**PIAC-FRPC Conference on C-10: The Legal Issues**
**Session 2, Wed 3 November 2021, 1:00 PM ET - 4:25 PM ET**
**("Will C-10's grant of discretion to the CRTC ensure implementation of Canada's broadcasting policy?")**

**Remarks—Bram Abramson**

The question posed to this panel is deceptively clever. To answer it directly: no, C-10's grant of discretion wouldn't ensure Canada's broadcasting policy gets implemented; Canada's broadcasting policy isn't coherent; you couldn't ensure its implementation even if it were. Yet how to structure discretion is despite that a matter at the heart of the C-10 debate. Over the next 15 minutes or so, I'll suggest this is really a 50-year-old debate that C-10's drafters should heed, then pinpoint what I think are the four key most urgent packages of fix they should consider.

To start I want to characterize that debate in terms of two related frames, the discovery of the Broadcasting Act and mistrust of the CRTC as an administrative agency.

By the discovery of the Broadcasting Act I mean this. It turns out the Broadcasting Act grants the CRTC a great deal of discretion and always has. That the definition of "program" has always been extremely broad. That transmitting programs to the public puts you through the CRTC door, but almost none of what broadcasting undertakings are asked to do is written into the Act. That the definition for "broadcasting" is impossibly broad, tamed mostly by a requirement to exempt anything whose regulation wouldn't advance an equally vague and multivocal, and certainly polycentric, set of policy goals that the CRTC has to pursue.

So, whether C-10 broadens or narrows the CRTC's discretion, I think the nub is really around the already-existing grant of discretion, which in many ways is neither new debate nor particular to communications law:

> I refer to the ever increasing practice of the Parliament of Canada … of depriving people of the protection of the law courts by vesting in autocratic bodies the power to arbitrarily deal with matters affecting our liberties and other rights without the intervention of the courts…. Compare the method in the courts with trial by some arbitrary tribunal such as a commission…. For long years, legislators have encroached upon many of the people's most sacred rights, deprived them of the protection of the courts of justice and conferred upon commissions, public officers and other irresponsible bodies the power of arbitrarily determining the people's rights…

If that sounds familiar within the C-10 debate—it shouldn't. That was Ontario's Chief Justice Mulock to the Canadian Bar Association in 1934. John Willis, some decades later, exemplifies the other side of the debate: "Being a 'government man' and a 'what actually happens' man, I naturally think that even today lawyers are inclined to tip the balance too far in the direction of the individual and to

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overestimate the importance of legal safeguards." Otherwise, as David Mullan has described the theory: "expert, context- sensitive interpretation would be replaced by the randomness inherent in non-expert, generalist judicial review."

But as Willis always took pains to underline, trusting and delegating discretion to purpose-built agencies requires attending deeply both to external checks and balances, but also informal checks on discretion, including the internal health and good functioning of the agency. It means functioning effectively and fairly and, especially in today's environment, being seen to , function effectively and fairly.

The CRTC has not been great at the latter. What it does is not widely understood. Nor is its already-existing grant of discretion. So the first of the four sets of urgent fixes I would have brought to C-10 would have been to take a step back. I think Parliament started in the wrong place. I think it should have started by shoring up that trust. For instance:

- Make all Commissioners DPOHs with whom lobbying meetings have to be reported. The BTLR suggested this.

- Disperse the current concentration of power in the Chair by decentralizing panel selection.

- Require that CRTC follow the practice of many, perhaps most, administrative agencies by having panel members sign their decisions, and let them make—and have access to internal staff resources to draft—signed concurring and dissenting opinions. The stakes in appearing anonymous and obscure are simply too high.

- Enshrine net neutrality at section 4(4) to ensure that the CRTC cannot act in respect of broadcasting in a way that would affect the underlying network service itself. Similarly shore up the Telecom Act's protections for net neutrality as an express form of common carriage.

- In the *Broadcasting Act,* as a preliminary move, start by solving confusing terms to unambiguous ones. Not broadcasting audiovisual media, as the EU has it. C-10 even makes things worse by talking about "broadcasters" and content that is "to be broadcast", which is well outside the careful wording of the existing legislation, and is a terminological choice whose meaning is frankly unclear—especially given the careful splitting out at the CRTC, where a "broadcasting undertaking" is about audiovisual media but a "broadcaster" and a "station" are over-the-air affairs.

This first set of moves—make the CRTC more accountable in its decisions, clarify the language around "broadcasting", shore up protection for net neutrality as a form of common carriage—would have created a more productive and more focussed debate, that set the stage for broader items. Otherwise, I'm not sure you get there from here.

The second fix I'd have liked to see is to better structure discretion in three areas, two of them well-trodden: bigness, and discoverability; and strengthening subsection 9(4).

By "bigness", I mean some kind of size threshold below which the Broadcasting Act's jurisdiction is limited to edge cases like access to undue preference resolution. Now the CRTC is of course eminently likely to itself establish some kind of threshold along these lines anyway. Arguably it is required to by subsection 9(4), just as it has in telecom through the $10 million Canadian telecom revenues threshold for domestic and foreign telcos in the contribution regime. But formalizing a bigness threshold and its formalities, such as a requirement that Cabinet approve it before the CRTC act on it is, in my view, necessary in view of reduced tolerance for CRTC discretion, and would help address sloppiness with ideas like "social media service" and "ancillary" along the way. I don't think those concepts as expressed currently work very well.

Similarly with "discoverability", about which much ink and many bytes have been spilled. Suffice it to say that I think this is far better aligned with cautious algorithmic impact review, which is really the river from which most discoverability matters are downstream anyway. This is clearly not a competency that the CRTC has today. It will clearly be a competency that it and most sector-specific agencies will need to and will gradually acquire, likely by mandating algorithmic impact assessment in sensitive situations rather than seeking to undertake such review themselves. We need look no further than a recent telecom matter involving blessing a Bell Canada voice-spam-filtering agency for evidence as to why. This shift from mandating discoverability to being able to require, from large players, certain algorithmic assessment, would also help address ideas like C-10's binary between having or not having "programming control", which I don't think works either.

As for subsection 9(4), it today requires the CRTC to exempt classes of undertakings whose regulation won't materially advance broadcasting policy or, in C-10, won't have a significant effect on implementing broadcasting policy. But broadcasting policy is a huge grab-bag. Worse, the standard to be met is whether the CRTC is itself satisfied. Subsection 9(4) could readily be strengthened. One way to do so would be to borrow from the telecom playbook so that, when implementing an order, regulation, or other measure, the CRTC must specify the broadcast policy objectives advanced by those measures, and demonstrate that the measures do not deter economically efficient entry and are implemented in a symmetrical and competitively neutral manner.

The next two fixes have to do with the role of the Broadcasting Act. Backstopping an enabling environment for independent Canadian content that reflects domestic stories, enhances domestic expression, and assures the kinds of domestic conversations that democracies need—and intervening in the least intrusive way if required to safeguard these—is certainly a significant part. But reducing it to Cancon alone is overly reductive.

The third fix is to elevate undue preference language, as currently lodged in most broadcasting regulations and in the new media exemption order, into the Act itself. Helping resolve and dispose of these sector-specific, specialized competitive disputes has long been one of the CRTC's most important roles. It has often not done this especially well. It must.

The fourth fix is to mirror the Telecom Act in protecting the privacy of persons as a policy objective. In a data-driven world of smart TVs and programmable audience monetization, both privacy and broader data governance, including access to audience data, is fundamental and highly involved. The sector-specific line agency has the ability to consider, become involved with, and promulgate

standards where a general data protection authority would have difficulty short of building staff in every sector from audiovisual to connected automobiles.

Both of these should require specific cooperation with the broad framework agencies—the Competition Bureau and the Office of the Privacy Commissioner. Legislation should require the CRTC to consult with them in adopting, or even require that they approve, clear guidelines as they apply to the CRTC's disposition of the audiovisual media area.

But the sector will not be well-served if its sector-specific agency tries to cleave undue preference and matters like set-top box privacy away from Canadian content promotion, which has been the headline for C-10. Nor will the sector be well-served if trust in the CRTC and the authority given to is not shored up both procedurally and, with respect to the Internet, substantively.

Whatever else happens or does not happen with any C-10 Part Deux, the four packages of measures that I have proposed can easily be considered in any reintroduced bill. They are: (1) build confidence in the CRTC, by making it more accountable, clarifying its mandate, and safeguarding net neutrality before playing on the Internet; (2) reduce discretion by structuring bigness, flipping discoverability, and requiring justification; and then build in (3) undue preference and (4) privacy

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