



C-10: The Legal Issues

A bit of context regarding discretion

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Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC)

56 ... The pragmatic and functional approach can take into account the fact that **the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.** However, though discretionary decisions will generally be given considerable respect, that **discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.**

A Discretion granted by 1991 Act

B Limits on CRTC's discretion

1. Public hearing required to issue new licence
2. Public hearing required before issuing mandatory order
3. CRTC required to report CBC breach of condition(s) of licence in writing to Minister in writing

C CRTC procedures and practices

1. Not all applications posted
2. Transparency limited by form of decision
3. Timeliness of public notification
4. Timeliness of decision-making
5. Decreasing number of CRTC consultations, decisions, orders over time
6. Some CRTC decisions not published

D Accountability

1. Unsigned determinations
2. CRTC's delegation of responsibility
3. CRTC's work
4. Implementation of section 3

A Discretion granted by 1991 Act

To CRTC:

1. Hold hearings to renew, amend licences if in public interest (18(2))
2. Set procedural rules (s. 21)
3. Decide whether to hear (orders – s. 12(1); complaints, representations, “any other matter” – 18(3))
4. Decide how flexibly to regulate and supervise (s. 5(2))
5. Decide whether to consider previous policies/statements (s. 6)
6. Decide whether to reconsider s. 12 orders (s. 12(3))
7. When to decide (silent)
8. How to decide (silent: Decisions, Letter Decisions, Bulletins)

To Chair:

1. Decide who decides (Chair appoints Commissioners to panels – s. 20)

B Limits set by 1991 Act on CRTC's discretion

1. Must hold hearings before granting licence applications (s. 18(1)(a))
2. Must hold hearings before issuing mandatory orders (s. 18(1)(d))
3. Must advise Minister if CBC found in breach of condition of licence (s. 25(1))

1: CRTC must hold public hearing before granting applications for new licences

Where public hearing required

18 (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

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

....

Result: Appearing vs non-appearing public hearings

In 2019 CRTC's website says it received 484 applications

- 44 applications were scheduled for CRTC hearing panels
- CRTC notices listed appearing and non-appearing applicants
- 8 of the 44 involved applications for new licences – all listed as non-appearing items on the agenda: neither applicants nor interveners invited to appear before hearing panel

2: CRTC must hold public hearing before issuing mandatory orders

Where public hearing required

18 (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

...

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

(Broadcasting Act does not define public hearing)

Result: mandatory orders considered in non-appearing hearings

- In 2018 CRTC issued 5 decisions with mandatory orders due to applicants' serial non-compliance
- 4 of the 5 decisions issued after non-appearing hearings
 - Decisions [2018-110](#), [2018-168](#), [2018-172](#) – 3 consecutive terms involving non-compliance; interveners opposed the applications
 - [Decision 2018-468](#) – 4 consecutive terms involving non-compliance

3: CRTC must advise Minister (and thence, Parliament) when CBC breaches conditions of licence

Report of alleged contravention or non-compliance by Corporation

25 (1) Where the Commission is satisfied, after a public hearing on the matter, that the Corporation has contravened or failed to comply with any condition of a licence referred to in the schedule, any order made under subsection 12(2) or any regulation made under this Part, **the Commission shall forward to the Minister a report** setting out the circumstances of the alleged contravention or failure, the findings of the Commission and any observations or recommendations of the Commission in connection therewith.

Marginal note: Report to be tabled

(2) 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.

Result: no report to Minister re CBC CoL breach

- CRTC – 19 Nov/12 hearing to consider renewal of CBC’s radio and television licences
- Broadcasting Decision CRTC 2013-263, ¶83– CBC acknowledged non-compliance for several years with condition of licence re original children’s programming
- ATIP A-2020-00055 (22 December 2020) asked for copy of CRTC report to Minister
- CRTC answer A-2020-00055 (18 January 2021): no report

I regret to inform you that a search of the records under the control of the Canadian Radio-television and Telecommunications Commission has revealed none relating to the subject of your request under the *Access to Information Act* (ATIA).

C CRTC procedures and practices

Genex Communications Inc. v. Canada (Attorney General), [2005 FCA 283](#) (CanLII)

...

[165] **The CRTC is the master of its procedure. ... it may make rules respecting the conduct of its business**, notably the procedure for applications for renewal of licences, for making representations and complaints to the Commission and for the conduct of hearings. It would be total anarchy if each licensee could dictate to it, as it wished, the procedure that was most convenient to it. In *Baker v. Canada (Minister of Citizenship and Immigration)* Madam Justice L'Heureux-Dubé restates the principle applicable to the duty of procedural fairness:

... the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints...

Canadian Radio-television and Telecommunications Rules of Practice and Procedure, SOR 2010-277

Rules for applications

S. 22(1): filing and service of applications

S. 22(2): form and content of applications (appropriate form or required information, style, statement of facts, grounds of application etc.)

CRTC commits to posting all (compliant) applications

“Marginal note: Posting of application

“23 The Commission must post on its website all applications that comply with the requirements set out in section 22.”

Exception:

Dispensing with or varying Rules

7 If the Commission is of the opinion that considerations of public interest or fairness permit, it may dispense with or vary these Rules.

1. Does CRTC post all applications?

CRTC does not publish information about applications received/not posted/returned

CRTC answer to ATIP A2020-00046

From 2016 – Sept/20 62 broadcasting applications received and not posted

- 8 not posted
- 54 received, not posted and later returned to applicant
- Unknown whether all unnumbered applications received are tracked by CRTC (at least 3 Part 1 applications re DMEQ not listed)

2. Form of decision creates gap in public process/participation

2019 – CRTC issued 39 Letter Decisions

- None of the applications decided by the CRTC Letters posted before CRTC made decision
- 13 applications posted on date of Letter Decisions
- 26 applications posted after date of Letter Decisions issued

3. Timeliness of public notification

In 2019 CRTC listed 100 Part 1 applications unrelated to licence renewals

Time from applications' submission to posting by CRTC

- within one month: 66%
- 1 – 3 months: 21%
- 4 months: 4%
- 9 months: 4%
- 14 months: 5%

CRTC took 9 months or more to post 9% of applications received

4. Timeliness of decision-making

2019: 100 Part 1 applications unrelated to licence renewals

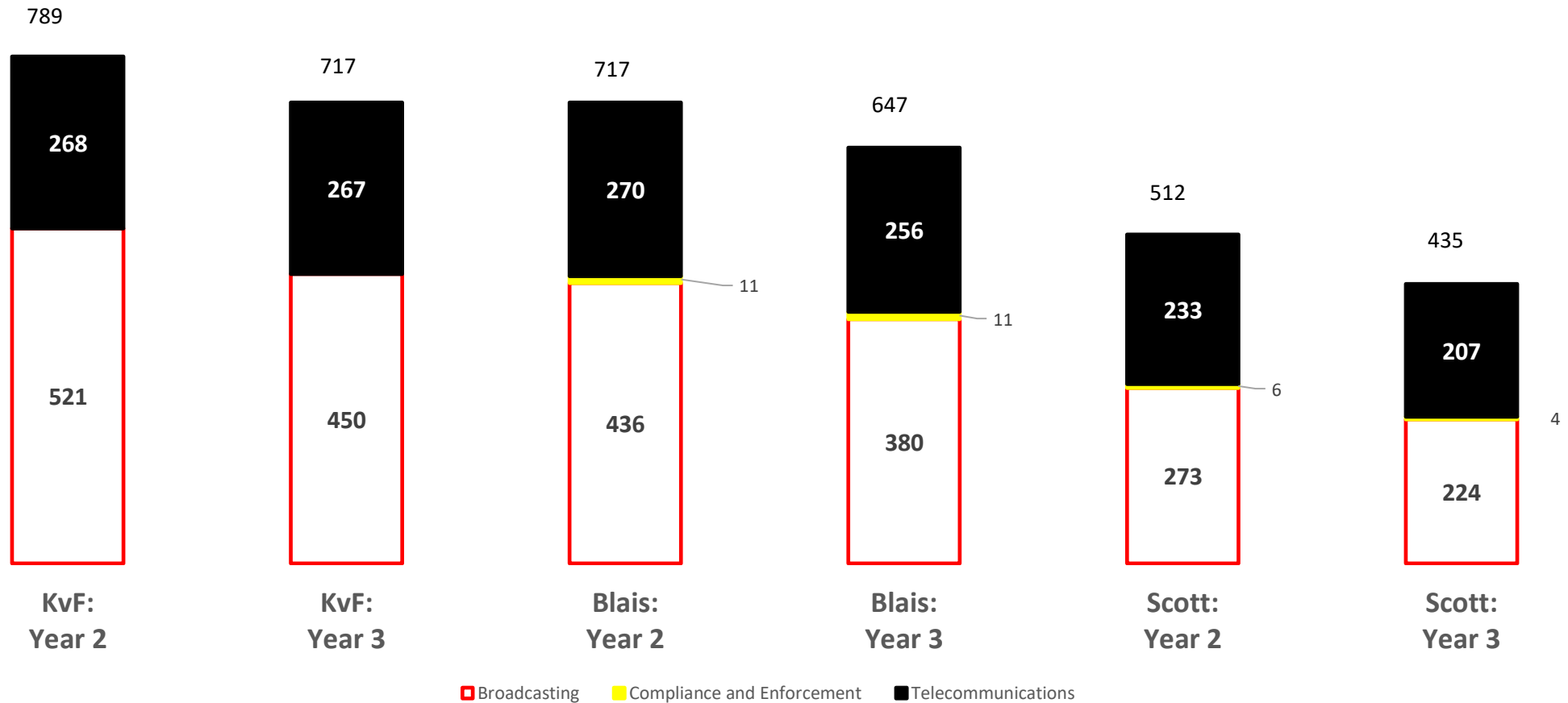
Time between applications' submission to CRTC decisions

- Within 4 months: 52%
- 5 – 11 months: 10%
- A year or more: 25%
- Not issued (as of Jan/21) – 23% (includes 18 applications filed six months or more before Feb/20)

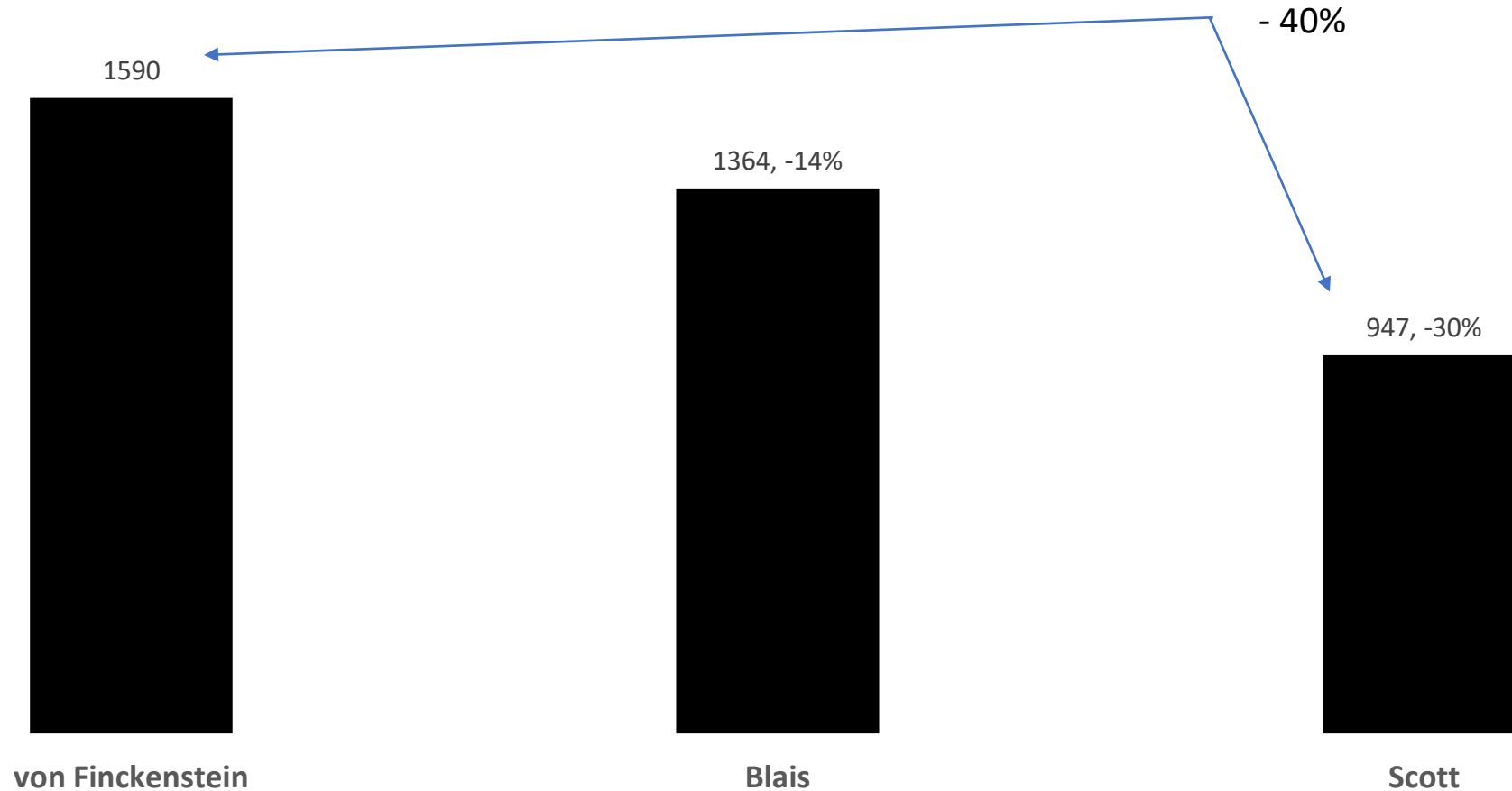
CRTC took a year or more to decide 25% of applications it received

5. Decreasing numbers of (original) CRTC determinations

CRTC Policies, Notices, Decisions and Orders:
by sector, current and previous 2 Chairpersons and year



Total CRTC notices, policies, decisions and orders issued in 2nd & 3rd years: 40% decrease



6. Some CRTC decisions not published

Some decisions not published by the CRTC:

71 letter decisions issued in 2017 (including 11 changes in ownership)

58 letter decisions issued in 2018 (including 10 changes in ownership)

39 letter decisions issued in 2019 (including 8 changes in ownership)

53 letter decisions issued in 2020 (including 2 changes in ownership)

D Accountability

1. CRTC Commissioners who render determinations do not sign them

Other Federal tribunals that show decision-makers:

- Canada Agricultural Review Tribunal
- Canadian Human Rights Tribunal
- Canada Industrial Relations Board
- Competition Tribunal
- Copyright Board of Canada

Aspects of accountability: who decides?

Panels of Commission

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

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

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

Are all CRTC determinations made by panels?

The screenshot displays the CRTC website's 'Statutes and Regulations' page. The page is organized into several sections:

- Statutes and Regulations**
 - Acts**
 - [Broadcasting Act](#)
 - [Canadian Act from Legislation](#)
 - [Canadian Radio-television and Telecommunications Commission Act](#)
 - [Bell Canada Act](#)
 - [Broadcasting Act](#)
 - [Telecommunications Act](#)
 - [Canadian Electronic Act \(Wire Contact Analysis\)](#)
 - Broadcasting and Telecommunications Regulations**
 - [Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure](#)
 - [Order documents](#)
 - Broadcasting Regulations**
 - [Broadcasting Information Regulations](#)
 - [Broadcasting License Fee Regulations](#)
 - [Broadcasting Distribution Regulations](#)
 - [Consent from Audited to Digital Television Regulations](#)
 - [Discretionary Services Regulations](#)
 - [Radio Regulations](#)
 - [Services Regulations](#)
 - [Technical Regulations](#)
 - [Broadcasting Regulations Relating to Television and Subscription Regulations](#)
 - Committee By Laws**
 - [Broadcasting Committee](#)
 - [Broadcasting and Telecommunications Committee for mobile and non-terrestrial mobile](#)
 - [Telecommunications Committee](#)
 - Telecommunications Regulations**
 - [Canadian Telecommunications Consumer Complaint Resolution and Control Regulations](#)
 - [CRTC Tariff Regulations](#)
 - [Telecommunications Fees Regulations](#)
 - Directions to the CRTC**
 - [Canadian Telecommunications Policy Guidelines \(2020\)](#)
 - [Canadian Telecommunications Policy Guidelines \(2018\)](#)
 - [Broadcasting \(BCH\) By-Laws \(New Services Programming\)](#)
 - [Direction from CRTC: Service Providers Understanding Accessibility in 2014 Broadcasts License](#)
 - [Accessibility of Non-Canadian](#)
 - [Transmission of Content Through](#)
 - [Transmission of Channels for the Distribution of CPAC](#)

Date modified: 2021-08-09

Two broadcasting committees

- no decisions issued
- membership unknown
- meeting schedule unknown
- decisions not published (reasons unknown)
- appellate process unknown

Committee By-Laws

- [Broadcasting Committee](#)
- [Broadcasting committee sub-committee for routine and non-contentious matters](#)
- [Telecommunications Committee](#)

Hearing panels empowered to decide on behalf of Commission

Panels of Commission

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

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Who makes “Decisions” on behalf of the CRTC?

Types of determinations – decisions to hear or not to hear, regulatory policies, licensing applications, non-licensing applications

Only public evidence – transcripts of hearings announced and held by CRTC: reviewed 259 CRTC hearing transcripts from 1996 to 2017:

Number of times Commissioners with same/overlapping terms of appointment appear on hearing panels		
Period	Commissioner appearing more frequently	Commissioner appearing less frequently
1996 – 2001	18 hearings	5 hearings
2002 – 2007	20 hearings	3 hearings
2007 – 2012	36 hearings	6 hearings

Accountability aside - do unsigned CRTC decisions lead to confusion?

- *Centre For Research-Action On Race Relations v. Canadian Radio-Television and Telecommunications Commission*, [2000 CanLII 16685 \(FCA\)](#)
 - Executive Director, Broadcasting, cannot make decisions on behalf of Commission
- *Communications, Energy and Paperworkers Union of Canada v. CanWest MediaWorks Inc.*, [2008 FCA 247](#) (CanLII)
 - Single CRTC Commissioner cannot make decisions on behalf of Commissioner

2. Does CRTC's 'delegation' implement section 3?

S. 3(2) 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.**

1967: Ad Standards (formerly Advertising Standards Council (ASC))

1991: Canadian Broadcast Standards Council (CBSC)

2007: Commission for Complaints for Telecom-television Services (CCTS)

3. How does CRTC 'account' for its work?

CRTC work in 1987

CRTC's 1986/87 Annual Report

- Heard 301 broadcasting applications in public hearings
- Heard 10,143 interveners at broadcasting hearings
- Considered 3,079 broadcasting applications (to issue, amend, renew radio, television and distribution undertakings or to change their ownership)
- “received over 14,000 calls from the public concerning both broadcasting and telecommunications” and
- Answered “1,940 verbal and 3,038 written complaints and requests for inquiries [sic] about telecommunications”

CRTC work in 2020

CRTC's 2018/19 and 2019/20 *Departmental Results Reports*:

No data on

- complaints (ss. 18(3), 21(a))
- representations (ss. 18(3), 21(a))
- interventions (s. 7(4)) or
- applications submitted and/or considered (ss. 19(a), 21(a))

Self-regulatory organizations may be dealing with complaints – should Bill C-10 confirm CRTC's authority to delegate its authority to those bodies?

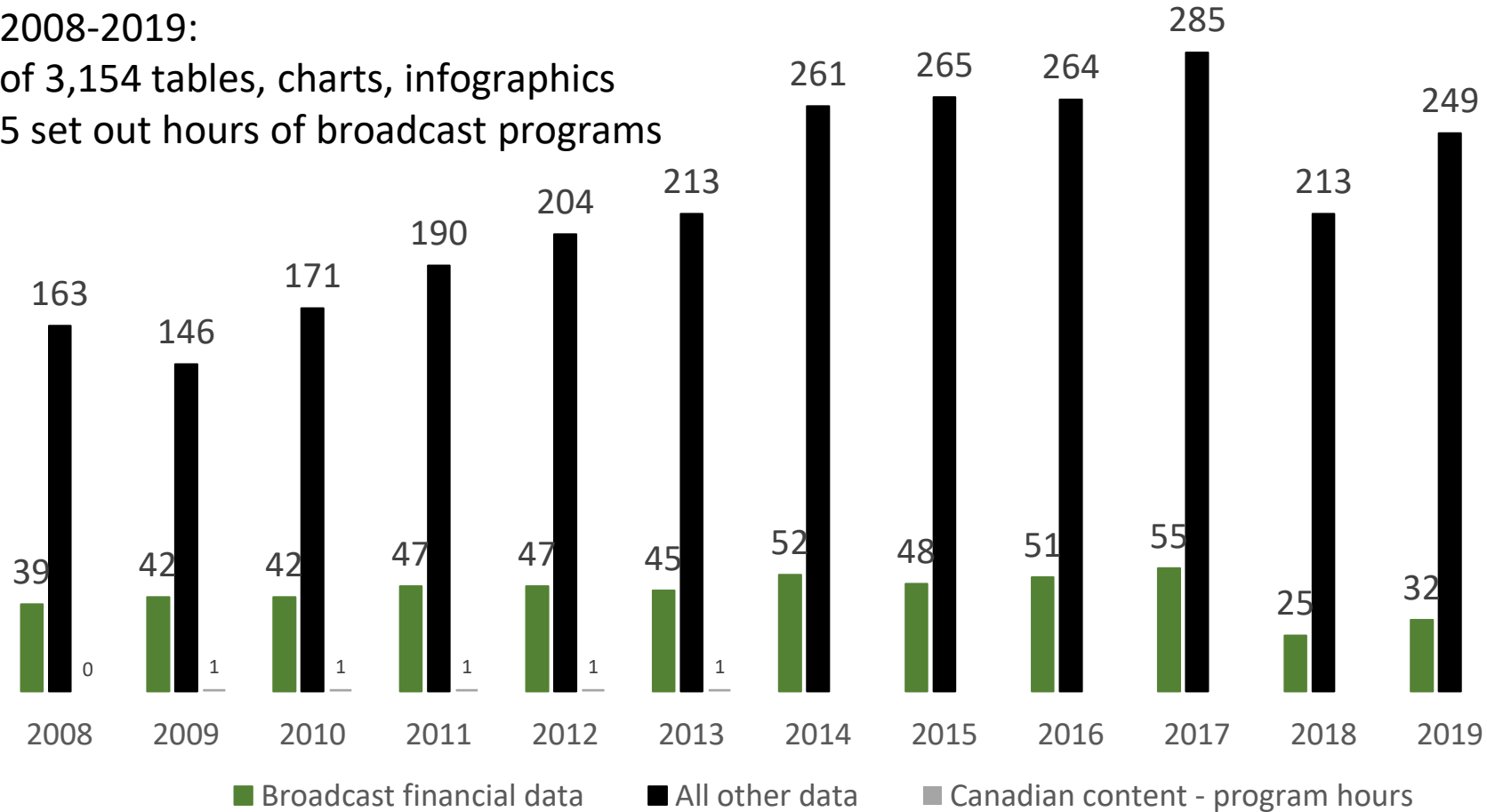
4. What is being broadcast?

CRTC, *Communications Monitoring Reports, 2008-2019*

2008-2019:

of 3,154 tables, charts, infographics

5 set out hours of broadcast programs



TV logs are published

- <https://open.canada.ca/data/en/dataset/800106c1-0b08-401e-8be2-ac45d62e662e>

And they look like this:

Log for CJOH-DT Ottawa, June 2021

CJOH_202106_145230491.log - Notepad

File Edit Format View Help

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2PGI50CJOH 210601050000053000003000VG/NECK PAIN
2PRC50CJOH 210601052847052917000030xCTV - Aquaman - Sunday - 0606 (:30)
2PRC50CJOH 210601052918052948000030Crave June 2021 REV 1 :30
2PRC50CJOH 210601052949052959000010xCTV - Station 19 (S4) - Finale - Thursday - 0603
2PGR50CJOH 210601053000060000003000CTV National news with Lisa LaFlamme HD EPS# 210531 CTV 1
2COM50CJOH 210601054505054535000030HA/APR-HAPPY-30
2COM50CJOH 210601054535054605000030NE/GEN2020-30
2COM50CJOH 210601054606054636000030LE/NEIGHBORHEROREV
2COM50CJOH 210601054636054651000015NI/SENTRA COMPILATION
2COM50CJOH 210601054651054706000015ME/HERO
2PRC50CJOH 210601055054055109000015MOVE Ottawa Music Image #1 (:15)
2PRC50CJOH 210601055109055114000005xCTV - Grey's Anatomy (S17) - Finale - Thursday -
2COM50CJOH 210601055115055145000030BE/IT'S NOT YOUR 5G
2COM50CJOH 210601055145055215000030NE/GEN2020-30
2COM50CJOH 210601055215055230000015NI/SENTRA COMPILATION
2COM50CJOH 210601055231055246000015ME/HERO
2COM50CJOH 210601055246055316000030CH/SPON VALECRAF
2PRC50CJOH 210601055316055326000010xLife Escape To The Country S26 Finale Thu 5/2p 10
2COM50CJOH 210601055540055610000030TC/150ELGIN-30
2COM50CJOH 210601055610055625000015ME/HERO
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2COM50CJOH 21060106233606236000030PR/OLD SCHOOL
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Ln 1, Col 1 100% Windows (CRLF) ANSI

Windows taskbar with search bar, taskbar icons (Start, File Explorer, Word, Outlook, PowerPoint, Excel, Adobe Reader, Notepad), system tray (network, volume, date/time: 11:15 AM 2021-11-02, notification: 2).

Panel 2: Will Bill C-10's grant of discretion to the CRTC ensure implementation of Canada's broadcasting policy?

Moderator Jeffrey Dvorkin

Panellists:

Bram Abramson

Ken Engelhart

Monica Song

Jay Thomson