian citizen ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, the person

(a) is engaged in a telecommunications undertaking; or

(b) has any pecuniary or proprietary interest in

(i) a telecommunication undertaking, or

(ii) the manufacture or distribution of telecommunication apparatus, except where the distribution is incidental to the general merchandising of goods by wholesale or retail.

[§106-17]

(2) **Disposal of interest**. – A member in whom any interest prohibited by subsection (1) vest by will or succession for the member's own benefit shall, within three months thereafter, absolutely dispose of that interest.

CHAIRPERSON AND VICE-CHAIRPERSONS

[§106-18]

6. (1) **Chairperson and Vice-Chairpersons**. – The Governor in Council shall designate one of the members to be Chairperson of the Commission and two of the members to be Vice-Chairpersons of the Commission.

[§106-19]

(2) **Chairperson chief executive officer**. – The Chairperson is the chief executive officer of the Commission, has supervision over the direction of the work and the staff of the Commission and shall preside at meetings of the Commission.

[Note: In *Shoan v. Canada (Attorney General)*, 2016 FCA 261 (CanLII), the court dismissed an argument that the CRTC Chairperson had no authority to establish hearing panels. The court held that implicit in the powers given by virtue of subsection 6(2), the Chairperson has the authority to assign cases and members to cases.]

[§106-20]

(3) **Chairperson's absence, incapacity or office vacant**. – In the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant, the Commission may authorize one of the Vice-Chairpersons to exercise the powers and to perform the duties and functions of the Chairperson.

[§106-21]

(4) **Acting Chairperson**. – The Commission may authorize one or more of its members to act as Chairperson if the Chairperson and both Vice-Chairpersons are absent or unable to act or if the office of Chairperson and each office of Vice-Chairperson are vacant.

REMUNERATION

[§106-22]

7. (1) **Salaries and fees**. – Each member shall be paid a salary to be fixed by the Governor in Council.

[§106-23]

(2) **Expenses**. – Each member is entitled to be paid such travel and living expenses incurred in the performance of his duties as are fixed by by-law of the Commission.

STAFF

[§106-24]

8. Appointment. – The officers and employees necessary for the proper conduct of the business of the Commission shall be appointed in accordance with the *Public Service Employment Act*.

SUPERANNUATION

[§106-25]

9. (1) **Member's superannuation**. – The members of the Commission shall be deemed to be persons employed in the public service for the purposes of the *Public Service Superannuation Act*.

[§106-26]

(2) **Compensation**. – For the purposes of any regulations made pursuant to section 9 of the *Aeronautics Act*, the members of the Commission are deemed to be persons employed in the federal public administration.

OFFICES, MEETINGS AND RESIDENCE

[§106-27]

10. (1) **Head Office**. – The head office of the Commission shall be in the National Capital Region described in the schedule to the *National Capital Act* or at such other place within Canada as may be designated by the Governor in Council.

[§106-28]

(1.1) **Regional offices**. – The Governor in Council may direct the Commission to establish an office of the Commission in any region of Canada and the Commission shall comply with any such direction.

[§106-29]

(2) **Meetings**. – The Commission shall meet at least six times in each year.

[§106-30]

(3) **Quorum**. – A majority of the members in office constitute a quorum of the Commission.

[§106-31]

(4) **Telephone conferences**. – A member may, subject to the by-laws of the Commission, participate in a meeting of the Commission or a committee of the Commission by means of such telephone

or other communication facilities as permit all persons participating in the meeting to hear each other, and a member who participates in such a meeting by those means is deemed for the purposes of this Act to be present at the meeting.

[§106-32]

10.1 (1) **Residence of members**. – Subject to subsection (2), the members of the Commission shall reside in the National Capital Region as described in the schedule to the *National Capital Act* or within any distance of it that may be determined by the Governor in Council.

[§106-33]

(2) **Residence of members - regional office**. - If a regional office of the Commission is established under subsection 10(1.1), a member of the Commission who is designated for that region by the Governor in Council shall reside in that region and within any distance of that regional office that may be determined by the Governor in Council.

BY-LAWS

[§106-34]

11. (1) **By-laws**. – The Commission may make by-laws

(a) respecting the calling of meetings of the Commission,

(b) respecting the conduct of business at meetings of the Commission, the establishment of special and standing committees of the Commission, the delegation of duties to those committees and the fixing of quorums for meetings thereof; and

(c) fixing the travel and living expenses to be paid to members.

[§106-35]

(2) **By-law subject to Minister's approval**. – No by-law made under paragraph (1)(c) has any effect unless it has been approved by the Minister.

OBJECTS, POWERS, DUTIES AND FUNCTIONS

[§106-36]

12. (1) **In relation to broadcasting**. – The objects and powers of the Commission in relation to broadcasting are as set out in the *Broadcasting Act*.

[§106-37]

(2) **Telecommunications**. – The full-time members of the Commission and the Chairperson shall exercise the powers and perform the duties vested in the Commission and the Chairperson, respectively, by the *Telecommunications Act* or any special Act, as defined in subsection 2(1) of that Act, or by *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act*, the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* and the *Telecommunications Act*.

[§106-38]

(3) **By-laws**. -The members of the Commission may make by-laws

(a) respecting the establishment of special and standing committees of the members, the delegation of the powers, duties and functions of the members to those committees and the fixing of quorums for meetings of those committees; and

(b) providing that any act or thing done by those committees in the exercise of the powers or the performance of the duties and functions delegated to it are deemed to be an act or thing done by the members.

[§106-39]

13. (1) **Annual report**. – The Commission shall, within three months after the end of each fiscal year, submit to the Minister a report, in such form as the Minister may direct, on the activities of the Commission for that fiscal year, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister receives it.

[§106-40]

(2) **Broadcasting Act**. - The report must include information about the following in respect of the fiscal year, including their number:

(a) inquiries conducted under subsection 12(1) of the *Broadcasting Act* in relation to the identification, prevention and removal of barriers;

(b) inquiries conducted under that subsection in relation to sections 42 to 44 of the *Accessible Canada Act*;

(c) orders made under subsection 12(2) of the *Broadcasting Act* in relation to the identification, prevention and removal of barriers;

(d) orders made under that subsection in relation to sections 42 to 44 of the *Accessible Canada Act*;

(e) notices of violation issued under section 34.8 of the *Broadcasting Act* in relation to contraventions of a regulation or order made under Part II of that Act in relation to the identification, prevention and removal of barriers; and

(f) notices of violation issued under section 34.8 of the *Broadcasting Act* in relation to contraventions of any of subsections 42(1) to (4) and (7), 43(1) to (3) and 44(1) to (3) and (6) of the *Accessible Canada Act*.

[History: paragraphs 13(2)(e) and (f) were added in 2023, by S.C. 2023, c.8, s.37.]

[§106-41]

(3) **Telecommunications Act**. - The report must include information about the following in respect of the fiscal year, including their number:

(a) inspections conducted under section 71 of the *Telecommunications Act* in relation to compliance with decisions made under that Act in relation to the identification, prevention and removal of barriers;

(b) inspections conducted under that section in relation to compliance with sections 51 to 53 of the *Accessible Canada Act*;

(c) orders made under section 51 of the *Telecommunications Act* in relation to the identification, prevention and removal of barriers;

(d) orders made under that section in relation to sections 51 to 53 of the *Accessible Canada Act*;

(e) notices of violation issued under section 72.005 of the *Telecommunications Act* in relation to contraventions of decisions made under that Act in relation to the identification, prevention and removal of barriers;

(f) notices of violation issued under that section in relation to contraventions of any of subsections 51(1) to (4) and (7), 52(1) to (3) and 53(1) to (3) and (6) of the *Accessible Canada Act*;

(g) inquiries conducted under subsection 48(1) of the *Telecommunications Act* in relation to the identification, prevention and removal of barriers; and

(h) inquiries conducted under subsection 48(1.1) of that Act.

[§106-42]

(4) **Observations and prescribed information**. – The report must include

(a) observations about whether the information referred to in subsections (2) and (3) discloses any systemic or emerging issues related to the identification and removal of barriers, and the prevention of new barriers; ands

(b) any information respecting the identification, prevention and removal of barriers that is prescribed by regulations made under subsection (5).

[§106-43]

(5) **Regulations**. - The Governor in Council may make regulations for the purposes of paragraph (4)(b).

[§106-44]

(6) **Definition of barrier**. - In this section, barrier has the same meaning as in section 2 of the *Accessible Canada Act.*

[§108-1]

MANDATE LETTER TO CRTC CHAIR

On February 3, 2023, Pablo Rodriguez, Minister of Canadian Heritage, and François-Philippe Champagne, Minister of Innovation, Science and Economic Development, sent a letter to Vicky Eatrides, recently appointed Chair of the Canadian Radio-television and Telecommunications Commission (CRTC).

[§108-2]

Dear Vicky Eatrides:

Congratulations on your appointment as Chairperson and Chief Executive Officer of the Canadian Radio-television and Telecommunications Commission (CRTC).

Through the open and transparent process for the selection of this important position, it became clear that your track record of leadership, change management, competition and commitment to the public interest was what was needed for the CRTC at this critical juncture. We are confident in your abilities to lead this organization into an evolving and ever-more-important function, and to see to its continued modernization to being more open, transparent, efficient, and effective. The need for a new approach is underpinned by the dramatic changes that are occurring in our country's communications ecosystem. Given this, we would like to take this opportunity to highlight a number of the issues that will be important in fulfilling your mandate.

For over 50 years, the Government of Canada has remained committed to an independent public authority that operates at arm's length as a communications regulator. This ensures that the Canadian communications system is supervised and regulated in an impartial manner by an expert body, which is essential to a free and democratic society. Mindful of our respective roles and responsibilities, we believe that we can work together on shared objectives, such as the creation and dissemination of quality Canadian audio and audiovisual content on all platforms and the strengthening of telecommunications affordability, competition, and consumer rights.

For Canadians, the Internet has added unprecedented connectivity and communication to almost every aspect of daily life. Greater availability and affordability of high-speed Internet offer Canadians increased opportunities to participate in our economy and democracy and to stay connected with family and friends. While digital transformation creates opportunities, it also brings challenges. We have now all witnessed the ways in which digital technologies can undermine our culture, entrench inequality and unfairness in society and jeopardize democracy. Navigating this digital reality will be a critical focus for all of us.

The Government of Canada has an ambitious legislative and policy agenda to advance the cultural, social, and economic interests of Canada and of Canadians in the digital economy. Together, the proposed *Online Streaming Act*, *Online News Act*, and *Digital Charter Implementation Act*, as well as a future legislation on online safety, represent core pillars of our digital policy agenda. This legislation builds on the foundations of the *Broadcasting Act* and the *Telecommunications Act*, as well as Canada's anti-spam legislation, alongside important ongoing work on competition, digital access and adoption, and Canadian leadership in new technologies. Your leadership, and that of the CRTC more broadly, will be critical to ensuring that new legislation is implemented effectively. Practical and workable regulations can ensure policy goals are met while maintaining Canadians' online experience and ensuring everyone can participate in and benefit from an increasingly digital culture and society.

[§108-3]

An expert and independent regulator facing waning trust

As an expert independent regulator, the CRTC implements the laws and regulations set forth by Parliament in the public interest. As the CRTC's leader, your role is vital in upholding public trust in the institution. The CRTC has a long history of balancing critical public policy objectives that can come into tension, which include individual interests and the pursuit of the common good and the long-term interests of the country.

Unfortunately, our sense is that public confidence and trust in the CRTC has waned in recent years. Over the course of our mandates, we have spoken and engaged with Canadians, parliamentarians, stakeholders, academics, and civil society on their experiences with, and perceptions of, the CRTC. While there is broad and strong support for an independent and effective CRTC, we consistently heard that the organization falls short in three areas:

1. Timeliness of decision making
2. Accessibility of CRTC processes to the public, non-corporate interest groups, and civil society
3. Openness and transparency

On the first point, there is a perception that the CRTC is taking too long to make decisions. CRTC regulatory decisions are essential to creating a stable, competitive, and innovative business environment. Undue delays create uncertainty and potentially impact investment decisions and service offerings for Canadians. As the pace of technological change continues unabated, timely decision making will only be more critical in responding to the needs and expectations of society and industry.

Public interest decision making requires hearing from diverse interests. Right now, there is a perception among many that access to CRTC processes is unequal. While the regulator's open and evidence-based processes are a core strength, barriers to participation remain. Smaller organizations and civil society groups, in particular, expressed concern about not having the same level of resources as large corporate interests to participate in CRTC proceedings.

In addition, hearing from traditionally marginalized communities is essential to achieving a fairer and inclusive communications system that is reflective of Canadian society. The *Online Streaming Act*, for example, proposes to update the policy objectives of the *Broadcasting Act* to be more inclusive of Indigenous peoples, persons with disabilities, Black and other racialized Canadians, and ethnocultural communities, among others. These communities deserve a seat at the table in these discussions. In this vein, the CRTC should continue to advance reconciliation with First Nations, Inuit, and Métis peoples by engaging and co-developing policies that may impact them in a spirit of recognition of rights, respect, co-operation, and partnership.

In the years ahead, the CRTC's decisions will shape the digital economy in Canada. As noted above, the CRTC has a long history of evidence-based decision making. Through legislation before Parliament, the Government proposes to further enhance the CRTC's information-gathering and data-sharing powers. We trust that interested parties, civil society, and the public can continue to count on the CRTC to help them understand the reasoning, evidence, and data underpinning its decisions. Active market monitoring and international benchmarking can help Canadians understand the context for regulation and so better equip them to participate in its formation.

Success depends on sharing data and information and collaborating on complex and interrelated issues arising from the digital economy. In the years ahead, the CRTC may wish to consider opportunities where it can coordinate its work with existing and proposed regulators, such as the commissioners for privacy, competition, and, potentially, digital safety and data.

Finally, we also heard from civil society that improved digital access is important to improving transparency and accessibility of CRTC decision making. For example, the Copyright Board of Canada recently worked with the Canadian Legal Information Institute (CanLII) to upload its tariff decisions to the database in an effort to make those decisions more accessible. We encourage you to consider creative and innovative ways to improve access to and usability of information and data held by the CRTC.

[§108-4]

Forward agenda: Telecommunications

Telecommunications are increasingly essential to all aspects of Canadians' lives and livelihoods. There is more work to be done to improve the functioning of the telecom industry for Canadians. To guide this work, the Government has proposed a new policy direction to the CRTC that will be foundational for all efforts in

this area. Once final, the policy direction will provide clear instruction on key policy issues that outline the Government's expectations as the CRTC performs its duties under the *Telecommunications Act*.

Overall, competition and affordability continue to be seminal issues in telecommunications, given the inherent barriers to entry and economies of scale. The CRTC has played a critical role in advancing competition, and its framework for wholesale access represents a core stream of ongoing work. Wholesale access is a proven regulatory tool for enabling retail competition in the Internet service market, and the CRTC can ensure that this tool is used, supervised, and adjusted effectively and in a timely manner. The CRTC can also promote competition by continuing with its approach to wireless services, while also monitoring to determine when changes are necessary.

The Government of Canada continues to support a competitive marketplace where consumers are treated fairly. It is important to continue to advocate for consumers, particularly those who are vulnerable, in their relationships with service providers. The CRTC can contribute to the Telecommunications Reliability Agenda to improve the reliability and resiliency of telecommunications networks and protect consumer rights. Protecting consumer interests is important in many regards, including when assessing the effectiveness of consumer codes and working with industry to protect consumers from fraudulent calls.

While the vast majority of Canadians are well served by high-quality telecommunications networks, gaps remain in underserved rural, remote, and Indigenous regions where the business case for network expansion is challenging.

The Government and the CRTC have important and shared roles to help bridge these gaps and ensure that all Canadians have access to high-quality broadband and mobile networks. The CRTC can continue to make positive impacts through support for infrastructure and consideration of broadband deployment barriers.

[§108-5]

Forward agenda: Digital media

The *Online Streaming Act*, also known as Bill C-11, seeks to update the policy objectives of the *Broadcasting Act* and ensure that streaming services meaningfully contribute to supporting the creation, production, and distribution of Canadian stories and music. To achieve these objectives, the Bill proposes giving the CRTC new regulatory tools. The passage of the *Online Streaming Act* would represent a watershed moment and an opportunity to craft a forward-looking, flexible regulatory framework for online broadcasting in Canada. If Parliament passes the Bill, the Governor in Council is expected to issue a policy direction to guide the CRTC in implementing it. Once the policy direction process has concluded, you can expect interested parties to quickly look to the CRTC to provide a roadmap for when and how the key regulatory questions will be considered.

The policy debate around the *Online Streaming Act* raised a key concern amongst parliamentarians regarding freedom of expression as they look for assurance that the Bill cannot be used to stifle what Canadians say online. The *Broadcasting Act* is fundamentally about promoting cultural expression, not hindering it. For decades, the Act has ensured re-investment into local content creation, support for creators and the sustainability of creative industries in Canada. Subsection 2(3) of the current Act already provides that it must be construed in a manner consistent with freedom of expression. As the Bill currently stands, parliamentarians have proposed additional amendments to further reinforce the importance and protection of freedom of expression. The rights and freedoms enjoyed by Canadians under the *Canadian Charter of Rights and Freedoms* are of paramount importance. If Parliament adopts Bill C-11, the Government trusts that the CRTC will implement a renewed *Broadcasting Act* in a manner consistent with the Charter.

Bill C-18, the *Online News Act*, seeks to enhance fairness in the Canadian digital news marketplace and to support its sustainability. The bargaining framework proposed by the legislation is intended to benefit a diversity of news businesses, including local and independent outlets. If passed, Bill C-18 would empower the CRTC to implement and oversee this new framework by creating and enforcing regulations. The Government will rely on the Commission`s expertise in dispute resolution to implement an effective, common-sense framework.

Maintaining a free and independent press in Canada must guide the Commission in its work. The independence of the CRTC, along with the transparency of its processes, will be of the highest importance. The Government will also seek input from the CRTC in the process of exercising the regulatory powers delegated to the Governor in Council under the Act. This will allow the Government to benefit from the experience and expertise of the Commission and to ensure the efficient and consistent application of the Act.

[§108-6]

Conclusion

You assume leadership of the CRTC at a critical moment, as we are beginning a new chapter in the digital age. The mission of the CRTC has never been more important or relevant.

During your mandate, the Commission will consider some incredibly important questions. The workload will no doubt be significant. We believe that the public's trust and confidence in the CRTC to respond to this work will depend on the CRTC's ability to harness and grow its expertise and to meaningfully address the concerns that we have outlined above, while maintaining the highest level of impartiality and integrity.

Canadians have heightened needs and expectations for access to an affordable, competitive, and world-class communication system. By regulating in the public interest, you can help ensure all Canadians can create, connect, and participate in our country's democracy, culture, and economy.

We are confident that you and the rest of the Commission are up to the task. We wish you all the best as you assume your new responsibilities.

Sincerely,

The Honourable Pablo Rodriguez, P.C., M.P.
Minister of Canadian Heritage and Quebec Lieutenant

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of Innovation, Science and Industry

[§110]

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