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A New Digital Policy for the Digital Age

A MANDATE REVIEW OF THE CRTC

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True North in
Canadian public policy



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Canadian public policy



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Executive Summary

Much has changed in the time between Pierre Elliott Trudeau's swearing in as prime minister in April 1968, and Justin Trudeau's accession to the position. But one thing that has remained largely unchanged is the mandate of the Canadian Radio-television and Telecommunications Commission (CRTC), which held its first public hearing months after the Prime Minister's father came to power. It is starting to show.

The commission's underlying legal and policy foundation – primarily the *Radiocommunication Act*, the *Broadcasting Act*, and the *Telecommunications Act* – was designed for an era of cultural nationalism, limited competition, and airwave scarcity. Its mandate was focused on managing the “orderly development” of Canada's broadcasting and telecommunications sectors in the “public interest.”

The explosion of new technologies, market structures, and consumer expectations disrupted the original, quaint vision for the CRTC.

The explosion of new technologies, market structures, and consumer expectations has disrupted this quaint vision for the CRTC. Its capacity to manage the “orderly development” of Canada's communications sectors has been undermined by market dynamism and technology-enabled disorder.

Consider that we now have more than 28 million wireless subscribers and 93 percent of Canadians are covered by the highest network access speed. Two-thirds of Canadian adults now own a smart phone and roughly half own a tablet. The average Canadian spends roughly 45 hours per month accessing the Internet – the highest usage rate in the world – and rising.

The Internet and its wide range of applications and opportunities has changed the landscape and yet Ottawa's digital policy and legal framework has failed to keep up. The result is that the CRTC's regulatory decisions have often become inconsistent, heavy-handed, and counterproductive. Regulating how much Canadian content is shown on traditional over-the-air television when Canadians are spending roughly one-third of a day per week watching Internet-based content, for instance, seems like a losing battle. Now is the time to update federal digital policy for the digital age.

This MLI study sets out a blueprint for a new digital policy and legal framework that reflects today's economic and technological environment. The goal is to establish a digital roadmap that shifts the CRTC's focus from protectionism to a confident, positive vision for the digital economy based on market forces and a responsiveness to consumer demands.

The study sets out the following policy recommendations to achieve these objectives:

- Consolidate mandated Canadian content objectives – including the financing and production of Canadian content – in the Canadian Broadcasting Corporation and no longer apply them to private corporations competing in a dynamic, sophisticated, and fragmented marketplace.
- Grant primary responsibility for evaluating competition issues in the broadcasting and telecommunications sectors to the Competition Bureau.

- Refocus the CRTC's role to overseeing sector-specific issues such as interoperability, the transfer of spectrum, wholesale rules where necessary, broadcasting licences, and pricing transparency; social policy objectives such as official languages, digital access for persons with disabilities, and privacy; and sector-related data collection and reporting such as its Communications Monitoring Report.
- Consider unifying the *Radiocommunication Act*, the *Broadcasting Act*, and the *Telecommunications Act* into one statute to reflect the increasing technological convergence and address the confusion and overlap caused by maintaining three separate laws.
- More generally, establish a new digital policy and legal framework that recognizes the broader importance of the digital economy and how highly competitive and dynamic the marketplace is.

Sommaire

Beaucoup de choses ont changé entre avril 1968, date à laquelle Pierre Elliott Trudeau est devenu premier ministre, et le jour où Justin Trudeau a accédé à ce poste. Mais une chose est demeurée essentiellement la même, à savoir le mandat du Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC), lequel a tenu sa première audience quelques mois seulement après l'arrivée au pouvoir du père du premier ministre actuel. La divergence commence à se faire sentir.

Le Conseil repose sur des fondements politiques et juridiques – principalement la *Loi sur la radiocommunication*, la *Loi sur la radiodiffusion* et la *Loi sur les télécommunications* – datant de l'ère du nationalisme culturel, de la faible concurrence et de la rareté des radiofréquences. Le mandat qu'on lui a confié était de « favoriser le développement ordonné » des domaines de la radiodiffusion et des télécommunications canadiennes dans l'« intérêt public ».

L'explosion des nouvelles technologies et les évolutions des structures de marché et des attentes des consommateurs ébranlent les idéaux que nous avons fixés pour le CRTC à l'origine.

L'explosion des nouvelles technologies et les évolutions des structures de marché et des attentes des consommateurs ont mis à mal cette ancienne vision du CRTC. La capacité du CRTC à « favoriser le développement ordonné » dans le domaine des communications au Canada a été considérablement perturbée par le dynamisme et les bouleversements du marché.

Tenons compte uniquement du fait qu'on dénombre maintenant plus de 28 millions d'abonnés aux services sans fil et que 93 pour cent des Canadiens bénéficient de l'accès à haute vitesse le plus rapide. Les deux tiers des adultes canadiens possèdent maintenant un téléphone intelligent et environ la moitié disposent d'une tablette. Les Canadiens passent en moyenne près de 45 heures par mois sur l'Internet – le plus haut taux d'utilisation dans le monde –, et ce chiffre est en hausse.

L'Internet et son large éventail d'applications et de possibilités ont certes changé le paysage, mais la politique numérique et le cadre juridique d'Ottawa n'ont pourtant pas suivi ces progrès rapides. La réglementation du CRTC est donc devenue incompréhensible, indûment contraignante et

contre productive. Dans ces circonstances, réglementer le contenu canadien au sein des réseaux traditionnels de télédiffusion par ondes hertziennes semble être un combat perdu d'avance, puisque les Canadiens passent environ le tiers d'une journée par semaine à regarder du contenu Web. À l'ère du numérique, il est grand temps d'actualiser la politique du gouvernement fédéral dans ce domaine.

L'explosion des nouvelles technologies et les évolutions des structures de marché et des attentes des consommateurs ébranlent les idéaux que nous avons fixés pour le CRTC à l'origine.

La présente étude de l'Institut Macdonald-Laurier se veut un plan directeur pour une politique numérique et un cadre juridique en harmonie avec le contexte économique actuel et l'évolution de la technologie. L'objectif est d'établir une feuille de route numérique qui ne mettrait plus l'accent sur le protectionnisme, mais tracerait plutôt la voie, de façon positive et confiante, vers une économie numérique fondée sur les forces du marché et la satisfaction des consommateurs.

Cette étude présente les recommandations suivantes pour atteindre ces objectifs :

- Regrouper les engagements en matière de contenu canadien au sein de CBC/Radio Canada – notamment en ce qui a trait au financement et à la production – et ne plus assujettir aux objectifs de contenu les sociétés privées, qui sont en concurrence au sein d'un marché dynamique, évolué et fragmenté.
- Déléguer au Bureau de la concurrence la responsabilité principale à l'égard des questions de concurrence dans les domaines de la radiodiffusion et des télécommunications.
- Recentrer le rôle du CRTC en matière de surveillance des enjeux liés à des domaines précis comme l'interfonctionnalité entre réseaux, le transfert de licences de spectre, l'imposition de règles aux grossistes là où c'est nécessaire et l'octroi des licences de radiodiffusion, ainsi qu'à l'égard de l'obligation de transparence des prix; en matière de respect des objectifs de politique sociale, comme l'utilisation des langues officielles et l'accès numérique pour les personnes handicapées, et de la protection de la vie privée; ainsi qu'en matière de collecte de données et de préparation des rapports connexes, comme son Rapport de surveillance des communications.
- Envisager de refondre en une seule loi la *Loi sur la radiocommunication*, la *Loi sur la radiodiffusion* et la *Loi sur les télécommunications* pour tenir compte de la convergence technologique et régler le problème de confusion et de chevauchement découlant du maintien de trois lois distinctes.
- Plus généralement, établir une nouvelle politique numérique et un cadre juridique qui reconnaissent l'importance accrue de l'économie numérique ainsi que la concurrence et le dynamisme en croissance au sein du marché.

Introduction

A confluence of economic, cultural, technological, and political factors have placed the Canadian Radio-television and Telecommunications Commission (CRTC) near the top of the public policy agenda in Ottawa. Recent think-tank studies have recommended an overhaul of its regulatory powers in order to minimize its role in an evolving and increasingly competitive digital marketplace (Globerman 2016b; Dachis and Schwanen 2016). A leading candidate for the leadership of the Conservative Party of Canada has called for a phase out of the commission's telecommunications work altogether (Bernier 2016). The minister of Canadian Heritage launched consultations on the future of Canadian content regulations (Canada 2016a). And the current CRTC chair's term is set to expire in the first half of 2017, with a process to find a successor presumably starting in earnest in the coming months (CRTC 2016).

We seem to be at a critical juncture. The CRTC is approaching its 50th anniversary and its enabling laws have not undergone major reform in a quarter century. Yet much has changed in the intervening years to say the least. Ottawa's outdated digital policy and legal framework has contributed to CRTC rulings that can often be inconsistent, heavy-handed, and counterproductive. The commission's command-and-control mandate is increasingly unworkable. Now is the time to update federal digital policy for the digital age.

What does a modernized CRTC look like? That is the subject of this study.

We examine the evolution of the CRTC and its enabling statutes, how changes in technology, market structure, and consumer demands have changed the face of Canada's digital economy, and how federal policy has failed to respond to these transformational changes. The goal is to inform the enactment of a modern policy and legal framework that reflects today's economic and technological environment. We need a digital roadmap that shifts the focus from protectionism to a confident, positive vision for the digital economy based on market forces and a responsiveness to consumer demands.

This study sets out a reform blueprint to achieve these goals. The first section provides a basic primer on the role of the CRTC and the evolution of its mandate over the past half century. The second section examines how new technologies, market structures, and consumer expectations have outpaced government policy and the CRTC's mandate. The third reviews the role of the Canadian Broadcasting Corporation and other pro-Canadian content policies and their relevance in the new technologically-enabled competitive environment. The fourth analyses the challenges that the CRTC has faced in applying its outdated conception of Canada's communications sectors to these economic and technological developments. The final section will set out recommendations to modernize Ottawa's digital policy in general and the CRTC's mandate in particular.

The result of such a mandate review should not necessarily be the elimination of the CRTC. It still has a role to play with regards to sector-specific responsibilities in the telecommunications arena such as enforcing interoperability between networks and overseeing the transfer of spectrum, managing

Ottawa's outdated digital policy and legal framework contributes to inconsistent and counterproductive CRTC rulings.

wholesale rules where necessary and administering social policy objectives such as official languages, digital access for persons with disabilities, and privacy. It will also maintain responsibilities on the broadcasting side for administering the allocation and transfer of broadcasting licences as well as social policy matters including those listed above.

But the commission's involvement in the marketplace ought to be curtailed to reflect the practical limitations of top-down regulation in the new fragmented and globally-competitive environment. The tendency to regulate should be replaced by a deference to market outcomes that are based on consumer demands and the reflection of a neutral, market-oriented regulatory model. Attempts to catch up to technological advances through regulatory actions should be replaced by greater humility about the commission's capacity to anticipate and respond to evolving technologies and market applications. Efforts to protect Canadian content should be expressed through the public broadcaster and otherwise content financing and production should be responsive to consumer demands. The general goal should be a forward-looking, neutral digital policy and legal framework that recognizes that the new, dynamic marketplace is far removed from the "single system" conception set out in the *Broadcasting Act* and is likely to become more fragmented over time.

The study sets out the following policy recommendations to achieve these objectives:

- Consolidate mandated Canadian content objectives – including the financing and production of Canadian content – in the Canadian Broadcasting Corporation. Mandated Canadian content objectives should no longer apply to private corporations competing in a dynamic, sophisticated, and fragmented marketplace.
- Judgments about competition in the broadcasting and telecommunications sectors should become the primary responsibility of the Competition Bureau. An overlapping role for the CRTC should be limited to sector-specific considerations and based on the bureau's competition law principles and analysis.
- The CRTC's role should thus be limited to overseeing sector-specific issues such as interoperability, the transfer of spectrum, wholesale rules, broadcasting licences, and pricing transparency; social policy objectives such as official languages, digital access for persons with disabilities, and privacy; and sector-related data collection and reporting such as its Communications Monitoring Report. It should cease trying to manage the "orderly development" of Canada's broadcasting and telecommunications sectors in a disorderly marketplace.
- The government should consider unifying the *Radiocommunication Act*, the *Broadcasting Act*, and the *Telecommunications Act* into one statute to reflect the increasing technological convergence and address the confusion and overlap caused by maintaining three separate laws.
- More generally, the federal government should seek to establish a new digital policy and legal framework that recognizes the broader importance of the digital economy and how highly competitive and dynamic the marketplace is. The CRTC's mandate and activities should start henceforth with a greater market orientation that recognizes that we no longer have a "single system" in broadcasting and that telecommunications regulations should focus on sustainable, market-based competition.

These recommendations do not purport to cover every policy issue affecting the broadcasting and telecommunications sectors in Canada. Several topics such as the tax treatment of foreign online-based companies with limited presence in Canada are not tackled in this study. The goal here is to show policy-makers and the Canadian public the extent to which the CRTC's mandate must be modernized and to lay out a proposal for doing so. The totality of the recommendations would shift the CRTC's "public interest" mandate from one of defensive protectionism to a new, positive vision for Canada's digital economy in the global marketplace.

What is the CRTC's Mandate? A Basic Primer on the Commission and its Evolution

Canadians may hear or read about the CRTC but it is understandable if they do not know much about the commission, its mandate, and the evolution of its role in broadcasting, and telecommunications. Its hearings and regulatory activities tend to be intensely followed by a small group of executives, lobbyists, academics, public servants, and media but rarely spill out into the broader public. But that does not mean that the CRTC is irrelevant or detached from the lives of everyday Canadians. Quite the contrary. The CRTC's decisions and directives can have a significant impact on Internet access and quality, domestic broadcasting, and the availability of digital content.

The CRTC is an arm's-length administrative tribunal that is responsible for overseeing and regulating Canada's broadcasting and telecommunications systems "in the public interest."¹ In practice this means that the commission grants licences for radio, television, and cable, uses its regulatory powers to oversee pricing, competition, and consumer options such as television channels and radio stations, and aims to promote and protect Canadian cultural content. Its historic mandate is to act as the "guardian" for Canadian interests with regards to cultural production, transmission, and consumption.

It assumed this responsibility in 1968 with the coming into force of the *Broadcasting Act* the same month that Pierre Trudeau became prime minister. The CRTC was given responsibility for putting the new broadcasting policy into effect, including the power to issue broadcast licences and the authority over cable television. It was a period of economic and cultural nationalism and the expectation was that the CRTC would ensure that Canadian content was protected, nurtured, and promoted on the public airwaves (Dewing 2014; Ozege and Baskoy 2012).

The CRTC's mandate was expanded to cover the telecommunications sector in 1976.² The unification of broadcasting and telecommunications under a single regulator stemmed from a Green Paper published by the federal government in 1973 and another set of proposals launched in 1975. The 1973 Green Paper recognized the growing relevance of telecommunications and the perceived need for greater regulatory coherence with broadcasting policy. As the paper states, the government's intent was to "safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada . . . and to reflect Canadian identity and the diversity of Canadian cultural and social values" (Baum 1975). The tone was imbued by a defensive nationalism and the commission's mandate came to reflect this posture.

The CRTC's regulatory model became characterized as "protecting and subsidizing" (Globerman 2016a). It spoke to a zero-sum vision of the industry that saw foreign competition as a threat to

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Canadian cultural identity and state intervention as the only bulwark against such a challenge to Canadianism. Thus the CRTC went about a policy to Canadianize the broadcasting and telecommunication sectors including repatriating licences from foreign ownership and control (Rabinovitch 2012; Hayes 2004). This genesis is critical to understanding the evolution of the CRTC, the challenge that new technologies (such as over-the-top streaming services including Netflix and YouTube) present to its historic mandate, and the clumsiness that the CRTC has exhibited in trying to apply its outdated mandate in the new digital era.

CANADIAN CULTURAL PROTECTIONISM IN A NUTSHELL

“ Perhaps broadcasting best illustrates our [Canada and the United States] different traditions. Most Americans seem to believe that market forces will bring about what they want their broadcast media to do for them. We believe that broadcasting is a matter for collective concern and that the intervention of the state may well be necessary to achieve national goals, and that it can be

done without compromising individual or collective freedom....

The policy of Canadian governments over the last 50 years has been to attempt to establish a reasonable balance between cultural product of Canadians and what we import.”

Pierre Juneau, 1986, “Why Canada needs cultural protectionism” *Ottawa Citizen*, May 31, B3.

How does the CRTC carry out its mandate? The commission carries out its responsibilities arm’s-length from government but its powers and activities are broadly set out in a number of different laws such as the *Radiocommunication Act*, the *Broadcasting Act*, the *Telecommunications Act*, and Canada’s anti-spam legislation. These statutes provide basic legal “marching orders” to the commission on the scope of its powers, the range of its activities, and the government’s broad policy objectives.

The federal government can augment or change these marching orders by issuing directions about policies to the CRTC, requiring the CRTC to re-examine a decision, or varying a decision. It can also repeal or revise the underlying laws at any time. Otherwise the commission has considerable discretion to interpret its legal scope of action and the application of government policy to new technologies, services, or other developments (Salter and Ordartey-Wellington 2008).

This is a critical point: the CRTC operates within a policy and legal framework set by the government. The commission risks having its decisions overturned if it diverges too far from the government’s agenda. But this assumes that government has a position or is prepared to take one on the evolving technologies and services for Canadians. The industry does not stop evolving or innovating to wait for government policy to catch up. The result is that the CRTC is often searching for some policy direction and ultimately ends up devising policy on the fly through its decisions and directives.

Consider how much broadcasting and telecommunications have changed. The progress set out in the CRTC’s own annual reporting is staggering and conveys a sea change in how Canadians communicate with one another and access and engage content (CRTC 2015c). And these changes are most evident with younger generations. Consider the following:

- More Canadian households now subscribe exclusively to mobile wireless services (20.4 percent) than exclusively to landline telephone services (14.4 percent).

- More Canadian households also reported subscribing to mobile phones (84.9 percent) than landline telephones (78.9 percent).
- Two-thirds of Canadians own a smart phone. Roughly half own a tablet.
- Canadians aged 18 years and older watch seven hours of Internet TV on a weekly basis, compared to 5.1 hours in 2013 and 1.5 hours in 2008.
- Canadians watched 27.4 hours of traditional television per week during the 2013/14 broadcasting year, compared to 27.9 hours in 2012/13 and 28.5 hours in 2010/11.
- Younger Canadians (ages 18 to 34 years) watch less than half the number of hours of traditional television (20.6 hours) as did Canadians aged 65 years and older (41.8 hours).

As we will discuss in the next section, these developments are the result of new technologies, industry players, and consumer demands. The problem is the CRTC’s so-called “marching orders” in the form of clear government policy have failed to keep up. Its mission largely remains to inoculate Canadian broadcasting and telecommunications from foreign competition and to pursue defensive cultural goals even though these are increasingly ill-fated tasks in the face of ubiquitous competition resulting from online technologies and services. Regulating how much Canadian content is shown on traditional over-the-air television when Canadians are spending roughly one-third of a day per week watching Internet-based content, for instance, seems like a losing battle. Canadians might rightly question the wisdom of pestering pornographic channels to up their Canadian content, for example, when the web offers seemingly infinite choice (Kennedy 2014). The CRTC is like the lost Japanese soldier who fails to realize that the war is over.

THE NEXT FRONTIER FOR CANADIAN CONTENT RULES

“ The whole thing [the CRTC case about the level of Canadian content on pornographic channels] points out the absurdity of Canadian Content regulations, and their attempt to impose cultural nationalism on the airwaves. It’s true that, without CanCon, “Debbie” in Debbie Does Deep River might never have

been given her shot at stardom. But is this really something a government regulator should be fighting for? When did porn become a strategic industry?”

Source: Globe and Mail editorial, 2014, “Is That Porn Canadian Enough for the CRTC?” *Globe and Mail*, March 6.

The onus, then, is on the government to modernize the policy and legal framework within which the CRTC must operate. Just consider the backward-looking parameters set out in the *Broadcasting Act*. The *Act* is still highly nationalistic and reads more like a cultural or social law rather than the foundation of a competitive, private market that is responsive to an increasingly fragmented audience. The legislation stipulates that the broadcasting system ought to maintain “cultural sovereignty”, “safeguard” Canadian culture, and “encourage the development of Canadian expression.” Nowhere does it consider competition or consumer demands or the potential to promote Canadian content to a global audience, or recognize that the basic function of broadcasting companies (with the exception of the CBC) is to generate a profit. Put differently: the CRTC is focused on managing the “orderly development” of Canada’s broadcasting and telecommunications sectors in a disorderly marketplace.

This imbalance between anachronistic cultural and social objectives and modern economics is best represented in the *Broadcasting Act's* assertion that Canadian broadcasting “constitutes a single system” – that is, that the government’s social and cultural goals animate equally both public and private networks. Basically the *Act* blurs the lines between public and private to such an extent that there is little distinction between state ownership and permeating the private market through regulations, quotas, mandates, and subsidies. This vision of a so-called “single system” may seem like an abstract concept but it is a useful way to think about the CRTC’s role and its tendency to ignore the distinction between public and private. Suddenly the current chair’s lament about certain programmes or services becoming the “sacrificial offering on the altar of corporate profits” comes into clearer focus (Blais 2015c).

The telecommunications sector is a bit different in that a primary role for the CRTC is about enforcing interoperability between networks and so the “single system” idea of interconnectedness does at least make conceptual sense. But there is a major difference between ensuring interoperability and micromanaging market choices and behaviours. Increasingly the government and in turn the CRTC has become more assertive in the wireless sector in the name of “consumer first.” This trend diverges with successive federal reviews (including a 2006 review by the Telecommunications Policy Review Panel that was started by the outgoing Liberal government and submitted to the then-Conservative government) that have called for a more *laissez-faire* model including a shift to *ex-post* rather than *ex-ante* regulatory interventions.

CONTINUED CALLS FOR TELECOMMUNICATIONS REFORM

“ Over the past 20 years, Canada’s telecommunications markets have become increasingly competitive. In the large majority of today’s telecommunications markets, competitive forces can be relied on to ensure that Canadians receive a wide range of services at prices and on conditions that are among the best in the world. Therefore, it is time to reverse the current presumption in the Telecommunications Act that all services

should be regulated unless the Canadian Radio-television and Telecommunications Commission (CRTC) issues a forbearance order. This should be replaced with a legislative presumption that services will not be regulated except in specified circumstances designed to protect end-users or maintain competitive markets.”

Source: Telecommunications Policy Review Panel, 2006, *Final Report*.

The key point is that Canada’s broadcasting and telecommunications industries are not single systems, at least not as envisioned in the *Broadcasting Act*. A process of fragmentation has led to significant variations with regards to technology, business models, and audience or target customers, and new developments are making it increasingly impossible for the CRTC to keep up. Even if one accepts that protecting and supporting the production, transmission, and consumption of Canadian cultural content is a public good, there are better options to meet these non-economic objectives. The new digital world is not conducive to a command-and-control policy and legal framework.

Evolving Technology, Market Structure, and Consumer Expectations

Fragmentation in the digital marketplace

Technological advancement, new online-based market players, and evolving consumer demands are the primary reasons that Canada's digital policy and legal framework is in need of modernization. So many of its underlying assumptions or key priorities have been overtaken by these powerful and unstoppable forces.

Just think, for instance, about how much the technological landscape has changed since the *Broadcasting Act* was passed in 1968 and updated in 1991. Colour television only came to Canada in 1966. The Internet was not broadly available until the early- to mid-1990s. And YouTube emerged roughly 10 years later. How does the CRTC effectively regulate content when an exempt service like YouTube saw its year-over-year views by Canadians increase by 170 percent in 2011 and counting (Canadians Connected 2013)?

Radio broadcasting has gone through similar changes and challenges over the past several years. Radio stations have been licensed in Canada since 1919 but the modern *Radiocommunication Act* was enacted in 1985. Much has changed in the ensuing 30 years including a growing number of radio stations, a broader range of ethnic and foreign content, and, of course, the advent of satellite services and Internet radio and the so-called “grey market” (Canada 2016b; Banks and Mingarelli 2008). These economic and technological developments have caused the federal government and the CRTC to respond with mostly piecemeal solutions rather than a more fundamental rethink about the role of regulation in the new technological environment.

Telecommunications has also not escaped this trend of economic and technological change. The telephone market was marked by state ownership and regional monopolies until the last quarter of the 20th century. A combination of federal regulation under the *Railway Act* and public mandates set by provincial governments dominated an industry that was focused on regional and local markets (Beaudry and Speer 2016a).

Responsibilities for regulating the sector were mostly shifted to the CRTC in 1976. Then competition in the long-distance market came nearly 20 years later (Wilson 1995). The first cellphone call took place between Toronto mayor Art Eggleton and Montreal mayor Jean Drapeau sometime in between (Henderson 2015). And now the industry is more sophisticated and complex than Alexander Graham Bell and the others that would follow him could have possibly imagined. We now have more than 28 million wireless subscribers and 93 percent of Canadians have access to some sort of long-term evolution (LTE) network (CRTC 2015c).

What has shaped these developments? And what does it mean for government policy? The biggest change is the confluence of broadcasting and telecommunications or what is known as convergence. New technologies have increasingly diminished the distinction between broadcasting, Internet and telephone services, and content. The shift from analog to digital enabling text, pictures, sound, and video over the same networks has changed how Canadians consume content. Think about streaming

video on one's smart phone for instance. Is it telecommunications? It is broadcasting? And under what authority do CRTC directives and regulations apply? This new functionality involves elements of both traditional broadcasting and telecommunications and yet we still have two different *Acts* that can create ambiguities and overlaps.

WHAT IS CONVERGENCE? AND WHAT DOES IT MEAN FOR THE CRTC?

“ The spheres of telecommunications and broadcasting are rapidly evolving and converging into a single world of communication. Cycles of innovation, adoption and further innovation with respect to services, applications and infrastructure can now be measured in months rather than years. Regulators throughout the world are challenged to keep pace. Where such fundamental

national considerations as cultural expression and a multi-billion dollar communications industry are at stake, the challenges and opportunities in reacting both quickly and with a measured response to technological change are critical to consider.”

Source: CRTC, 2010, *Navigating Convergence: Charting Canadian communications change and regulatory implications*.

Consider the 2012 Supreme Court decision that upheld a lower court's ruling that Internet-service providers that are subject to the *Telecommunications Act* should not be responsible for “broadcasting undertakings” under the *Broadcasting Act*. The case originated with a request by the CRTC to the federal court to resolve a dispute between cultural groups and Internet-service providers about the application of Canadian content regulations. Cultural groups claimed that Internet-service providers should be subjected to the broadcasting regime and contribute to a fund to support the creation of Canadian content. The companies contended that their business model was a content-neutral service and thus they should not be subject to the broadcasting rules. The court ultimately sided with the Internet-service providers on the grounds that the service was a platform for content rather than its source (Reference re Broadcasting Act 2010).

This specific example is far from the only one where the CRTC has struggled to navigate the complexities of convergence. That is largely because the CRTC's regulatory model is still based on the assumption that access to the public airwaves is scarce and requires a top-down, state regulator to ration it. This is the basis for the CRTC's role in issuing or overseeing broadcasting and spectrum licences in exchange for agreements to follow certain requirements such as Canadian content quotas, with respect to broadcasting, and mandatory network sharing with respect to telecommunications. But the phenomenon of convergence has undermined much of these old assumptions and replaced them with the two major trends of fragmentation and consolidation. Both have complicated the role of the CRTC and catalysed the need for reform.

Fragmentation refers to the recent explosion of services, content, and applications that are now available to customers thanks to technological advances. It has resulted in a wider range of consumer options than ever before including regulated services such as specialty channels delivered by cable or satellite and unregulated or exempt services such as programming delivered over the Internet. The idea of watching cable broadcasting on one's television based on the time and schedule

set by a traditional broadcaster is increasingly antiquated. Now we can essentially watch whatever we want at any time that we want on whatever device we want. As the CRTC chair puts it: we are living in an “Age of Abundance” (Blais 2015b).

THE STORY OF GROWING FRAGMENTATION

“Increasing fragmentation – the steady erosion of audiences and customers to multiple sources of substitutable products, services, content and applications delivered by domestic and international providers that may be inside or outside of the regulatory environment – may require a re-examination of the current *ex ante* regulatory approach that balances

access to the system with corresponding obligations. This is intensified by the greater consumption of broadcasting content from outside the regulated system via the Internet.”

Source: CRTC, 2010, *Navigating Convergence: Charting Canadian communications change and regulatory implications*.

This trend to a fragmented marketplace has several potential consequences. But a primary one is a growing lack of neutrality in the application of CRTC regulations between so-called traditional broadcasting and foreign-based online content platforms. This divergent regulatory treatment between broadcasting and digital provision mostly stems from the 1999 *New Media Directive* from the CRTC (1999a), which followed public consultations on how the government ought to respond to what was then called the “new media.”

The CRTC (2009b) concluded web-based content would be exempted from CRTC regulation under the authority of the *Broadcasting Act*. The exemption has subsequently been reviewed and largely upheld as the basis for how the commission treats Internet Protocol (IP)-based networks and content. Therefore the CRTC’s rules – including those related to mandated Canadian content requirements and financial contributions to support Canadian content – do not apply. The result is a marketplace that contains both regulated and exempted players.

At the time of the initial exemption the scope and availability of web-based content was limited and not seen as a real source of competition for traditional broadcasting.³ The decision to exempt new media (or IP-based content) from CRTC regulations was largely based on the experience with web-based content to date. The ensuing shift to convergence and the introduction of new foreign-based streaming services such as Netflix has resulted in asymmetric regulatory treatment, and an uneven playing field.

Just think that when the directive was enacted the data showed that 36 percent of Canadian households were equipped with a personal computer and 42 percent of connected households reported spending more than 20 hours per month online (CRTC 1999a). Now the average Canadian spends roughly 45 hours per month accessing the Internet – the highest usage rate in the world – and rising (Canadians Connected 2013). Canadians watched, on average, 300 online videos per month in 2011, which was also the highest number around the world (Canadians Connected 2013). And the smartphone has increasingly become a tool for accessing content as a mini-computer rather than making phone calls (LaSalle 2012).

The point is the broadcasting landscape is rapidly changing in the direction of more options, more choice, and more audience fragmentation. The old “single system” concept has been superseded in virtually every way except for government policy. The CRTC’s focus on “orderly development” with regards to broadcasting is basically unworkable in such a competitive, dynamic, and disorderly marketplace.

FRAGMENTATION IS THE FUTURE

“ TV is increasingly delivered over the Internet, where bandwidth abounds and the CRTC does not rule. Technology is driving down the costs of entry for content producers. Anybody with a good-quality mobile phone and a YouTube account can be rewarded with millions of viewers. Most of the programming that Mr. Blais looks on so longingly isn’t produced

by traditional “broadcasters” at all, but by pay-TV services such as HBO and Netflix.

Perhaps most importantly, TV is increasingly a “pull” medium. That is to say consumers can find and pay for exactly the programming that suits their taste and budget.”

Source: Brian Lee Crowley, 2014, “Vikings Are Coming for the CRTC,” *Globe and Mail*, February 21.

Thus it is not surprising that the CRTC has struggled to respond through regulatory action. The outcomes have tended to reinforce rather than minimize this policy asymmetry. Consider that at present over-the-top broadcasters such as Netflix are not required to make financial contributions to Canadian programming but traditional broadcasting services including video-on-demand services such as Shomi (which is now set to shut down next month) and CraveTV must. The CRTC has recently sought to minimize the obvious inconsistency by enacting yet another set of regulations to exempt services that are offered on the Internet to all Canadians without the need for a subscription but the basic asymmetry persists (CRTC 2015a; Dachis and Schwanen 2016). Few would argue that it is good public policy to exempt some services from Canadian content rules (including certain financial obligations) and not others.

CONSENSUS ON ASYMMETRICAL TREATMENT

“ Namely, over-the-top broadcasters do not have to make contributions to Canadian programming, while VOD broadcasters using cable or satellite distribution systems are required to make financial contributions. The rationale offered by the CRTC for exempting Internet broadcasting from direct and indirect Canadian content financial obligations is that it wants to promote innovation and growth of the new medium in Canada. However,

to the extent that Internet broadcasting is an increasingly strong competitor to conventional broadcasting, the asymmetric regulatory system imparts a bias to the competitive process. There is no public interest in providing a financial advantage to broadcasting over the Internet relative to VOD broadcasting over conventional BDUs.”

Source: Steven Globerman, 2016, *Technological Change and Its Implications for Regulating Canada's Television Broadcasting Sector*, Fraser Institute.

CONSENSUS ON ASYMMETRICAL TREATMENT (continued)

“ So, right from the dawn of Internet broadcasting, we have had this double standard that covers the CBC, CTV and other already regulated companies with one set of rules, and the Internet start-ups with another One result of the CRTC’s unwillingness to reconsider its 1999 order

is that Netflix, Google, and other Internet services are exempt from having to channel part of their revenues to Canadian culture.”

Source: John Anderson, 2016, *An Over-the-Top Exemption: It’s time to fairly tax and regulate the new Internet media services*, Canadian Centre for Policy Alternatives.

The lesson is *not* that we need more regulations. As we discuss in more detail in a subsequent section, the CRTC’s attempts to fill the existing policy and legal gaps with regulatory directives have often caused further confusion and market uncertainty. It is hard to justify, for instance, exempting over-the-top services from CRTC regulations altogether at the same time that the commission is heaping more and more rules and requirements on the traditional broadcasting companies including the mandated offering of so-called “skinny packages”, and how they are marketed to consumers (Sagan 2016).

The solution is a modernized regime that recognizes that fragmentation has overtaken the “single system” underpinnings of the CRTC’s marching orders and that federal policy must adapt accordingly.

The specific circumstances may be different from broadcasting but similar problems are present in telecommunications where outdated government policy and a lack of clarity between the roles of the Department of Industry (now the Department of Innovation, Science and Economic Development) and the CRTC can produce confusion and market uncertainty. This points to a similar model of deregulation as the solution.

Consider the example of Globalive/Wind’s ownership regime in 2009 and the competing decisions between the government and the CRTC over a 7-month period (CRTC 2009a). The government is responsible for issuing wireless licences and the CRTC has the authority for allowing companies to operate, including applying the foreign ownership rules and setting the terms with regards to the functioning of the market. Here the government assessed that Globalive/Wind complied with the foreign ownership rules in order to participate in the 2008 spectrum auction and then the CRTC ruled the opposite. The consequence of the duplicative responsibilities is the potential for this type of conflicting decision, which temporarily put the company’s ability to enter the market in jeopardy until the government overturned the CRTC’s ruling. That the government ultimately partially liberalized the foreign investment restrictions is a good example of how fewer rules can resolve the challenges posed by new market and technological developments (Innovation, Science and Economic Development Canada 2012)

Consolidation and vertical integration

Multipurpose use of digital networks has fundamentally changed the business model. Companies are no longer in broadcasting or telecommunications. They are involved in all of it using essentially the same digital infrastructure. This technological advance led to corporate consolidation in these sectors. The result has led to what some policy and industry commentators refer to as vertical integration, whereby a single firm is involved in creative production and distribution of content. Think, for instance, of Bell acquiring CTVglobemedia or Rogers acquiring five Citytv stations. The

upshot is that the owner of the digital network also has the proprietary rights to specific content available only for its users and subscribers.

Vertical integration is a logical step in the process of convergence. If a company owns the digital network as well as the content, there may be market temptation for the same firm to use its content for competitive gain. The CRTC has grappled with how to ensure that content remains broadly available and has imposed rules against exclusive content for a company's own mobile or Internet subscribers (Krashinsky 2011).

The "bundling" of multiple services (including cable, Internet, and wireless) is another consequence of this type of integration. It creates economies of scale and simplicity for consumers even if some have criticized different forms of bundling (including channel bundling by broadcasters) as anti-competitive (Hunter, Iacobucci, and Trebilcock 2014; Inukshuk). Now more than 10 million subscribers have some form of multi-service bundling agreement in Canada (CRTC 2015c).

The CRTC has grappled with balancing the benefits of consolidation with the potential risks such as monopolistic behaviour. A 2011 decision sought to limit the trend by requiring that wireless owners that also own TV channels must sell access to their content on fair terms to competing mobile phone providers for their smart phones and tablets. The decision was seen by some as a rejection of the vertically-integrated business model but a closer read finds this interpretation is overstated. The commission's decision exempted content produced exclusively for new media platforms from any regulations (CRTC 2011). The decision reflects the commission's inherent tension in balancing its various responsibilities including with regards to content, choice, and consumer demands.

Vertical integration thus has continued unabated but is happening against a backdrop of broader audience fragmentation. This means that Canadian firms are not acting to exploit consumers but rather to better position themselves to compete with a plethora of services and applications, respond to evolving demands, and finance the underlying infrastructure needed to support these efforts. Concerns about concentration do not hold up to scrutiny when one considers the historic range of choice available to Canadian consumers. The days of flipping through 13 television channels for interesting content are over. As the CRTC (2015d) itself recently concludes: "Canadians enjoy multiple sources and means of accessing content, from conventional over-the-air linear broadcasting to digital media provided over the Internet."

CRTC ON CONSOLIDATION

“ Consolidation can have the effect of reducing competition in the marketplace, resulting in monopolies or oligopolies. This may compromise the Commission's legislated objectives to achieve affordable pricing, universal access and a diversity of content choices. A balance between the market's natural tendency toward integration, with ensuing benefits for the financial health of the sector, and the requirement to maintain the necessary conditions for competitive

entry, with benefits to consumer pricing, diversity of editorial sources, and the "virtuous circle" of innovation created through the competitive dynamic, have led to regulatory policies such as diversity of voices and common ownership policy rules in broadcasting, as well as various wholesale regimes in telecommunications.”

Source: CRTC, 2010, *Navigating Convergence: Charting Canadian communications change and regulatory implications*.

The idea therefore that a Canadian-based broadcaster could meaningfully limit consumer choice overstates their market power and understates their market responsiveness. Market dilution caused by audience fragmentation has limited the potential for monopolistic behaviour and instead caused firms to respond in different ways. Some are experimenting with consolidation in order to more effectively compete. Others are moving in the opposite direction and focusing on core business. Shaw's recent sale of Canwest and acquisition of Wind Mobile's wireless assets and customers, for instance, suggests that it is partly betting against the trend toward vertical integration, and TELUS's business model bet against it from the start (Bradshaw 2016a).

The point is that companies are still trying to figure out how to respond to evolving consumer preferences and it can be counterproductive for regulators to prejudge how the transition to convergence, fragmentation, and consolidation plays out. As technology analyst Peter Nowak (2011) bluntly puts it: "this is a classic case of the CRTC needing to stay the hell away."

The instinct to regulate should be tempered and regulation seen as a last resort rather than a default position. The CRTC's deference to organic, bottom-up growth in the multi-competitor Internet-based market as articulated in the 1999 *New Media Directive* should to a large extent also be reflected in the traditional broadcasting and telecommunications markets. New media is increasingly becoming old media and old media is now but a small part of the overall media landscape. Why the market-oriented, hands-off approach to new media but an increasingly heavy-handed one – including micro rules on offerings and marketing – for regulated players? And, if more market orientation and deregulation are the right approaches for broadcasting, why would they not also apply to telecommunications?

A HANDS-OFF APPROACH

“ The Commission expects that the exemption of these services will enable continued growth and development of the new media industries in Canada, thereby contributing to the achievement of

the broadcasting policy objectives, including access to these services by Canadians.”

Source: CRTC. 1999. "Archived – Public Notice CRTC 1999-197."

This asymmetric treatment is partly a reflection of the CRTC's clumsy attempts to apply its outdated policy and legal framework. Broadcasting and telecommunications are now highly sophisticated, complex, and dynamic industries that state regulations simply cannot manage or control. Trying to keep up with the changing environment with more regulation and more directives is a losing proposition.

The choices of consumers

A big part of the changing digital marketplace is the result of evolving consumer tastes and demands. The CRTC produces an annual report that documents the state of the industry and Canadian preferences. This report captures the extent to which Canadian consumers are driving these industry-wide changes by their collective behaviour (CRTC 2015c). The evolution is staggering.

Broadband is now at the core of so much of what we do. Broadband Internet is a data communication service that allows consumers to access digital content faster than traditional methods such as

dial up and offers more individualized access to content than traditional broadcasting. It now increasingly serves as the technological foundation for radio, broadcasting, Internet, and wireless services. It is therefore fair to say that broadband has revolutionized how Canadians access digital content and the role of digital industries in economic and social life. Broadband has become an enabling technology that Canadians are increasingly relying on to access content and communicate with friends, families, and customers.

More than 19 million Canadians subscribed to broadband services in 2014, compared to 17.6 million in 2013 and 13.2 million in 2011 (see table 1) (CRTC 2015c). And we are using broadband technology for more and more, particularly among younger Canadians. Nearly 60 percent of Anglophones between the ages of 18 and 34 now subscribe to Netflix and more than 50 percent of Canadians streamed a YouTube video in 2014 (CRTC 2015c). The amount of time that Canadians are spending streaming online videos on their mobile devices has more than doubled in recent years (Oliveira 2014).

TABLE 1: Mobile broadband subscribers (millions)

Year	2011	2012	2013	2014	Compounded Annual Growth Rate
Number of Subscribers	13.2	14.3	17.6	19.2	13.5%

Source: CRTC 2015c.

And that only begins to tell the story of the consumer-driven trends in broadcasting and telecommunications. The growing range of options is diluting market concentration irrespective of what the CRTC does. The era of concentrated viewership, for instance, is largely over especially in a world of personal video recorders (PVR) and multiple viewing applications. It was not uncommon 30 years ago for a top television show to be viewed by as many as 25 million households in the US market. Now plenty of “hit” shows may breach one million viewers in a key demographic, and a former CBC executive cites an audience of 700,000 as a key measure of success (PwC Digital Pulse 2014; Atherton 2000). Sports have typically been resistant to these trends but even hockey viewership in the Canadian market is down. One broadcasting executive describes it as a “new normal” (Bradshaw 2016b).

This is one of the primary reasons that Canada’s 93 conventional television stations saw their revenues decline by 2.5 percent in 2015 – the third straight year in which profits before interest and taxes declined for the industry (see table 2) (CRTC 2015e). Online streaming services such as Google, Netflix, Amazon, and Yahoo, by contrast, experienced a 175 percent increase in global revenues between 2010 and 2013, climbing from \$1.86 billion to \$5.12 billion (Evans 2015). The clear trend is in the direction of more competition and more consumer choice in the form of new technologically-enabled content.

TABLE 2: Broadcasting revenues in Canada, 2011–2015

Year	2011	2012	2013	2014	2015
Total revenue (\$billions)	\$2.14	\$2.04	\$1.95	\$1.80	\$1.76
Year-over-year change (%)		-4.72	-4.6	-7.23	-2.58

Source: CRTC 2015e.

The key takeaway is that technological change and new consumer patterns have revolutionized broadcasting and telecommunications and rendered the CRTC's mandate increasingly obsolete at best and counterproductive at worst.

Increasing access to high-quality broadband networks and the transition to digital transmission is reducing the market power of traditional players and creating the conditions for new players to compete. The market is thus placing greater and greater pressure on Canadian-based firms to stay competitive with regards to costs, service quality, and content. Yet at the precise moment that traditional broadcasting firms are facing unprecedented competition and experiencing significant revenue declines the CRTC is imposing asymmetrical costs and mandates and then criticizing the resultant cost-saving measures.⁴ It is a deleterious cycle that is weakening Canadian-based companies when they need to be innovating and strengthening their relative positions in the new, dynamic marketplace.

As University of Pennsylvania communications professor Elihu Katz says, our traditional conception of "television" – by which he means a market dominated by three major networks, or a government sponsored public interest" channel – "is dead" (Kam 2003). Government policy must adjust.

The Role of the CBC and Pro-Canadian Content Policies

Canadian content objectives are a key example of the type of government policy that must be reformed to reflect the shift from a "single system" to a new, dynamic marketplace where consumers are in control. This section considers the case for government policies involving the financing and mandating of Canadian content and examines how this objective is currently pursued.

Why does Canadian content matter? Regulatory policy related to Canadian content is underpinned by the idea that it is a public good to maintain domestic national broadcasting content. Such content is supposed to connect Canadians through common information, a common identity, and a common conception of citizenship, experience, and culture. Simply put: the underlying assumption is that this content helps to preserve and nurture a common expression of Canadianism.

Globerman (2016b) examines the evidence of whether national content objectives are effective at cultivating a national identity or common experience and finds that it is inconclusive. Schwanen (1997; 2001) makes the case that a Canadian content objective is indeed a public good and that the government ought to intervene to the extent necessary to ensure the production and dissemination of domestic content.

Irrespective of how one falls on this question, it is not in dispute that much of what the CRTC does is designed to protect and support Canadian content and its producers. The CRTC was conceived at the height of Canadian cultural nationalism in the 1960s and is still infused by a Canadianism objective to this day. The real question, is whether Canadian content objectives are being achieved in the face of technological change and evolving preferences.

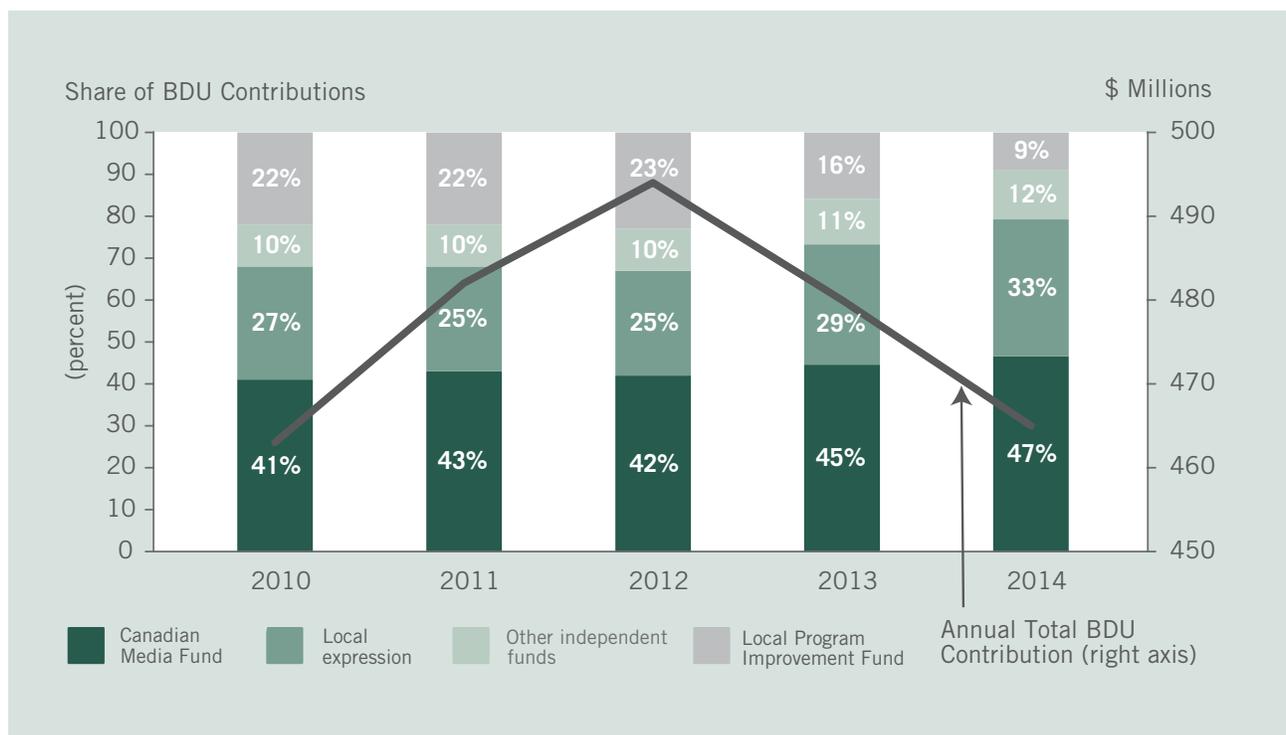
Present pro-Canadian content policies assume that Canadian broadcasting companies do not have a sufficient market basis to finance the production and dissemination of quality Canadian content and therefore require quotas, mandates, and subsidies to do so. This is the basic ethos of the CRTC.

The federal government protects and supports Canadian content in three primary ways. It supports the financing of Canadian content production directly via the National Film Board, Telefilm Canada, and the Canada Media Fund, which is funded by a combination of federal transfers and contributions by private broadcasters as a condition of their broadcasting licences. It sets “exhibition quotas” that require broadcasters to offer a certain number of Canadian channels and a certain proportion of Canadian content as part of their offerings to subscribers. And it maintains a public broadcaster with nation-wide coverage and offerings in both of Canada’s official languages through the CBC/Radio-Canada.

The first two methods – financing requirements and exhibition quotas – derive primarily from the scarcity of spectrum (referring to the limited availability of radio frequencies) and the government’s role in granting broadcasting licences. In exchange for a licence, Canadian broadcasters must adhere to regulations which set minimum levels of spending on Canadian programs and minimum numbers of hours of airing Canadian programs, and impose contributions into a fund to finance new production.

Canadian-based cable or satellite service providers, known as Broadcast Distribution Undertakings (think for instance of Bell Fibe or Telus Optik TV) must make significant financial contributions to Canadian programming. These broadcasting distributors with more than 2000 subscribers must contribute 5 percent of their gross revenues from broadcasting-related activities to creating Canadian programming. More than 80 percent of these contributions are made to the Canada Media Fund, a public-private entity created by the Department of Canadian Heritage in 2009.⁵ In total, Canadian broadcasters contributed between \$460 million and nearly \$500 million per year toward Canadian content creation between 2010 and 2014 (see chart 1).

CHART 1: Broadcasting distribution undertaking contributions to Canadian content, 2010–2014



Source: Dachis and Schwanen 2016, figure 1, page 6.

This mandated financing of Canadian programming only applies to Canadian-based broadcasters and excludes over-the-top foreign streaming services such as Netflix and YouTube. As discussed previously, it is broadly accepted that the asymmetrical treatment is a problem from a public policy perspective especially as the market share of these foreign web-based competitors grows. This is a view that crosses the political and ideological spectrum and is held irrespective of one’s predisposition to markets or the state. The Fraser Institute (Globerman 2016b) and the Canadian Centre for Policy Alternatives (Anderson 2016) agree.

Canadian broadcasters are also subjected to a minimum level of Canadian programming as a condition of their licences. According to new CRTC rules, major Canadian broadcasters will be required by August 2017 to offer 50 percent Canadian content during prime-time evening hours and specialty channels will need to provide Canadian content as 35 percent of their overall broadcasting time (CRTC 2015a).

While this new set of rules announced in March 2015 eliminates day-time quotas, it is hard to describe it as a full-scale overhaul of the system. The maintenance of the prime-time quota for Canadian content and the asymmetrical treatment of over-the-top streaming services who are not subject to these quotas leaves the most challenging aspects of the policy firmly in place. This basically represents an incomplete, Band-aid solution.

This is not to say that there are not benefits to some of the conditions that CRTC tends to apply to the granting of broadcasting licences. The current Broadcasting Distribution Regulations set out a series of conditions that can reasonably be characterized as a public good, including emergency alert messages, official languages programming, digital access to persons with disabilities, and privacy provisions. These are sensible examples of the CRTC operating as a “traffic cop” rather than an omnipresent planner with a Canadianization agenda.

The CBC/Radio Canada is the backstop of the federal government’s Canadian content objective. The CBC/Radio Canada operates on a combination of parliamentary appropriation and external revenues (see table 3). The *Broadcasting Act* stipulates that its mandate is to produce content that is “predominantly and distinctively Canadian.” Its purpose in theory, then, is to augment the offering of Canadian content by private broadcasters. Its role in practice has been more complicated and a subject of some controversy.

TABLE 3: CBC’s source of revenue, 2010/2011 to 2014/15 (billions)

Year	2010/2011	2011/2012	2012/2013	2013/2014	2014/2015
Parliamentary appropriation	\$1.17	\$1.16	\$1.15	\$1.10	\$1.06
Own-source revenues	\$0.66	\$0.69	\$0.65	\$0.77	\$0.60
Total	\$1.82	\$1.85	\$1.80	\$1.85	\$1.63

Source: Ménard 2013.

A 2007 submission by the CBC to a parliamentary committee studying the future of Canadian broadcasting made a Canadianism case for the public broadcaster. As then-CBC president Robert Rabinovitch (2007) writes in a foreword to the submission: “It is through public broadcasting that the Government can ensure a place for high-quality Canadian content that serves Canadian citizens in a broadcast environment overwhelmed by largely foreign choices.” The message and mandate is mostly about Canadian content.

Yet the ICI Radio-Canada Télé and CBC Television's licences from the CRTC require only 75 percent Canadian content for the daily broadcast and 80 percent in prime-time (CBC/Radio-Canada 2015). Both generally exceed these thresholds but there remains scope to more singularly focus CBC's mandate on Canadian content and refrain from having it compete with private broadcasters on other content.⁶ What possible market function is the CBC filling in competing with private broadcasters in non-Canadian content, especially in an era of audience fragmentation?

And that does not even consider the increasing advantage that CBC/Radio Canada has with regards to salaries and staffing relative to their Canadian-based private competitors. Evidence from a Senate committee report released in July 2015 shows that CBC/Radio Canada employees earn between 12 and 51 percent more than their private sector counterparts and maintain a higher staff ratio (Standing Senate Committee on Transport and Communications 2015). Private broadcasters are having a challenging enough time competing with the growing number of online-based competitors. How can we justify subsidizing a public broadcaster largely immune from market forces to outbid them on staffing and salaries?

These questions have gone largely unaddressed as the CBC has responded to one financial crisis after another including the loss of the National Hockey League contract, declining advertising revenues, and a reduction in its parliamentary appropriation under the Harper government. The advent of new market competitors has only reinforced these negative trends for the public broadcasters. Yet the CBC has resisted this type of fundamental thinking about its role, its place in the broader landscape, and how to best position itself to meet its Canadianism objectives. As University of Ottawa law professor Michael Geist (2014) writes: "there is no willingness to radically rethink its future."

THE HOCKEY CONUNDRUM

“ The sky fell for many of the CBC's fans on Monday [November 25, 2013], when the successful \$5.2-billion Rogers Communications bid for NHL broadcast rights was revealed. Hockey Night in Canada will remain on CBC for four more years, but Rogers will take over editorial control and all revenues. Early reaction had it that half the network's ad revenue was gone, and with it, financial support for dramas, radio and news

programs that would be shredded or cut. A gaping 330-hour hole (plus playoffs) was being ripped into the prime-time schedule for which there would be less than no money to fill. A single private-sector deal seemed about to destroy an institution that decades of government cuts had been unable to kill.”

Robert Everett-Green, 2013, "Where Can the CBC Find Clues to a Hockey-Free Future? Why, the CBC," *Globe and Mail*, November 29.

But the CBC should not necessarily be singled out for its failure to think fundamentally about its role in the new technological environment. It is more symptomatic of the general inadequacy of policy thinking about the right policy and legal framework for digital and cultural industries in Canada. Ottawa's tendency to de-emphasize these big questions in exchange for short-term political advantage on consumer issues is no doubt part of the explanation. Political sensitivities about asking cultural questions and their association with language and national unity are another. Irrespective of the origins, the result is the same: the CRTC has been forced to apply its outdated marching orders to an increasingly dynamic, sophisticated, and fragmented marketplace.

Evidence of the Need for Reform

A number of recent issues demonstrate the challenges that the CRTC has faced in responding to these economic and technological developments with the existing policy and legal framework. As the CRTC chair says in a June 2015 speech: “There is nothing to be gained by applying regulatory tools that were designed for the traditional system to the digital world” (Blais 2015a). But that is precisely what the commission has been forced to do.

The Netflix case (which will be discussed subsequently) is the highest-profile example of the CRTC’s lack of direction and the inadequacy of the current digital policy and legal framework but it is far from the only one. Recent years have been marked by efforts on the part of the CRTC to respond to the rapid developments set out in a previous section. The results have often been inconsistent, heavy-handed, and counterproductive.

The CRTC’s “pick and pay” directive is a good example. Broadcasters were instructed by the CRTC to unbundle their channel offerings to consumers beginning in 2016 as part of a “consumer first” agenda (TheStar.com 2015). “Skinny packages” of no more than \$25 per month were to be offered which would allow customers to pick and choose which channels to purchase, a seemingly sensible reform. But because “pick and pay” was grafted on to existing Canadian content obligations the CRTC necessarily has had to get involved in the composition and pricing of the basic offerings that broadcasters are required to make available to consumers (CRTC 2015b). And now the CRTC seems poised to even begin regulating how these packages are marketed. Regulation has begot regulation all in the name of so-called consumer choice.

“WORLD OF CHOICE”

“Overall, the CRTC’s new “world of choice” begins with a no-choice entry-level package of channels at “no more than \$25-a-month.” The basic package must include “all local and regional television stations,” along

with public interest, educational and community channels.”

Summary: Terence Corcoran, 2015, “CRTC’s Reforms Aim for ‘Viewer Choice’, but What They’ll Really Get Is Viewer Confusion,” *Financial Post*, March 19.

This emphasis on mandating consumer choice for regulated companies completely ignores the growing competitive pressure from exempt services such as Netflix and YouTube. Fiddling with how channels are packaged by traditional broadcasters without changing the broader digital and legal policy framework or recognizing the trend of audience fragmentation seemingly misses the point. As three C.D. Howe Institute scholars rightly note: “A more fundamental review of the state of the industry and the dynamic changes it is experiencing is required, including a review of the instruments appropriate for regulatory intervention, such as Canadian content requirements, in this environment” (Hunter, Iacobucci, and Trebilcock 2014). Pick and pay is hardly inherently a bad idea. But mandating such a change in the absence of broader reform is akin to replacing the furniture while a home’s roof is still leaking.

The commission's duplicative review of the Bell/Astral merger based on the "public interest" is a second case that shows where the CRTC's role requires new thinking. The transaction between the two companies was subjected to a full review by the Competition Bureau and two separate CRTC reviews before finally receiving approval in 2013 with a number of conditions (CBC News 2013). Separate reviews by the Competition Bureau and the CRTC based on essentially the same economic questions is hard to justify. The Competition Bureau required divestitures to address competitive concerns with respect to price and programming following its rigorous review. The CRTC imposed further conditions based on its conception of "public interest" without evidence of incremental analysis or what two C.D. Howe Institute scholars call "clear economic reasoning" (Dachis and Schwanen 2016).

It is not to say that one could not support or oppose the transaction on competitiveness grounds. But that is a role for the Competition Bureau, particularly since it has general responsibilities for reviewing

mergers in the Canadian economy and has expertise in assessing the competitive implications. The CRTC's opaque "public interest" test creates market uncertainties and seemingly contributes little to the process besides securing a significant contribution to Canadian content including funding for Telefilm Canada (CRTC 2013). It is the reason that the same two C.D. Howe Institute scholars call the whole process an exercise in "profit-skimming" (Dachis and Schwanen 2016).

*Regulation has begot regulation
all in the name of so-called
consumer choice.*

Yet the CRTC's clash with Netflix is the clearest example of the inherent problems with the CRTC's approach to the evolving technological and consumer-driven broadcasting environment. The CRTC had Netflix appear at one of its *Let's Talk TV* hearings and the exchange and

subsequent events highlighted the limitations of the CRTC's mandate. The commission requested details from Netflix about its revenues, subscriber base, and its content, and the foreign-based company refused on the grounds that the CRTC had no authority over its operations.

Recognizing its own limitations and anxious about the prospect of a judicial process, the CRTC simply struck Netflix's testimony from the record in what was described by the *Globe and Mail* (2014b) as a "petulant" act. Having been challenged by the over-the-top player and flinched the CRTC displayed its own weakness in the new digital marketplace and in turn exemplified the need for reform.

And the examples of regulatory overreach are not limited to broadcasting. The telecommunications sector has also been subjected to an uncertain regulatory environment over the past decade. There has been a real see-saw effect between a move to deregulation and a shift back to heavy-handedness during this period.

The 2006 Telecommunications Policy Review Panel called for a new telecommunications policy framework that was more deferential to market forces. Its recommendations included, among other things, a commitment to a symmetrical regulatory treatment regardless of market power, phasing out mandatory network sharing for non-essential facilities, and the creation of a new joint CRTC-Competition Bureau entity called the Telecommunications Competition Tribunal to better analyse market competition in the sector (Telecommunications Policy Review Panel 2006).

The previous government largely adopted this position early in its mandate with a 2006 directive to the CRTC stipulating greater market orientation and less intrusiveness (Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives). But soon thereafter it abandoned this shift to deregulation and proceeded to enact an interventionist agenda in the name of adding more competitors to the market (Beaudry and Speer 2016b; 2016a). The

consequence has been, among other things, the type of regulatory complications evidenced by the Wind/Globalive licence issue, a series of regulatory interventions to sustain new entrants when it became clear that they were not sustainable on a market basis, and a general confusion about federal telecommunications policy, particularly following the sale of Wind to Shaw and the change in government.

These recent experiences show the limitations of the current digital policy and legal framework in the face of evolving economic and technological developments. Layering new regulatory actions on top of old ones in an attempt to keep up with these dynamic changes is a recipe for uncertainty and missed opportunities for Canadian firms in the global marketplace.

Reforms for the Future

The case for reform is thus increasingly clear. The CRTC chair's comment about applying old ideas and tools to the new environment is precisely right. The commission's marching orders need to be updated. We can no longer have a command-and-control policy and legal framework in the digital age.

This section sets out some clear, concrete recommendations to modernize the CRTC's mandate with a new digital roadmap rooted in a confident, positive vision for Canada's digital economy based on market forces and a responsiveness to consumer demands. These recommendations are not exhaustive. Policy thinking on the taxation of foreign-based online companies to prevent tax leakage and an unlevel playing field with Canadian firms is outside the scope of this study.

The goal here is to focus on the CRTC's mandate with regards to (i) Canadian content objectives, (ii) competition issues related to protecting consumers and reviewing mergers, (iii) the legal treatment of telecommunications and broadcasting in light of growing technological convergence, and (iv) a more general market orientation that follows the 2006 Telecommunications Policy Review Panel's advice for deregulation in general. The result would be a more focused, less intrusive CRTC whose future actions would be rooted in a forward-looking, neutral digital policy that reflects the new, highly dynamic marketplace.

Reforming Canadian content objectives

Whether domestic content is a public good that ought to be mandated or subsidized is the subject of some debate. But even accepting that it is a worthwhile public objective does not mean that one must endorse the current model. The asymmetric treatment of traditional broadcasters and foreign online-based competitors with regards to financing and airing Canadian content is an obvious problem. Maintaining a public broadcaster that receives considerable taxpayer subsidies to partly compete with private broadcasters in non-Canadian content is another.

As former CRTC Chairperson Konrad von Finckenstein says in a 2011 speech: “the control of access as a means of guaranteeing the supply of Canadian content is becoming outdated. In the future, if we want Canadian content in any media, we’ll have to consider an increased role for support and promotion, and a more innovative use of the public broadcaster to that end.” The federal government’s Canadian content objectives should be modernized along these lines.

What does a new model for promoting Canadian content look like? The first priority should be to end the asymmetrical treatment between Canadian-based firms and foreign online-based companies

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with regards to federal mandates for financing and producing Canadian content. Some have argued that the solution is to extend these mandates to over-the-top broadcasters such as Netflix and YouTube to fix the uneven treatment (Anderson 2016). Countries such as France have experimented with such an approach with mixed results and it is not even clear if the CRTC has a legal basis to regulate them in the first place (Goodyear 2014; Palmer 2014).

A simpler solution would involve eliminating these mandates for Canadian firms to reflect growing market fragmentation and the need for Canadian-based radio and broadcasting companies to compete with multiple players, including non-regulated ones, for audiences.

Subsidies and quotas would cease and the expectation is that these regulated players would then be able to better compete on a level playing field with exempt services.

It is not to say that these companies would not produce or disseminate Canadian content but it would mean that it would be based on global consumer demands rather than national government dictates. This is not an empty point: indeed, it is consistent with the CRTC’s own assessment in 1999 of how online content providers were positively responding to demands for Canadian content. As its *New Media Directive* put it then: “market forces are providing a Canadian Internet presence that is also supported by a strong demand for Canadian product” (CRTC 1999a). There is no reason that the same demands would not apply to traditional broadcasting absent top-down subsidies and quotas.

A major part of these changes would involve shifting government policy and the CRTC’s mandate from protectionism to focus on promoting and expanding Canadian content to a global audience on market terms. Broadband technologies allow for Canadian cultural content to reach a much larger audience and diminish the need for domestic financing and broadcasting rules. This should be seen as a major opportunity to promote and sell our cultural content around the world.

Yet to achieve the “public good” aspect of Ottawa’s Canadian content objectives in the domestic market, the CBC’s mandate should be refocused as the sole vehicle for delivering mandated Canadian content. The CBC/Radio Canada should become solely responsible for fulfilling federal mandates for the financing and production of Canadian content based on the rightful premise set out in a July 2015 senate committee report that it should focus on “areas where the Canadian public’s needs are underserved by the private sector” (Standing Senate Committee on Transport and Communications. 2015).

A new mandate for the CBC/Radio Canada would focus on its complementarity role by becoming the federal government’s primary producer and purveyor of Canadian content. Implicit in this shift would be a recognition that we no longer have a “single system” subject to Ottawa’s command-and-control regime. Instead we would be left with a public broadcaster with a clear Canadian content

mandate and a private market comprised of multiple players competing for and responding to consumer demands.

This may mean that the CBC's parliamentary appropriation would need to increase in the short term to account for a mandated shift to solely Canadian content. But internalizing the cost of Canadian content production and dissemination in the CBC will give Canadians a clearer sense of the true price of Canadian content than the present model, which has costs widely distributed and embedded in consumer prices, and may ultimately give us a better understanding of how much Canadian taxpayers are prepared to pay to maintain these options. It may eventually create the conditions for a broader policy debate about different financing models for the CBC/Radio Canada such as adopting some degree of paid subscriptions.⁷

Clarifying CRTC's role in competition matters

A second area of reform is the CRTC's duplicative role in *ex ante* judgments about competition and its relationship to the Competition Bureau. The Bell/Astral case raises legitimate questions about the need for a CRTC review that is separate from the process led by the Competition Bureau. The clumsiness of Globalive/Wind licensing issues between the Department of Industry and the CRTC is a further example of the risks of duplication and uncertainty that having multiple bodies involved in these types of decisions can produce. Streamlining the process for making determinations about competition matters would produce greater market certainty for Canadian firms and limit the risks of regulatory confusion and inconsistency emanating from Ottawa.

Iacobucci and Trebilcock (2007) rightly argue that technological change – namely, the growing realities of convergence – have come to diminish the case for a sector-specific regulator for potential anti-competitive conduct by communications providers. The CRTC's undefined conception of "public interest" is a legacy from the 1960s and should be replaced with a clearer focus on competition law principles that draw from the rigour and analysis of the Competition Bureau.

In practice, this would entail deferring to the Competition Bureau in countering specific anti-competitive conduct, protecting consumers, and reviewing mergers. The bureau is better placed to make judgments about market dominance and anti-competitive practices given its broad mandate and expertise, and can therefore provide the commission with its own findings and recommendations and minimize the need for duplicative processes. The CRTC's role would become limited to technical and sector-specific issues such as interoperability, the transfer of spectrum, wholesale rules, pricing transparency, and overseeing broadcasting licences as well as social policy goals including official languages, disabilities access, and privacy. The result would be a more specialized process with less overlap and duplication and in turn greater market certainty.

The CRTC needs a clearer focus on competition law principles that draw from the rigour and analysis of the Competition Bureau.

Unifying a new digital statute

A third possible area of reform is the interplay between the *Radiocommunication Act*, the *Broadcasting Act*, and *Telecommunications Act* and the potential for new, unified legislation. Convergence has minimized the differences between telecommunications and broadcasting and the maintenance of

three separate statutes becomes increasingly arbitrary and even counterproductive considering it involves multiple government departments, agencies, and commissions.

Calls for new comprehensive legislation have grown louder. Former CRTC chair von Finckenstein (2011) is a chief proponent of such an idea – including what he describes as “a conceptual rethink of the whole regulatory system.” A recent C.D. Howe Institute study also makes the case for a new unified policy framework (Dachis and Schwanen 2016). Support for the idea is largely a result of the dynamics of convergence and a recognition that separate legislation no longer reflects how the digital economy operates. New comprehensive communications legislation could help to facilitate the ongoing economic and technological transformations that are occurring in the marketplace.

But the idea is not without its critics. Former CRTC commissioner Timothy Denton (2015), who is an outspoken opponent of regulating the Internet, has argued that unifying the laws would risk extending the *Broadcasting Act*'s reach to the Internet and generally expanding the scope for government intervention rather than limiting it.

These concerns should not be dismissed. Any consideration of unifying the CRTC's enabling statutes would need to focus on clarifying the commission's role in the marketplace rather than expanding it. But the general concept of bringing these different statutes with separate ministerial accountabilities and competing priorities together makes basic sense. It is a reform that the government ought to consider as part of a more ambitious mandate review of the CRTC as envisioned in this study.

Deregulating the digital economy

More generally, the CRTC should be more deferential to market forces in the communications sectors. The transformational changes occurring in these industries are far from complete and it is still not clear how they will evolve. Regulatory intervention risks short-circuiting this process of trial and error and presuming government knowledge exceeds that of the market and Canadian consumers.

The CRTC's mandate of “orderly development” of the broadcasting and telecommunications sectors should cease in an era of disorderly market dynamics. The commission can be guided in this role by the 2006 directive on telecommunications, which instructed the CRTC to “rely on market forces to the maximum extent feasible” and to ensure that any regulatory intervention “interfere[s] with the operation of competitive market forces to the minimum extent necessary” (Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives). Those are the right marching orders for the new digital age.

It does not mean that the CRTC will no longer have a role to play. But the time has come to transform the CRTC and replace its historic mandate rooted in protectionism with a confident, positive vision for Canada's digital economy based on market forces and a responsiveness to consumer demands. The 2006 Telecommunications Policy Review Panel offers a technical blueprint on how to get there. Further steps can include liberalizing foreign ownership restrictions in broadcasting and telecommunications, and enacting new rules on wireless spectrum trading and leasing on the secondary market to create the potential for new market arrangements.

Conclusion

The CRTC has played a crucial role in the application of communications policy including broadcasting and telecommunications for nearly 50 years. It continues to make influential rulings and set out directives that have a significant impact on Internet access and quality, domestic broadcasting, and the availability of digital content in Canada.

But the CRTC finds itself at a critical juncture. Much of its mandate has been superseded by technological and market developments. And it is starting to show.

The *Broadcasting Act*'s notion of a “single system” is the best (or worst) example of the CRTC's anachronistic mandate and vision. The premise is that the line between public and private is blurred and that public objectives should permeate the private market through regulations, quotas, mandates, and subsidies. The CBC or CityTv? It does not matter. Ultimately both will heed to state-mandated impulses and objectives. This “single system” mindset explains much of the flaws of the CRTC's marching orders and the reasons that it has struggled in the new economic and technological environment.

This vision might have worked in a world of limited competition and scarcity but that world has been replaced by one of convergence and fragmentation. As the OECD (2013) writes, “it is no longer possible to provide a uniform, all-encompassing definition of ‘broadcasting’ that is adequate to capture all the particular features of the market for broadcasting services” (11). Put differently: we no longer have a “single system.”

We now have a monopolistic public broadcaster that is supposed to provide a public good and a highly dynamic and competitive private market that is responsive to consumer demands. It is necessary for Ottawa to reset the digital policy and legal framework to reflect how Canadians *actually* access content rather than how cultural nationalists from a bygone era wish we did. The CRTC's present command-and-control mandate is unworkable and in need of an overhaul.

And that also applies to the telecommunications sector, which has been subject to increasing *ex-ante* regulatory action by the CRTC. Successive federal reviews have called for a more market-oriented approach to the telecommunications sector and a focus on creating the conditions for real rather than government-induced competition. The circumstances may be different than in broadcasting but the prescription is broadly the same with regards to shifting the CRTC's mandate from one of defensiveness to a new, more positive vision for Canada's digital economy based on market forces and a responsiveness to consumer demands.

This study has therefore set out recommendations for a modernized mandate for the CRTC. The totality of the recommendations would consolidate current Canadian content objectives – including mandated financing and production – in the Canadian Broadcasting Corporation, grant the primary responsibility for promoting competition in the broadcasting and telecommunications sectors to

It is necessary for Ottawa to reset the digital policy and legal framework to reflect how Canadians actually access content.

the Competition Bureau, possibly unify the *Radiocommunication Act*, the *Broadcasting Act*, and the *Telecommunications Act* in a single statute, and have the CRTC generally focus on creating the market conditions for the digital economy.

The result would not be the elimination of the CRTC. It will still have a role to play in sector-specific issues such as enforcing interoperability, the transfer of spectrum, managing wholesale rules where necessary, broadcasting licences, and price transparency, as well as delivering on social objectives such as official languages, digital accessibility for persons with disabilities, privacy, and producing sector-related data and information. But the outcome would be a more focused, less intrusive CRTC whose future actions would be rooted in a forward-looking, neutral digital policy that reflects the new, highly dynamic marketplace.

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Endnotes

- 1 As a 2003 report from the House of Commons Standing Committee on Canadian Heritage discusses, the notion of "public interest" can be "very slippery."
- 2 The mandate change also involved a name change from the Canadian Radio-Television Commission to the Canadian Radio-television and Telecommunications Commission.
- 3 As the commission said at the time: "The Commission considers that new media have not had any detrimental impact on conventional radio and television audiences. The Commission is of the view that the effect of new media on television audience size will be limited at least until such time as high-quality video programming can be distributed on the Internet" (CRTC 1999a).
- 4 The CRTC chair's comparison between the horrific Charlie Hebdo murders and cost-cutting rationalizations to local broadcasting in Canada is only one example of the regular criticisms of market-driven cost reductions by private Canadian broadcasters (Blais 2015c).
- 5 Private sector contributors to the Canada Media Fund are available here: <http://www.cmf-fmc.ca/about-cmf/overview/funding-contributors-1/>. The group ranges from large national broadcasters such as Rogers and Bell to smaller regional or local broadcasters such as TBayTel.
- 6 Radio Canada achieves 99 percent Canadian content over the full course of the broadcasting day. See: Standing Committee on Canadian Heritage, n.d., "Profile of CBC/Radio-Canada Services."
- 7 The Standing Senate Committee on Transport and Communications (2015) considered alternative financing models including the use of paid subscription and recommended that the CBC and the government consider them in order to put the corporation on a more solid financial footing.



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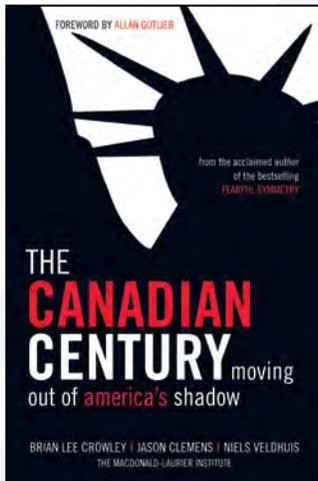
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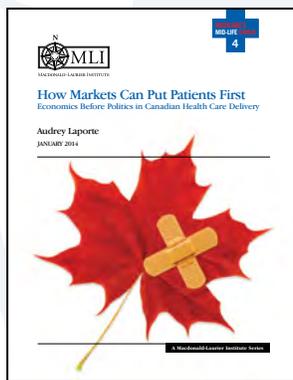
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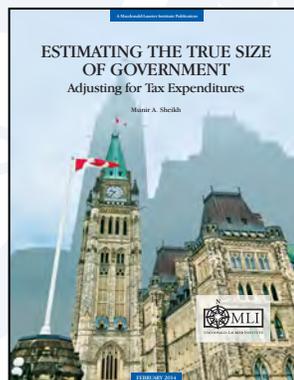
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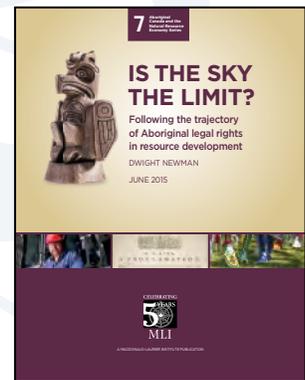
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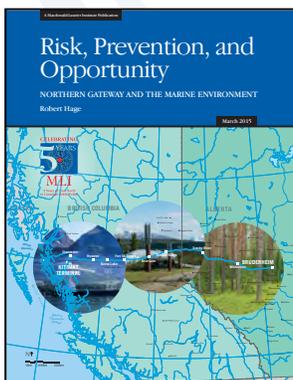
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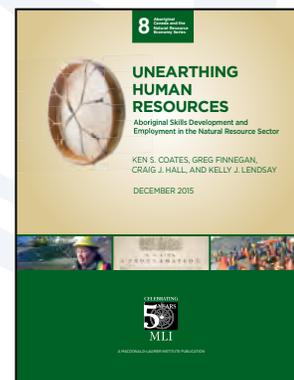
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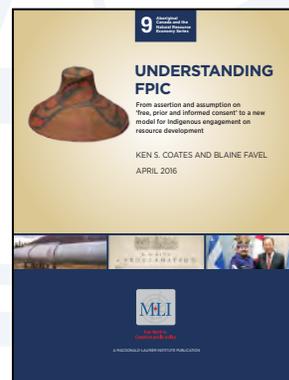
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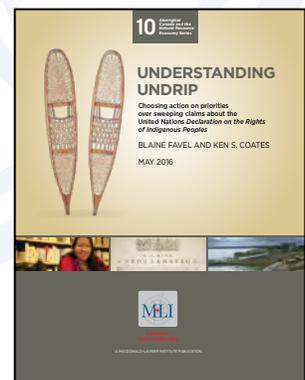
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