



C-10: The Legal Issues

A bit of context regarding section 3

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3 November 2021

Does C-10 still matter?

Wednesday, October 27, 2021



“Internet Regulations Drafted”, *Blacklock’s Reporter*, (27 October 2021)

...

The bill lapsed in the Senate communications committee August 15 though **Minister Rodriguez** had **called its passage “an absolute priority” for cabinet**. “You’re talking about the Broadcasting Act which was a very, very important bill,” he said.

“We made many promises to table important bills in the first 100 days and that includes the broadcasting bill,” said Rodriguez. **“We need that bill. We have to modernize it.”**

CRTC announced its jurisdiction over online broadcasting 22 years ago

New Media, Broadcasting Public Notice CRTC 1999-84 and Telecom PN CRTC 99-14 (Ottawa, 17 May 1999), paras. 38 - 44

CRTC's arguments:

1. **Definition of "broadcasting" is technologically neutral:** “includes the transmission of programs, whether or not encrypted, by other means of telecommunication”; delivery of programs by the Internet is still broadcasting
2. **‘Broadcasting receiving apparatus’:** **sufficiently broad** to include personal computers or other “devices”
3. **Irrelevant that users activate program delivery** or that programs not delivered simultaneously

At that time (and now) s. 9(4) required CRTC to exempt online broadcasting from Part II requirements

S. 9(4)

The Commission **shall**, by order,

on such terms and conditions as it deems 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 or of a regulation made under this Part

where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

2017 Netflix agreement: are \$100 million material?



Government
of Canada

Gouvernement
du Canada

Canada.ca > [Canadian Heritage](#)

Launch of Netflix Canada: a recognition of Canada's creative talent and its strong track record in creating films and television

From: [Canadian Heritage](#)

News Release

OTTAWA, September 28, 2017

Today, the Minister of Canadian Heritage and Netflix announced an agreement that will see the company create Netflix Canada – a first of its kind production company for Netflix outside of the United States – and invest a minimum of CAD \$500 million in original productions in Canada over the next five years.

The government's agreement with Netflix

Raised at least two questions and at least one problem.

Questions:

1. Does CRTC have evidence that 9(4) no longer applies?
2. If CRTC rescinds or changes the DMEO, would non-Canadian broadcasters be subject to its authority?

Q1: does CRTC have the authority to compel non-licensees to submit information?

CRTC authority	Parties subject to authority	Statutory section
Submit program & financial information	Licensees	10(1)(i)
Audit books	Licensees	10(1)(j)
Require carriage of programming services	BDU licensees	9(1)(h)
Make carriage of broadcasting a priority	BDU licensees	9(1)(g)
Establish classes	Licensees	9(1)(a)
Shut down broadcasters	Licensees	9(1)(d) - non-renewal
Approve telco contracts	Licensees	9(1)(f)
Pay licence fees	Licensees	11(1)

Q2: does CRTC have the authority to license non-Canadian broadcasters operating in part in Canada under the 1991 *Act*? Section 4(2) suggests yes

4(2) 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 ...

...

(b) any spacecraft that is under the direction or control of [Canada, a Canadian citizen/resident or Canadian corporation]

...

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

(3) ...whether or not they are carried on for profit or as part of, or in connection with, any other undertaking or activity.

Yes: *Rogers Communications Inc. v. Canada (Attorney General)*, [1998 CanLII 7494 \(FC\)](#)

- 1991 *Broadcasting Act*, s. 3(1)(a): “effectively owned & controlled by Canadians” (does not define Canadian broadcasting undertaking)
- 1997 *Direction to the CRTC (Ineligibility of Non-Canadians)*: non-Canadians cannot hold broadcasting licences – except for qualified successors – subsidiary operating only in Canada, executives and Board are Canadian and have exclusive control over programming
- 1998: non-Canadians indirectly held 50.8% off the common shares of BC Telecom, BC Tel and Quebec-Telephone

Held: 3(1)(a) does not require every broadcasting undertaking to be entirely or wholly Canadian owned and controlled

No – the problem: If the CRTC rescinds or amends the DMEO, Cabinet's *Direction* prevents it from licensing non-Canadian online broadcasters and CRTC could only license Canadian online services



CONSOLIDATION

Direction to the CRTC
(Ineligibility of Non-Canadians)

SOR/97-192

CODIFICATION

Instructions au CRTC
(inadmissibilité de non-Canadiens)

DORS/97-192

Morning session

What do Canada's Parliamentarians want from Canada's broadcasting system?

Courts will focus on the new section 3

- ***CKOY Ltd. v. R.***, [1978 CanLII 40 \(SCC\)](#) (p. 11): “the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute”
- ***CRTC v. CTV Television Network Ltd. et al.***, [1982 CanLII 175 \(SCC\)](#) (p. 539) “... nothing in the Act ... precludes the Executive Committee from imposing the kind of condition of licence renewal that it imposed here when it was authorized under s. 17(1) to further the objects of CRTC set out in s. 15 and to implement the broadcasting policy enunciated in s. 3.”
- ***Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168***, [2012 SCC 68 \(CanLII\)](#), at ¶¶22
Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, **they circumscribe the discretion granted to a subordinate legislative body.**
- ***Bell Canada v. Canada (Attorney General)***, [2019 SCC 66](#), at ¶49
.... the extent of the CRTC’s powers under ... section [10] of the *Broadcasting Act* means that a narrow reading of s. 9(1)(h) will not hamper its efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1).

TVA Group Inc. v. Bell Canada, [2021 FCA 153](#)

- [31] ...This appeal therefore raises questions of law that directly concern the limits of the CRTC's power.
- [35] ... section 3 and section 5 of the *Act* are not attributive of jurisdiction and are not sufficient in and of themselves to justify the validity of the impugned regulatory provisions. ... the Court must analyze the issue of whether the CRTC has the jurisdiction to adopt the impugned regulatory provisions, particularly in light of section 10 of the *Act*, which grants the CRTC its delegated authority to make regulations
- [36] ... **the Court must follow the modern approach to statutory interpretation** I will therefore examine (i) the wording of paragraph 10(1)(h) of the *Act*, (ii) the purpose of the Act and finally (iii) its legislative history, all with a view to determining whether the impugned regulatory provisions are *ultra vires* the powers conferred on the CRTC under the *Act*.

TVA Group Inc. v. Bell Canada, [2021 FCA 153](#)

- [50] ...The importance TVA gives to *Reference re Broadcasting Policy* in this case is exaggerated given the issue that was before the Supreme Court. ... it **does not mean that every regulatory measure adopted by the CRTC that has economic consequences is *de facto ultra vires* the Act. *Reference re Broadcasting Policy* cannot ... be seen as a prohibition against or elimination of any power of the CRTC to exert economic control over a programming undertaking and a distribution undertaking** within the Canadian broadcasting system.
- [51] ...it should also be noted that in Bell 2019, the Supreme Court of Canada clearly indicated that a narrow reading of paragraph 9(1)(h) “will not hamper [the CRTC’s] efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1)” (Bell 2019, para. 49).

Section 3 matters. How has Parliament developed its broadcasting policies in the past?

1929 Royal Commission on Radio Broadcasting (Aird)

1932 *Canadian Radio Broadcasting Act*, S.C. 1932, c. 51

1957 Royal Commission on Broadcasting (Massey)

1958 *Broadcasting Act*, 7 Eliz. 2, c. 22

1965 Advisory Committee on Broadcasting (Fowler)

1966 White Paper on Broadcasting

1968 *Broadcasting Act*, 16&17 Eliz. 2, c. 25

1991 Act – ten years in the making

1982 Federal Cultural Policy Review Committee

1983 DoC: *Towards a New National Broadcasting Policy*

1986 Caplan-Sauvageau Task Force on Broadcasting Policy

1988 HoC Standing Committee on Communications and Culture

1991 *Broadcasting Act*, S.C 1991, c.11

Bill C-10: A few or many progenitors?

1995 Information Highway Advisory Council

1999 CRTC – *New Media* ([PN 1999-84](#))

2003 House of Commons Standing Committee on Canadian Heritage,
[Our Cultural Sovereignty](#)

2010 CRTC – [Navigating Convergence](#)

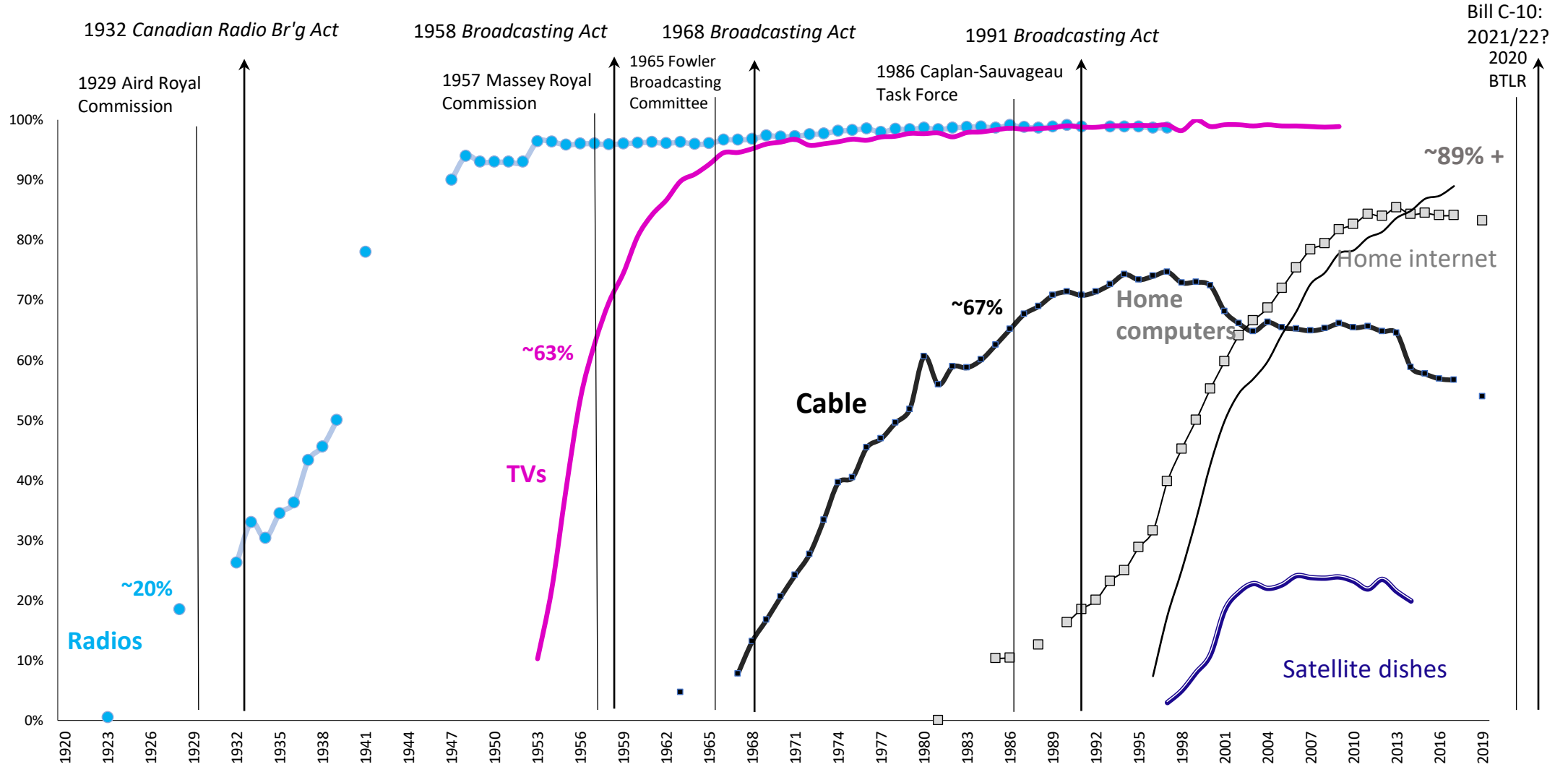
2011 CRTC – [Navigating Convergence II](#)

CHPC, *IMPACTS OF PRIVATE TELEVISION OWNERSHIP CHANGES AND THE MOVE TOWARDS NEW VIEWING PLATFORMS*, ([Ottawa, March 2011](#))

Bill C-10 - continued

- 2016 Canadian Heritage in June appoints [Expert Advisory Group on Canadian content in a digital world](#) , and in September launches [public consultation](#)
- 2017 Federal budget proposes to review and modernize *Broadcasting and Telecommunication Acts*
- 2017 Canadian Heritage publishes [Creative Canada](#) in September and re-announces review/modernization of Broadcasting Act
- 2018 Broadcasting and Telecommunications Legislative Review panel appointed
- 2020 BTLR Panel reports

Households' adoption of new communications equipment and new broadcasting legislation: 1920 to 2021



Source of data: Statistics Canada (*Historical Statistics of Canada*; household equipment data)

Bill C-10 and CHPC: 30 meetings (Feb/21 to June 21) and 142 witnesses

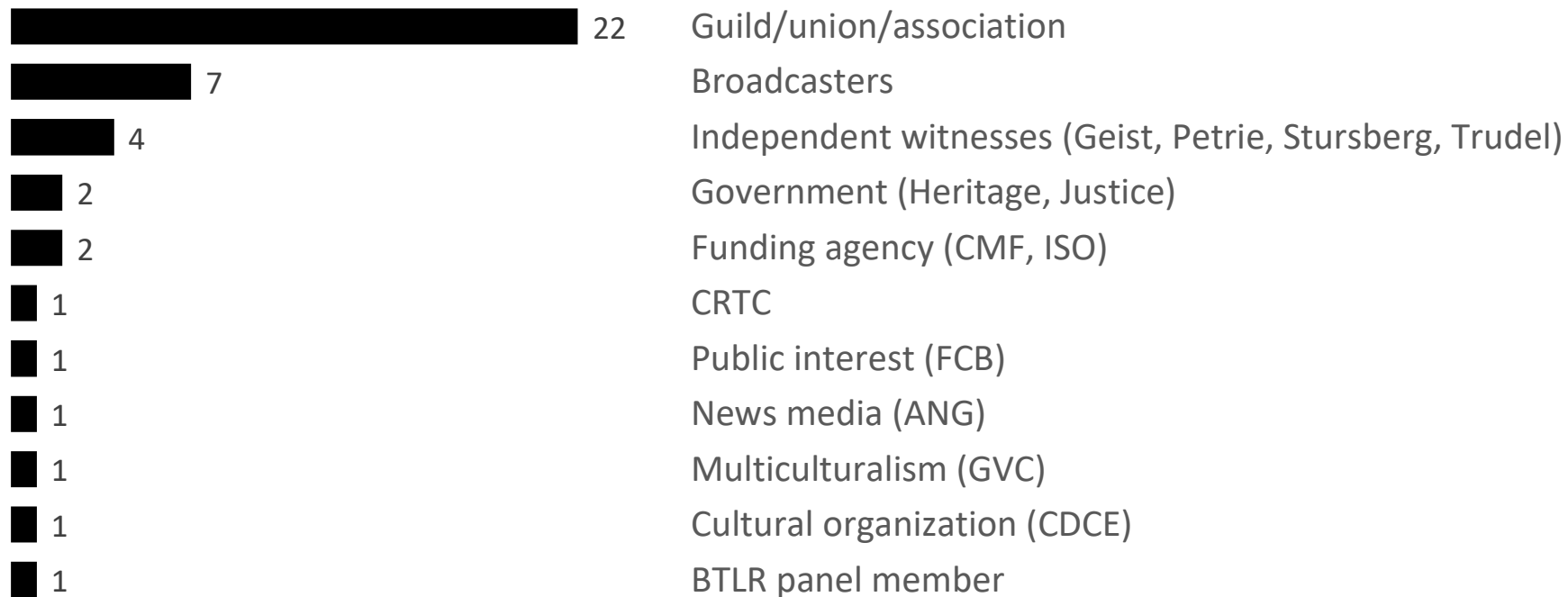
The screenshot shows a web browser window with the following elements:

- Browser tabs: CHPC - Bill C-10, An Act to Ameri
- Address bar: ourcommons.ca/Committees/en/CHPC/StudyActivity?studyActivityId=11135743
- Navigation icons: Back, Forward, Refresh, Search, Star, Profile (M)
- Bookmarks: Apps, News, CRTC, E-mail, Law, Weather, Banking, Legal searches, Website, Research, BTLR, Other bookmarks, Reading list
- Section: Information
- Dropdown menu items: Order of Reference, Briefs (46), **Witnesses (142)** (circled in red), and an unlabeled item.
- Section: Meetings
- Meeting details:
 - Friday, June 11, 2021 (with laptop and warning icons): Meeting 44, 12:44 p.m. - 3:23 p.m. (EDT)
 - Thursday, June 10, 2021 (with laptop and warning icons): Meeting 43, 3:35 p.m. - 5:34 p.m. (EDT)

<https://www.ourcommons.ca/Committees/en/CHPC/StudyActivity?studyActivityId=11135743>

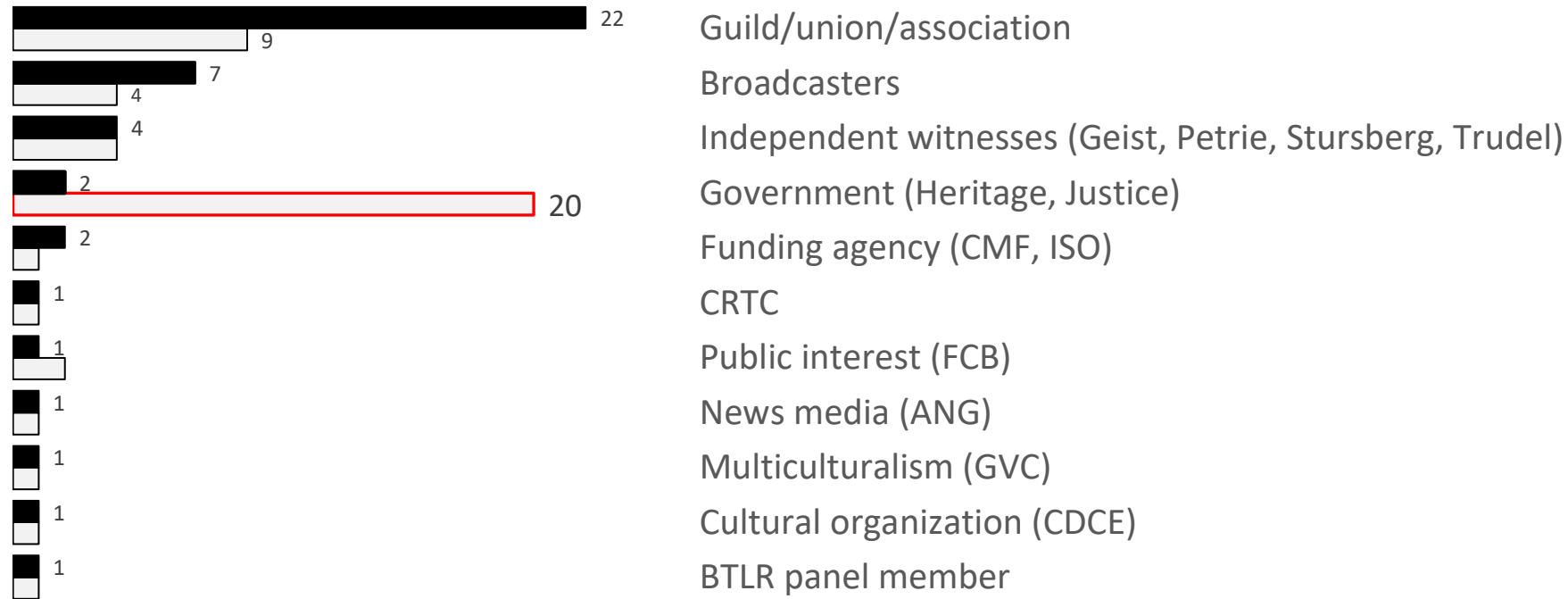
142 witnesses, representing 43 parties

43 parties that appeared before CHPC, by type of organization

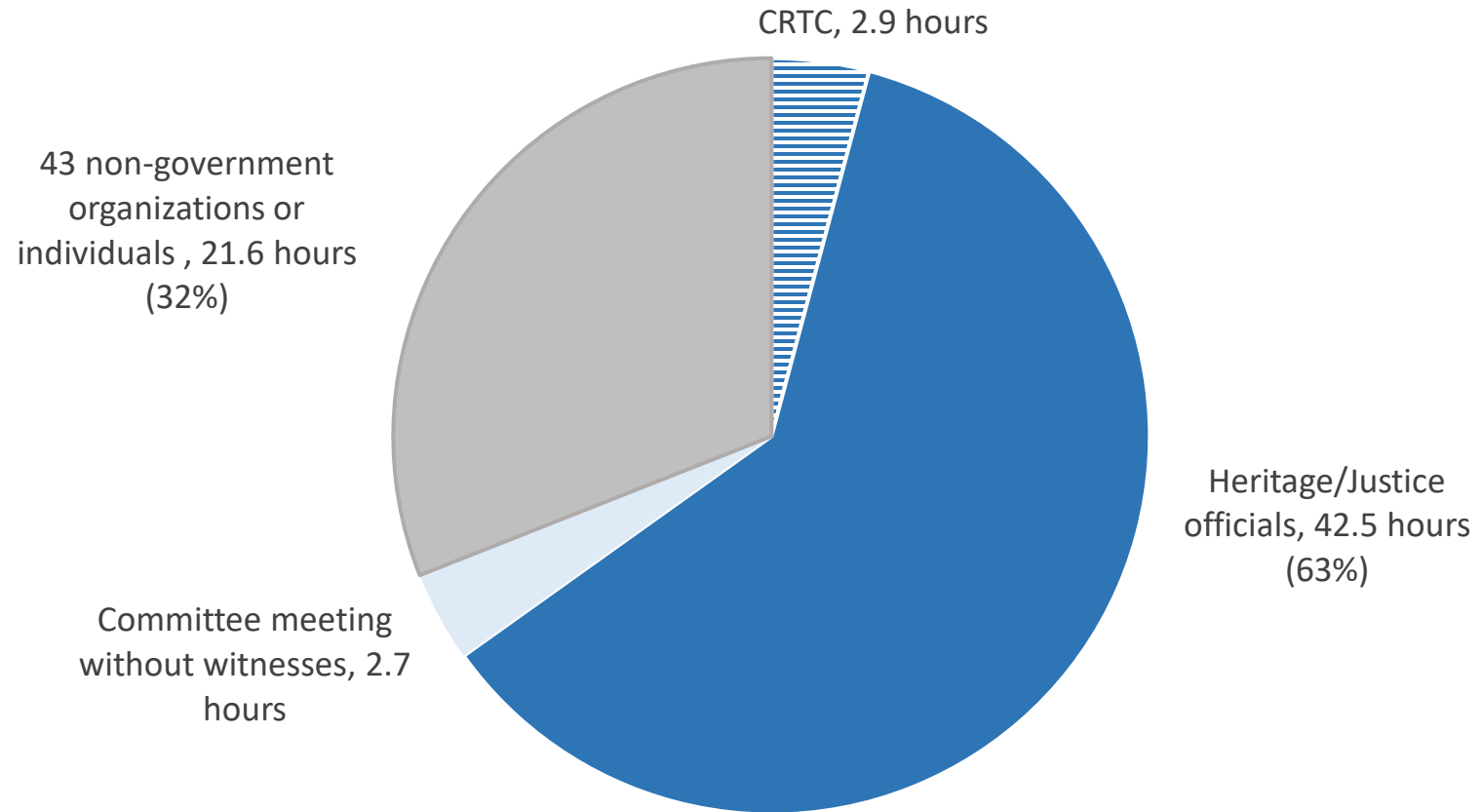


CHPC – 30 meetings on Bill C-10

43 parties that appeared before CHPC,
by type of organization and number of CHPC meetings where they appeared
(does not sum to 30 because CHPC often heard more than one party per meeting)



HoC Heritage Committee (Spring 2021)
67.4 hours to pre-study and study Bill C-10



Outcome: House passed Bill C-10 on 29 Jun/21 (196 in favour; 112 against)

The screenshot shows the LEGISinfo website for Bill C-10. The page title is "C-10 43rd Parliament, 2nd session" with dates "September 23, 2020, to August 15, 2021". The bill's title is "An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts". The sponsor is the "Minister of Canadian Heritage". The bill type is "House Government Bill".

The "Summary" section includes:

- Current status:** At consideration in committee in the Senate
- Latest activity:** Referral to committee on June 29, 2021 (Senate)

The "Progress" section is divided into three columns: House of Commons, Senate, and About.

House of Commons	Senate	About
First reading Completed on November 3, 2020	First reading Completed on June 22, 2021	
Second reading Completed on February 16, 2021	Second reading Completed on June 29, 2021	
Consideration in committee Completed on June 14, 2021	Consideration in committee No activity	Standing Senate Committee on Transport and Communications Studies and bills
Report stage Completed on June 21, 2021	Report stage Not reached	
Third reading Completed on June 21, 2021	Third reading Not reached	

Broadcasting policy for Canada

1991 – 59 objectives; 2021 – 74 objectives

	1968 Act	1991 Act	Bill C-10 – Jun/21	% change ('91 – '21)
Sections:				
# declaratory sections	3	4	4	0%
# mandatory sections	1 (10%)	5 (25%)	8 (36%)	60%
# discretionary sections	6 (60%)	11 (55%)	10 (45%)	- 9%
Total sections	10 (100%)	20 (100%)	22 (incl'g e.1, f.1) (100%)	10%
Objectives (acts/verbs):				
# mandatory objectives	2 (11%)	8 (14%)	14 (19%)	75%
# discretionary objectives	16 (89%)	51 (86%)	60 (81%)	22%
Total objectives	18 (100%)	59 (100%)	74 (100%)	29%

What is mandatory?

Section 3(1) – “shall”	1991 Act	Bill C-10
(a) Effective Canadian ownership & control	X	X
(e) Contribute to creation & presentation of Canadian programming	X	X
(f) Make maximum use of Canadian resources to create & present programming	X	X
New (f.1) “Greatest practicable use of Canadian” resources by foreign online undertakings		X
(k) Extend range of English- and French-language services across Canada (“progressively”)	X	X
(n) Resolve conflicts between CBC and others in public interest	X	X

What is discretionary?

Section 3(1) – “should”	1991 Act	Bill C-10
(d) Cultural values, employment opportunities, multiculturalism, multiracial society, technological change	X	X
(g) High-standard programming	X	X
(i) Varied and comprehensive programming (inform, enlighten, entertain)	X	X
(l) CBC should provide broadcasting services (inform, enlighten, entertain)	X (radio/TV)	X (broadcasting)
(m) CBC programming characteristics	X	X
(o) Programming that reflects Indigenous cultures	X	X
(p) Barrier-free access to programming	X	X
Old (q) Alternative television programming services	X	
New (q) Online undertakings – discoverability, terms of carriage		X
(s) Creation, presentation of Canadian programming by private services	X	X
(t) Priority of Canadian programming services by distribution undertakings	X	X

1991 broadcasting policy for Canada: mandatory and **discretionary** objectives



Are there also ‘unwritten’, mandatory broadcast policy objectives?

- CRTC “must balance the needs of other players in the broadcasting system” ([Decision CRTC 2021-140](#), para. 34)
- CRTC considers whether adhering to its policies/regulations imposes ‘undue financial burdens’ on licensees ([Decision CRTC 2014-399](#), para. 148)
- CRTC addresses needs of Canadians and those of “consumers”
 - [Decision CRTC 84-300](#) - community radio advertising must not attempt to persuade “consumers to purchase” goods or services
 - Broadcasting [Decision CRTC 2021-341](#) – the Standstill Rule exists “to maintain the status quo for consumers”

Panel 1: Does Bill C-10's section 3 hit the mark as a 21st century broadcasting policy for Canada?

Moderator Ben Klass

Panellists:

Doug Barrett

Tim Denton

Peter Grant

Phil Palmer