SUBMISSION TO THE LIBERAL CAUCUS GROUP ON THE CRTC

A View to Democratizing the CRTC

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“Have you got any plausible vocabulary to sell this to the public?”

CRTC Chairman, 1995

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The CRTC is not a truly responsive or democratic public institution and it must be reformed.

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1. The federal government to conduct a thorough and comprehensive public review of the CRTC, its regulations, its mandate, and its conduct.
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3. Legislation to raise adequate funds from CRTC licensees in order to create an independent public interest organization with a mandate to organize and assist individuals and public interest groups to fully participate in the regulatory process.
4. Appointment of an independent Ombudsman, charged with protecting the rights of citizens in the regulatory process.
5. Adoption of Bill C-381 so as to (1) introduce a bi-partite administrative tribunal model, with equal representation of both public and private interests on the Commission; (2) eliminate secrecy in voting; and (3) entrench the concept of consumer rights into the *Broadcasting Act*.
6. Legislation to facilitate debate with regard to regulatory matters in the House of Commons. For example, the introduction of quarterly and/or special reports from the aforementioned Ombudsman.
7. Legislation addressing the requirement of full disclosure with the adoption of a lobby registry, creation of better rules of procedure, and the adoption of effective public notice requirements.

I. INTRODUCTION [1]

The federal government first became involved in regulating the airwaves in 1905, shortly after communications by radiotelegraph began in Canada. "The Wireless Telegraph Act was a simple Act, being less than two pages in length." [2] How times have changed.

The Canadian Radio-television and Telecommunications Commission emerged from an evolutionary process, and there is no reason to believe that this process has reached its zenith in the current structure of the Commission. To the contrary, it is our contention in that specific improvements to the regulator are warranted. In any event, improving the accountability and accessibility of this important federal institution is certainly in the public interest.

Our submission, contained herein, is by no means a comprehensive critical analysis of the present regulatory system, nor is it a blueprint for the optimal model. Our objective is to clearly identify specific deficiencies within the CRTC, substantiate these claims, and recommend viable solutions. To this end we focus on the broadcasting side of the federal regulator, due solely to our greater expertise in this area as opposed to the telecommunications industry. However, since the CRTC acts as adjudicator under the authority of both the *Broadcasting Ac*t and the *Telecommunications Act,* improvements made to the Commission will result in tangible benefits to consumers in both sectors. More importantly, however, it is our position that the implementation of our recommendations will guarantee a more responsive and democratic public institution for all citizens.

II. PUBLIC AIRWAVES

As the appointed gatekeeper of the public airwaves, the effectiveness of the CRTC is an essential component of the health of Canadian democracy. It may be a trite observation, but the public airwaves are far more than just another opportunity for profit. It is well accepted that the information the public receives is as much a part of a healthy democracy as the responsiveness of elected officials. The public cannot be said to make informed choices without full access to

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1 Acknowledgment is due the lawyers who collectively contributed tens of thousands of dollars worth of pro bono legal assistance: Mr. C. Leafloor, Toronto, counsel to Cable Watch and lead counsel before the Ontario Court (General Division) in the case of *Mahar v. Rogers Cablesystems Limited*, and his associates, Mr. J.B. Drummie, Toronto, and Mr. N. Milton, Ottawa. Mr. Leafloor has agreed to discuss the legal issues addressed herein. He can be reached at the law firm Racioppo Zuber Coetzee Dionne at (905) 848-6100 or via the Internet at cleafloor@rz-law.com.. To quote Mr. Justice Sharpe: *Mahar v. Rogers Cablesystems Limited* "was brought on a bono fide basis and raised a genuine issue of law of significance to the public at large."

2 Frank Foster, Broadcasting Policy Development, Franfost Communications Ltd. Financially supported by the CRTC, 1982, p.3.

accurate information. If we accept that democratic principles are an integral part of our culture, then the protection of Canadian culture involves protecting the basic democratic underpinnings of our society. At present, the public airwaves are out of the control of the public.[3] The transfer of effective control of the public airwaves from elected representatives to bureaucrats, without adequate safeguards, is not in the public interest. Such safeguards do not exist in the current regulatory system in Canada.

III. CABINET APPOINTMENTS

The present Cabinet appointment method used to select Commissioners has not historically reflected the importance of the matters regulated by CRTC. Candidates are not always chosen on the basis of merit but rather on the relative strength of their political or business connections.

> "In recent years, the 13 members of the Canadian Radio-television and Telecommunications Commission have largely been veterans of the TV, cable and telephone industries, and the commission has made its decisions based on their impact on the profitability of those industries." [4]

Furthermore, there is no statutory protection to direct Cabinet to guard against possible bias in the composition of the quasi-judicial regulatory body.

IV. CONFLICTS OF INTEREST

Commissioners and CRTC staff regularly leave public service and shortly afterwards find themselves in senior positions with companies regulated by the CRTC. The revolving door between regulator and regulated sacrifices the integrity of the regulatory process, creating a painfully obvious conflict of interest. One executive went from being president of a regulated company, to being CRTC Chairman, to being vice-chairman of another regulated company. The incestuous nature of the regulatory system also works the other way. One former lobbyist for the Canadian Association of Broadcasters was appointed by Cabinet as a Commissioner.

V. PRESENT LEGISLATION

The present legislation empowering the CRTC to regulate the Canadian airwaves is antiquated, obscure and lacking democratic safeguards.

(a) Independence from Parliament

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[3] For example, Canadians cannot even call the community channel their own. On October 15, 1996, CRTC officials objected to the concept of transferring control for the community channels from the cable television companies to the communities themselves.

[4] Doug Saunders, "CRTC commissioners appointed", *The Globe and Mail*, October 10, 1998.

Present legislation insulates the CRTC, the federal government, and all parties involved in the Canadian broadcasting system from accountability. The arm's length status of the CRTC from Parliament makes it unaccountable to the Canadian public. These Cabinet appointees wield considerable power without any requirement that they justify their actions. According to the following statement made by the CRTC in 1995, Parliament apparently created the Commission specifically to avoid having to answer to the public.

> "The *Broadcasting Act* is a little messy in its application and necessarily unpopular. I guess that's one reason why Parliament created a regulator. We cannot make decisions that are each universally popular." [5]

Elected officials have used the arm's length status of the CRTC to effectively shield themselves from accountability for unpopular decisions. For instance, in response to appeals to Cabinet against the Rogers-Maclean Hunter merger, the Minister of Canadian Heritage simply issued a press release. The press release stated that, "under the *Broadcasting Act*, the Government has no power to set aside, refer back, or uphold the main CRTC decision that approved the transfer of Maclean Hunter shares to Rogers." [6]

On another occasion, a fundamental question to the Prime Minister, in the House of Commons, regarding the introduction of a de facto tax on cable subscribers by the CRTC, to raise revenue for subsidies to private production companies, was left unanswered, citing the arm's length status of the CRTC.

> "**Mrs. Jan Brown:** How can the Prime Minister justify this tax without having consulted the Canadian consumers?
>
> "**Hon. Sheila Finestone (Secretary of State (Multiculturalism)(Status of Women), Lib.):** Mr. Speaker, the hon. member should think through her observations and her direction. It would mean that a worthy and considerate member of the ministry would have to resign as a result of interference in an arm's length organization." [7]

To put the CRTC's relationship with Parliament into proper perspective, Cabinet is actually required to consult with the CRTC before the Government has the legal right to direct the Commission to hold a hearing or to issue a report on broad policy matters.

(b) Legal Authority

Present legislation grants the CRTC extensive legal authority without commensurate safeguards to protect the public from abuse.

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5 Keith Spicer, CRTC Chairman, Evidence, Standing Committee on Canadian Heritage, Chair: John Godfrey, Meeting No. 84, Tuesday, May 16, 1995, p.84:15.

6 Press release from the Hon. M. Dupuy, Minister of Canadian Heritage, March 14, 1995.

7 House of Commons Debates, March 30, 1996 re: CRTC.

> "The Commission has, in respect of any hearing under this Part, with regard to the attendance, swearing and examination of documents, the enforcement of its orders, the entry and inspection of property and other matters necessary or proper in relation to the hearing, all such powers, rights and privileges as are vested in a superior court of record." [8]

There is no evidence to suggest that the general public is aware of the actual power possessed by the CRTC. The bureaucracy has the power to subpoena to compel citizens to attend hearings as witnesses, the right to enter and inspect the property of Canadians, and the ability to fine members of the public up to $20,000 a day for violating its regulations. [9]

(c) Statutory Language

To further compound the problem, the language used in the *Broadcasting Act* is extremely broad, thereby creating room for creative interpretations by the CRTC with regard to its own mandate and the breadth of its legal authority. This vagueness creates both an opportunity for abuse by the CRTC and, at the same time, insulates the tribunal from accountability for its actions. Moreover, the CRTC actually seems proud of this fact.

> "The Commission notes that there is an established body of Canadian jurisprudence that gives a broad and generous interpretation to the Commission's powers and the exercise of its discretion under the *Act.* Moreover, Canadian courts have repeatedly stated that, as a specialized tribunal, the Commission is entitled to a high degree of curial deference when acting in its area of expertise. CRTC Ruling."[10]

The relationship between the ambiguity of the *Act* and the willingness of the CRTC to fill in the blanks was apparent in its recent order to have the TVA network distributed across Canada. As reported in the *Globe and Mail*, "The ruling [was] based on a novel interpretation of an ambiguous and little-used section of the *Broadcasting Act."*[11] The Cable Production Fund is another example of the CRTC taking liberties with its mandate, liberties that have cost Canadian consumers approximately $600 million to-date. [12]

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8 Ibid s.16

9 *Broadcasting Act*, S.C., 1991, s. 32.(1)(a).

10 Correspondence from Allan J. Darling, CRTC Secretary General to Christopher Leafloor, legal counsel to Cable Watch, dated June 25, 1996, dismissing the Cable Watch complaint. According to the CRTC, the CRTC had the authority to require Canadians pay for the Cable Production Fund, but the same consumers paying for the Fund did not have a right to written notice about this obligation, or its monthly cost.

11 Doug Saunders, "Cable firms told to carry French TV network", *The Globe and Mail*, October 30, 1998.

12 The *Broadcasting Act* does not explicitly grant the CRTC the authority to require cable subscribers to pay for subsidies for production companies. In fact, cable subscribers are not even identified as elements of the broadcasting system in the *Act*. Nonetheless, the CRTC decided that it had the authority to create the Cable Production Fund.

Ian Hunter, Professor Emeritus at the Faculty of Law, University of Western Ontario, recently noted certain bureaucratic and judicial threats to Canadian democracy in *The National Post.* In his thought-provoking article, entitled *Democracy and its discontents*, Professor Hunter cites the assertion made in 1929 by Lord Hewart, Chief Justice of England, in *The New Despotism*, that citizens were increasingly ruled by "an organized and diligent minority" of bureaucrats, not by their elected representatives:

> "Lord Hewart's attack was on vaguely worded statutes that gave broad discretion to civil servants to exercise 'departmental authority and activity beyond the realm of ordinary law'." [13]

(d) Regulatory Bias

The CRTC performs an important regulatory function yet suffers from two serious types of bias, one relating to the composition of the Commission itself, the other relating to its administration of inconsistent functions

First, there is no statutory direction to Cabinet that its appointments to the federal adjudicator create or maintain a balanced composition. Historically the CRTC has consisted of Commissioners with close connections to the regulated industries or the political process, resulting in a potentially biased adjudicator.[14]

Second, when Parliament created the CRTC it neglected the fundamental administrative law principle relating to the segmentation of inconsistent functions. As a result, the CRTC is plagued by structural conflicts of interest. For instance, it is simply impossible for the CRTC to extract funds from consumers for subsidies to cultural industries and simultaneously act as an effective consumer watchdog. Similarly, the CRTC cannot impartially adjudicate a complaint involving a regulation it has created.

(e) Transparency

Much of the business of the CRTC takes place behind closed doors. There is a degree of secrecy involved in the process that only serves to increase the potential for abuse. Some specific issues deserve comment:

Commissioners and their senior advisors are not required to publicly disclose any connections they may have to the parties involved in the proceedings. This type of

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13 Ian Hunter, Professor Emeritus in the Faculty of Law, University of Western Ontario, "Democracy and its discontents," *The National Post*, February 23, 1999.

14 CRTC Fact Sheet, "So, Who's Who at the CRTC?", December 1995, also see Doug Sanders, "CRTC commissioners appointed," *The Globe and Mail*, October 10, 1998.

disclosure is imperative for a due process. For example, Britain's highest court set aside its own ruling regarding Augusto Pinochet, solely because a judge had not declared his affiliation with Amnesty International. This important decision by the Law Lords was the first time in its history "that a verdict had ever been reviewed, much less rejected," and it serves to illustrate the importance of proper disclosure. [15]

Furthermore, there is evidence to suggest that the CRTC does not always render its decisions based strictly on the information presented during its public hearings. The Public Interest Advocacy Centre raised the issue of the behind-the-scenes component to the CRTC's adjudication process in one of its publications.

> "Needless to say, this method of adjudication leads some to believe that decisions come about as a result of behind-the-scenes manouvering rather than from the evidence presented in the public part of the hearing. In December 1994, the Chairman of the CRTC, Keith Spicer, seemed to confirm this when he indicated that over 80 members of CRTC staff were involved in producing the CRTC decision regarding the Rogers-Maclean Hunter merger, while a relative handful were actually involved in the hearing."[16]

Finally, the CRTC objects to transparency in its own process. This regulatory body refuses to even reveal how Commissioners vote when determining questions of public interest, as shown in the following correspondence from the Secretary General of the CRTC:

> "You should note that the record of how each member votes on a particular matter has never been revealed except in those instances where members made their vote known by expressing a dissenting opinion attached to a Commission decision."[17]

Secret voting, by bureaucrats acting at arm's length from Parliament, on matters involving important public policy issues and the financial interests of billion-dollar companies, is certainly not an example of participatory democracy in action.

(f) Professional Lobbyists

Professional lobbyists exist throughout the world. The extent of their influence on governments and their agencies is a concern for democrats everywhere. The fact that lobbyists have the resources to be extremely persuasive to is self-evident. The Canadian who heads the International Olympic Committee's television rights negotiations recently revealed, "that he had once turned down the offer of a $US1 million bribe in connection

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15 Warren Hodge, "Pinochet closer to freedom as ruling overturned," *New York Times Service*, London, re *Globe and Mail*, December 18, 1998, p. A23.

16 M. Janigan, "CUBS for Canada: Can the Citizen Utility Board Organize Canadian Consumers? Can it work for Cable TV?", The Public Interest Advocacy Centre, November 1995, p.53

17 Correspondence from Allan J. Darling, Secretary General to the Commission, to Keith Mahar, director, Cable Watch Citizen's Association, dated March 22, 1996, p.1.

with an IOC television deal." [18] Unfortunately, not all of the IOC officials possessed the same integrity.

The existence of high-priced and influential lobbyists representing the important industries regulated by the CRTC is understood. However, the degree of interaction between these professional lobbyists and the bureaucrats involved in the regulatory process warrants close monitoring, to protect both the interests of the public and the reputations of all persons associated with the regulatory system.

By comparison, participants in a legal proceeding are not permitted to lobby the judge outside of court. "Nor is it desirable to phone one up to suggest how he or she should decide an upcoming case; that's called contempt of court, and the citizen who tries it will soon find the constabulary knocking at his door."[19] However, influential lobbyists associating behind closed doors with the CRTC's most senior officials is routine and called business as usual. Why? Canada apparently has yet to fully appreciate the dangers inherent in this situation.

> "Canada is 30 years behind the rest of the world in forcing PR consultants and lobbyists to fully disclose what they're up to. Democracy thrives on information; secrecy is where the 'soft money' flows. It's in the shadows that PR consultants arrange the questionable deals based on 'you scratch my back, I'll scratch yours'." [20]

(g) Consumer Safeguards

Renowned regulatory expert Hudson Janisch, University of Toronto telecommunications specialist and law professor, identified one *Broadcasting Act* weakness during an *Ottawa Citizen* interview in 1994.

> "The *Act* does not direct the CRTC to consider the best price deal for consumers when making a decision." [21]

In fact, the *Broadcasting Act* totally ignores the existence of consumers. They are not even referred to in the legislation. Consequently, consumer interests are not a top priority at the CRTC. The fact that consumers do not have an effective voice at the CRTC compounds the statutory omission. As a result, basic considerations such as consumer choice, demand, notice, cost-effectiveness and proper consultation are routinely

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18 Glenda Korporaal and Mark Riley, "Bribes scandal may cost jobs of 16 IOC members," *The Sydney Monring Herald*, January 22, 1999

19 Ian Hunter, Professor Emeritus in the Faculty of Law, University of Western Ontario, "Democracy and its discontents," *The National Post*, February 23, 1999.

20 Guy Crittendden, "Flack attack," *Special to The Globe and Mail*, October 31, 1998.

21 "Controversial Decisions Sending CRTC into Quagmire" interview with Hudson Janisch, Ian Austen, *The Ottawa Citizen*, December 21, 1994, re: Public Interest Advocacy publication.

dismissed by the CRTC in the pursuit of other agendas. The absence of cost awards and the opportunity to cross-examine industry witnesses under *Broadcasting Act* proceedings further aggravates the system's shortcomings.

At the same time that Parliament neglected to incorporate consumer rights into the *Broadcasting Act*, it is regulatory policy that the CRTC be "sensitive" to the needs of the business people involved in the broadcasting system.

> "The Canadian broadcasting system should be regulated and supervised in a flexible manner that is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings." [22]

Why do consumers pay all the bills for the Canadian broadcasting system, but not rate in the associated legislation?

(h) Effectiveness of Legislation

Consumer interests have historically been sacrificed by the CRTC in the name of protecting and promoting Canadian culture. At the same time, however, there is little to suggest that the CRTC has been at all effective in this role.

Professors Globerman, Janisch and Stanbury point out in *Perspectives on the New Economics and Regulation of Telecommunications*, that the Canadian broadcasting regulations do not differentiate between the protection of Canadian culture and the protection of Canadians that produce, own and distribute programming. a fundamental distinction.

> "It must be emphasized that *none* of the many regulations to which broadcasters (or other 'distribution undertakings') are subject seek to specify the themes, subject matter or *substantive* content of program material. 'Canadian' programs are simply those that are made by persons who are Canadian citizens. It is for that reason that most economists think of Cancon regulations as 'boiling down' to yet another case of a small, well organized group using the power of the state to redistribute income to themselves." [23]

The highly questionable relationship between the Canadian content rules and the protection of Canadian culture is easily illustrated. For example, a program on "*South American Iguanas*" may be classified as "Canadian" while a program on the "*Political Philosophy of Sir John A. MacDonald*" may not, depending entirely on the citizenship of the persons who made the program. As a more specific example, one of Canadian Bryan Adam's hit songs was not deemed "Canadian" under the rules.

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22 *Broadcasting Act*, S.C. 1991, s. 5 (2) (g).

23 Steven Globerman, Hudson N. Janisch and W.T. Stanbury, *Perspectives on the New Economics and Regulation of Telecommunications*, Ch.12 *Convergence, Competition and Canadian Content*, The Institute for Research on Public Policy, p.217.

VI. PUBLIC HEARING PROCESS

The public hearing process used by the CRTC does not provide Canadians with a fair or balanced opportunity to fully participate in the regulatory process.

a) Lack of Commitment

The CRTC has not demonstrated a genuine commitment to maximize public participation in its decision-making process. To the contrary, certain of its actions have actually served to suppress full participation by citizens and public interest groups in hearings.

One example: the decision by the CRTC to hold its Convergence Hearing under the authority of the *Broadcasting Act* instead of the *Telecommunications Act* dramatically reduced the degree of public debate in the proceedings. By proceeding, in this manner, the CRTC prevented both cost awards and the discovery of industry evidence by public interest advocates. The Public Interest Advocacy Centre vehemently complained to the CRTC that the Commission had "sabotaged" its own hearing.

> "It is our respectful submission that the CRTC has sabotaged the potential importance of this proceeding
> ....
> "The CRTC has chosen to conduct these hearings pursuant to the much-criticized procedures used to conduct proceedings under the ***Broadcasting Act***. This means that there is no ability to direct interrogatories or to cross-examine parties upon the evidence to be introduced." [24]

On another occasion, the editorial department at *The Toronto Star* felt it necessary to urge the CRTC to open up its process to the public, noting that the regulator "seemed uninterested in engaging the public in the local phone debate." The CRTC had "ruled out full public hearings on the issue." [25]

More recently, the CRTC "originally denied requests for public consultation" [26] into the application by Manitoba Telecom Services' application for a residential rate increase of $8 per month. The CRTC only agreed to hold a public hearing into the matter when public pressure became too large to ignore.

In November 1998, the CRTC launched its first ever on-line Internet forum, in conjunction with its consideration of its role with the exciting new Internet technology. Certainly the CRTC should be commended for using the Internet technology to reach out

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[24] The Consumers' Association of Canada and the National Association of Canada's comments concerning Notice of Public Hearing CRTC 1994-130, p.4-5.

[25] Editorial, "Open up debates on local phones", *The Toronto Star*, July 15, 1995, p. E2.

[26] Telecom, *The Golbe and Mail*, September 14, 1998.

for the public. However, this raises question why the CRTC did not open up its process years ago to the public by simply using the existing and effective telephone service.

> "The call for submissions prompted a flood of angry responses from Canadians when the CRTC opened its first on-line Internet forum to debate the issue." [27]

Is it possible that the federal regulator does not really want greater public participation in its hearing process?

b) Statutory Right of Presentation

Canadians have a "*statutory right of presentation*" in CRTC public hearings. In order to exercise this right, however, certain fundamental procedures have to be in place. A Canadian Court gave the following instruction to the CRTC regarding the statutory right of Canadians to participate in the regulatory process.

> "To be such a public hearing, it would, in my view, have had to be arranged in such a way as to provide members of the public with a reasonable opportunity to know the subject matter of the hearing, and what it involved from the point of view of the public, in sufficient time to decide whether or not to exercise their statutory right of presentation and to prepare themselves for the task of presentation if they decide to make a presentation. In other words, what the statute contemplates, in my view, is a meaningful hearing that would be calculated to aid the Commission, or its Executive Committee, to reach a conclusion that reflects a consideration of the public interest as well as a consideration of the private interest of the licensee; It does not contemplate a public meeting at which members of the public are merely given an opportunity to 'blow off steam'." [28]

c) Public Notice of Proceedings

The Commission is required by statute to notify Canadians in advance of its hearings. Furthermore, the rules of fairness and natural justice require that this notice be effective.

It is our concern, however, that the CRTC's notice process is ineffective. The CRTC public notices placed in the Canada Gazette and newspapers do not generally provide Canadians with sufficient information to determine in advance how a hearing might affect them.

For example, the following court case involving a public utility board in Newfoundland helps to illustrate what is required to be effective notice.

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27 Brenda Dalglish, "CRTC wrestles with new media question", *The Globe and Mail*, November 19, 1998.

28 *Re Canadian Radio-Television Commission and London Cable TV Ltd.* (1976), 67 D.L.R. (3d) 267 (Fed. C.A.), *per* Jackett, C.J. at p. 270: appeal dismissed on the grounds that it had become moot, at *sub. nom. Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada* (1977), 77 D.L.R. (3d) 641 (S.C.C.)

> "Where, as in this case, there is no statutory provision specifying the notice to be given the general rule is that it must be sufficient to allow the affected person to know how he or she might be affected and to prepare to make representations. ...
>
> ...
>
> "In the end it is the ratepayers who must pay the difference either through the surcharge or increased taxation, unless of course the municipalities could function without the income. The ratepayers are vitally interested in the outcome of the hearings and were entitled to notice." [29]

The following CRTC public notice was published in the Globe and Mail in relation to a public hearing in February 1996. What useful information does the notice convey to the ordinary Canadian? Moreover, what information does it convey to you?

Notice of Change relating to a Public Notice CRTC 1995-128-1.

Further to Public Notice 1995-128 dated 28 July 1995 relating to Order in Council P.C. 1995-398, the Commission announces that it will hold a public hearing commencing on 5 February 1996, 9:00 A.M., Conference Centre, Phase IV, 140 Promenade du Portage in Hull, QC. Complete text of this notice of change relating to a public notice may be obtained by contacting the Public Examination Room of the CRTC in Hull, at (819) 997-2429; or through the CRTC offices in Montreal (514) 283-6607, Vancouver (604) 666-2111, Winnipeg (204) 983-6306, Halifax (902) 426-7997 or by consulting CRTC's Home Page: http://www.crtc.gc.ca.

Toronto administrative lawyer C. Leafloor addressed the legal shortcomings of the public notice procedures used by the CRTC at an *Insight Conference* in early 1996. In reference to the above CRTC notice, Mr. Leafloor said, "as far as 99.99% of the public would be concerned, this notice conveys no information whatsoever. In this regard, this notice would be equally effective if it were written in Latin." He further observed that, "The language is obscure. There is no use of bullet points or white space that may assist the eye in focusing on the most important information. The CRTC makes no attempt to

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[29] *Conception Bay South (Town) et al. v. Board of Commissioners of Public Utilities (Nfld.) et al.* (1991), 95 Nfld. & P.E.I.R. 106 (Nfld. S.C.T.D.), *per* Cameron J., at pp. 110, 112 and 114.

[note] Another court case to consider in this subject is *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. And Ontario Hydro et al.* (1984), 8 Admin. L. R. 81 (Ont. Div. Ct.), *per* Reid J. at pp. 113-14 and 121, where the court said: "In any event, it is well established that where the form or content of the notice is not laid down it must be reasonable in the sense that it conveys the real intentions of the giver and enables the person to whom it is directed to know what he must meet. …Even in the absence of express statutory requirement it is trite law that where property rights or interests may be affected notice must be given and even in the absence of a statutory direction as to form and content a notice given must be reasonable in the circumstances."

express clearly in simple language exactly what significance this notice may have on the Canadian public."[30]

Not all notices are created equal. For example, compare the CRTC's notice with the following notice by Algoma Central Railway Inc.

30 C. Leafloor, "Is the CRTC Omnipotent?, *Insight/Globe and Mail* conference, Toronto, "The Changing Role of the CRTC", January 29, 1996."

ALGOMA CENTRAL
RAILWAY INC.

NOTICE OF DISCONTINUANCE
OF RAILWAY LINE

In accordance with Section143(1) of the *Canada Transportation Act*, notice is hereby given that Algoma Central Railway Inc. intends to sell or lease its operating interest in the railway line described below or to discontinue operating the railway line if it is not transferred or leased:

The Michipicoten Subdivision being that Railway line between Hawk Junction at Mile 164.6 ACRI Line and Michipicoten Harbour (approximately 26 miles).

Parties interested in acquiring this railway line for the purpose of continuing in railway operations must make their interests known in writing by June 15, 1999.

Correspondence should be forwarded to legal counsel acting on behalf of Algoma Central Railway Include.:

Orlando M. Rosa, Counsel
Wishart & partners Law Firm
Barristers and Solicitors
390 Bay street, 5th Floor
SAULT STE MARIE, ON P6A 1X2

Phone : 705-949-6700
Fax: (705) 949-2465 E-mail: orosa@wishartlaw.com

Expressions of interest and proposals are subject to ACRI conditions for acquiring railway lines (available upon request).

Following the 60 day period, if no party has made their interest known, or if no agreement has been entered into within the four months following, the railway line will be offered to the Federal (subject to certain conditions) Provincial and Municipal governments whose territory the railway line passes through. Each will have 30 days to indicate their intention to acquire the interest in the line. If no agreement is entered into, operations on this line will cease.

Algoma Central Railway Inc.
By its authorized agent and legal counsel
Orlando M. Rosa
Wishart & Partners Law Firm

We submit that the Algoma Central Railway notice is effective, while the CRTC's is not.

In the same *Toronto Star* editorial which complained that the CRTC "seemed uninterested in engaging the public in the local phone debate," the newspaper also noted the ineffectiveness of the CRTC's notice. The editorial was critical of the "arcane" language used in the "little-noticed announcement."

> " 'Two significant issues affecting local competition are the rate at which the contribution component of the carrier access tariff (CAT) and subsidies between various local services should be reduced through rate revisions. The resolution of these issues will require that the commission take into account concerns related to rate shock affordability and the impact of changes in the contribution of the CAT on the toll market.'
>
> "Huh?" [31]

d) Unequal Opportunity

Independent parties have observed that the CRTC's adjudication process appears to be grossly unbalanced in favour of corporate interests.

> "The public part of such hearings usually consists of a lengthy presentation from the cable operator followed by presentations limited to fifteen minutes by each of the party intervenors."[32]

Historically, the public and public interest groups have been "enormously frustrated both with the hearing process and their inability to make an impact." [33] The British Columbia Public Interest Advocacy Centre became so disillusioned with the process that it finally stopped participating in CRTC public hearings.

> "Dick Gatherole, the former Executive Director of the British Columbia Public Interest Centre, had the occasion to represent seniors' organizations and consumer groups in British Columbia on numerous occasions before the CRTC in the 1980s and early 1990s. With the concurrence of his clients, Gatherole eventually ceased involvement in CRTC cable proceedings because of lack of responsiveness on the part of the CRTC to any consumer-based submissions." [34]

On another occasion, the Ottawa-based Public Interest Advocacy Centre complained about the limited opportunity made available to public interest groups by the CRTC at the important Structural Hearing:

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31 Editorial, "Open up debate on local phones", *The Toronto Star*, July 15, 1995, p. E2.

32 M. Janigan, "CUBS for Canada: Can the Citizen Utility Board Organize Canadian Consumers? Can it work for Cable TV?", The Public Interest Advocacy Centre, November 1995, p.52.

33 Ibid p.52.

34 Ibid p.53.

> "In closing, and with respect to the Commission, we have some concerns about the limited opportunity that has been made available to consumer groups to develop and advance positions on these very substantial questions." [35]

The disparity in the amount of time allotted to the different interests involved in the process is great. To illustrate, the Structural Hearing transcripts contain 64 pages of presentations made by the Consumers' Association of Canada and the Public Interest Advocacy Centre. By comparison, approximately 1553 pages were dedicated to cable industry presentations.

The Commission has acknowledged that citizens do not fully participate its regulatory process. According to the CRTC, however, the disorganization of Canadians and public interest groups is to blame, not the processes of the CRTC. The Chairman went so far as to invite Parliament to rectify this problem.

> "As you know, it's intrinsically difficult to get 20 to 25 million consumers organized. We are not allowed to give grants to consumers, to create the CRTC's private little consumers' group. It would be horrible. We can't do that. If Parliament and this committee can find an arm's length way to fund consumers' public interest groups, that would be wonderful." [36]

Democracy Watch [37] agrees that Canadian consumers are unorganized and vulnerable. The Ottawa-based non-profit organization has been lobbying for legislative remedies to solve the problem.

e) Questionable Decisions

Many decisions made by the CRTC do not serve to instill a great deal of public confidence. In fact, public opinion polling suggests that the CRTC is suffering from a crisis in public confidence. Public trust in the regulatory body is not commensurate with its legal status. One Angus Reid poll found that forty percent of respondents had no trust at all in the ability of the CRTC to set cable rates, and "[l]ess than 12 per cent of respondents said they have a great deal of trust in the CRTC to regulate cable TV charges." [38] This absence of trust in the government regulator helped to set the stage for the unprecedented consumer revolt in 1994.

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35 Public Interest Advocacy Centre, Transcript of CRTC's "Structural Hearing", March 1, 1993, p. 139.

36 CRTC Chairman Keith Spicer, Evidence, Standing Committee on Canadian Heritage, Tuesday, May 16, 1995, p. 84:15.

37 Democacry Watch is a non-profit, non-partisan, consumer organization based in Ottawa. The group has been advocating Citizen Association legislation to better organize and educate Canadian consumers. The group has world-renowned consumer advocate Ralph Nader in its corner on this important matter.

38 Lawrence Surtees, "Canadians prefer learning on information highway, poll says", *The Globe and Mail*, February 6, 1995.

Perhaps an explanation for this crisis in public confidence is to be found in the CRTC's structural and procedural deficiencies noted above. Regardless, the CRTC has a long history of not balancing the interests of the public and private sector. A number of poor decisions have been made. One *Toronto Star* editorial noted that the federal regulator was becoming all too well known for using "*perverse logic."* [39]

VII. REGULATORY CULTURE

Every group of people, whether an agency, a company or nation, develops their own particular culture, and the CRTC is no exception. These groups and agencies, once established, may seek to solidify their authority. However, not all bureaucracies develop a culture that operates in the public interest. The International Olympic Committee is a perfect example of this sad truth.

> "In another era the IOC might have been able to handle this investigation in its own, discreet way. It has fought hard to put itself above the direction of governments and other outside forces, insisting on its independence as a global 'Olympic movement', a private club of hand-picked members with its own rules." [40]

In our opinion, the CRTC bureaucracy has developed a troubling culture. We believe that the dysfunctional nature of the CRTC manifests itself in a way that is contrary to the public interest. The Commission operates in an undemocratic environment and it selectively ignores both the statutory rights of citizens and the superior authority of Parliament. [41]

(a) Political Nature of the CRTC

To avoid the danger of politics intruding too much in the regulation of the Canadian broadcasting industry, Parliament created a regulatory body that would operate at arms-length from Parliament. These were appropriate intentions. Unfortunately, however, the CRTC has demonstrated itself, over these past decades, to be regulatory body that is insufficiently accountable to Parliament and to the public. As well, the CRTC has demonstrated itself to be overly responsive to the manipulations of the well-funded business interests in the broadcasting industry. As a result, the CRTC operates in an environment that is too political, yet unresponsive and undemocratic. Decisions appear to be made by the CRTC not on the merits of the case but rather on the relative power of the participants

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39 Editorial, "Open up debate on local phones", *The Toronto Star*, July 15, 1995, p. E2.

40 Glenda Korporaal, "Ousting corrupt members a bit of a marathon", *The Sydney Morning Herald*, January 22, 1999, p.9.

41 The CRTC has chosen to ignore certain elements of Government policy regarding convergence For instance, the CRTC has knowingly entrenched the ability of cable companies to use revenues derived from monopoly service to cross-subsidize other ventures into its latest regulations. In addition, the Commission has not enforced its own regulations in relation to the sale of the inside wire in multiple-unit-buildings.

According to Globerman, Janisch and Stanbury, "while there is much talk about culture and national identity, in reality what is involved here is the protection of a highly articulate (and hence hugely politically influential) industrial sector in flagrant violation of the principles underlying free trade." [42]

The Direct-to-Home satellite controversy in 1995 provided Canadians with a glimpse into the intricate web of connections operating within the regulatory system. The *Financial Post* article entitled, "Politics invades satellite battle" by J. Vardy, focused on some of the influential people connected to the politics of the regulatory system.

> "In the messy, clannish world of broadcast policy, it seems political connections are important. And when connections are being plied by two competing corporations, the regulatory spitting match that results can be damaging.
> ...
> "Andre Desmarais, Power Corp.'s president and chief operating officer, is Chretien's son-in-law.
> ...
> "Cancom's president and CEO is Allain Gourd, a former deputy minister of communications. He recently hired Paul Racine, a former assistant deputy minister at the old Department of Communications and the ADM at Canadian Heritage.
> ...
> "Also in Expressvu's ring is Andre Bureau, vice-chairman of Astral Communications Inc. He's a former chairman of the CRTC and a mentor to Fernand Belisle, the CRTC vice-chairman who has been the commission's intellectual leader on both the convergence and DTH issues." [43]

(b) Public Relations Tactics

In 1965, the Committee on Broadcasting recommended, "that Parliament should delegate authority over all Canadian broadcasting to a single board or agency." [44] At the same time, the Committee advocated "an important public relations job" for the proposed regulator in order to facilitate understanding and input into the Canadian broadcasting system by the Canadian public.

> "Thirdly, the chairman and members of the proposed Canadian Broadcasting Authority should be responsible for explaining, defending and, where necessary, correcting defects in the whole broadcasting system. In the best sense of the phrase, it has an important public relations job to do. Public comment and criticism of broadcasting is inescapable, and if it did not come naturally we should have to take steps to promote it. A constant flow of comment from Members of Parliament, from interested groups, and from the public, is essential if broadcasting is to be responsive to Canadians needs and fulfill its national purpose. It should be a two-way flow, with comment and criticism coming in,

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42 S. Globerman, H.N. Janisch, W.T. Stanbury, "*Perspectives on the New Economics and Regulation of Telecommunications*", The Institute for Research on Public Policy (IRPP), 1996, p.211.

43 J. Vardy, " Politics invades satellite battle", *The Financial Post*, April 27, 1995.

44 Report on the Committee on Broadcasting, Queen's Printer, Ottawa, September 1, 1965, p.98

> and being answered by explanation, defence, and correction of valid complaints going out.
>
> "The outward flow should not only answer particular complaints, but should seek to develop public understanding, in all segments of the population, of the purposes and aspirations of the Canadian broadcasting system. Until now, the dialogue between the broadcasting system and the people it seeks to serve has been confused and muted." [45]

Public relations do play a major role at the CRTC today, but not in the positive manner envisioned by the Committee on Broadcast in 1965.

In his recent special to *The Globe and Mail*, journalist Guy Crittenden was critical of how public relations may threaten Canadian democracy. Mr. Crittenden argued that some public service institutions use public relations to such an extent that it threatens democratic processes. [46] It is our view that this criticism applies to the CRTC.

The marketing culture that has developed at the CRTC puts the institution's self-interest above that of the public interest. The Commission's decisions, rules and practices are all packaged and sold in such a way as to avoid opposition. The comment by then CRTC Chairman Keith Spicer in March 1995 helps to illustrate the creative liberties used by the CRTC with language to this end.

> "Have you got any plausible vocabulary to sell this to the public? Very often words matter. If somebody calls this a 'cable tax', you may have another consumer revolt on your hands." [47]

The actual extent to which the CRTC will go to hide potentially unpopular information from the public raises fundamental questions of law and government ethics.

For example, hundreds of millions of dollars have been raised from cable subscribers for the Cable Production Fund. The Fund, in turn, provides subsidies to production companies in Canada. Cable subscribers have never been notified that they are paying for the Cable Production Fund, or their exact monthly cost of the Fund. Instead, these consumers have been given written notice that the special fees being collected by their monopoly service provider are for an entirely different purpose. Millions of Canadians have been notified that these special fees are to partially offset specific capital expenditures made by their cable television companies on their basic service.

According to information obtained from the Access to Information and Privacy Co-ordinator at the CRTC, the cost of the Cable Production Fund is significant to some Canadians. For example:

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45 Report on the Committee on Broadcasting, Queen's Printer, Ottawa, September 1, 1965, p.100.

46 Guy Crittenden, "Flack attack", *Special to the Globe and Mail*", October 31, 1998.

47 CRTC Chairman Keith Spicer, Transcript of Public Hearing on Convergence, March 9, 1995, p. 802.

> "The January 1996 cable rate for Newmarket, Ontario would be $22.65 if Rogers contributes to the Cable Production Fund and $17.61 if it doesn't." [48]

Despite this fact, the CRTC was able to successfully introduce this new levy in the middle of the January 1995 cable revolt without public opposition. From the perspective of the CRTC, this was a public relations success story.

The CRTC is only too happy to use the media for its own propaganda. For example, one month after the CRTC introduced the Cable Production Fund without the knowledge of the public, the then CRTC Chairman wrote a special editorial to the *Ottawa Citizen*, extolling the democratic virtues to be gained by Canadians from the regulation of the information highway by the Commission.

> "The Information Era we're entering - what Alvin Toffler calls the Third Wave - will surely make a more democratic society. Knowledge is power as the cliché goes, and inexpensive universal access to a numbing variety of facts, opinions, ideas and cultures will inevitably open minds, governments and power structures of every kind from big business to religion." [49]

The CRTC, however, shows no reluctance in its selective use of the media. For example, one month after the special editorial to the *Ottawa Citizen*, which described the democratic benefits of knowledge, the CRTC refused to discuss the Cable Production Fund on-air. [50]

Furthermore, the CRTC is not above using the same public relations strategies in its dealings with Members of Parliament, as demonstrated when the CRTC appeared before the Standing Committee on Canadian Heritage on May 16, 1995.

The Commission prepared a special text in anticipation of some tough questions relating to the Cable Production Fund. Prior to discussing the scheduled subject matter, the CRTC Chairman started applauding the exceptional virtues of the Commission, its difficult job, its transparency, its respect for citizens' views, and how "precious" other nations consider the CRTC process. The Chairman acknowledged that it was uncharacteristic of him to bring a text to the proceeding.

A few minutes later, Member of Parliament Dan McTeague questioned the CRTC Chairman on whether the fees paid by consumers for the Cable Production Fund constituted a hidden tax. The CRTC Chairman chose to describe the fees being charged to subscribers as "voluntary contributions."

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48 Correspondence from Betty MacPhee, Access to Information and Privacy Co-ordinator at the CRTC to Keith Mahar, Cable Watch.

49 CRTC Chairmen Keith Spicer, "Welcome to the Infobahn", *The Ottawa Citizen*, February 21, 1995.

50 The CRTC declined an invitation by Canada Am to discuss the Cable Production Fund on-air, similarly representatives from the CRTC declined invitations by CBC Face-Off and Global Television to discuss its controversial decision.

> "We did not create a tax. We do not have the right to do so. Parliament has the right. It is certainly not a hidden tax, because we did it openly. What we created was not a hidden tax. We created a system of voluntary contributions, openly discussed and openly arrived at." [51]

At the same time, the CRTC Chairman claimed that Canadians had been notified about the Cable Production Fund decision by the CRTC.

> "**Mr. McTeague**: Did you give notification to Canadians that this was going to happen?
>
> "**Mr. Spicer**: Oh, yes, we did."

As noted above, Canadians were never sent written notice regarding the monthly cost of the Cable Production Fund. Millions of Canadians had been given written notice that the special fees were for an entirely different purpose.

Furthermore, to put this claim by the CRTC into proper perspective, even a person who had complete knowledge of the cable regulations, who had attended all public hearings, and had read all the CRTC public notices, would still require additional information in order to ascertain the impact of the Cable Production Fund on his or her monthly bill.

Unfortunately, this type of public relations tactic by the regulatory adjudicator is common. The *Globe and Mail* editorial staff was highly critical of the Commission in November 1998 for its use of "disingenuous terms" when selling its "exceptionally weak argument" for its TVA decision." [52]

Finally, official communications from the CRTC also employ public relations tactics that are counterproductive to the public interest. For example, CRTC "Fact Sheets" sometimes omit important facts about the topic subjects, facts that might be objectionable to members of the public. At other times, the regulatory language used is a sufficient barrier to comprehension.

The "Fact Sheet" for the Cable Production Fund is a perfect example of both of these qualities. In the CRTC "Fact Sheet" for the Cable Production Fund, extremely important and probably controversial facts are omitted. The CRTC finishes its 3 page "Fact Sheet" with a self-promoting ad of its virtues, finishing with the self-serving slogan, "*For Communication in the Public Interest*":

> "We aim to help Canadians better understand how their values and diversities shape Canada's unique personality in the world. We do so by regulating our broadcasting and telecommunications industries in open, flexible ways to foster creative freedom and strengthen the prosperity of all our citizens." [53]

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[51] CRTC Chairman Keith Spicer, Evidence, Standing Committee on Canadian Heritage, Chair: John Godfrey, Tuesday, May 16, 1995, p.84:16.

[52] Editorial, "Cable of Babel", *The Globe and Mail*, November 2, 1998.

[53] CRTC, Fact Sheet, Canadian Program Production Fund, June 1994.

VIII. CONCLUSION

Due to the importance of the public airwaves, this scarce resource must be managed and regulated in a manner that fairly and democratically reflects the interests of the public. As noted above, the CRTC is not a truly responsive or democratic public institution. The CRTC must be reformed.

We respectfully submit to the Liberal Caucus Group on the CRTC that it is desirable that an examination be conducted into the Canadian Radio-television and Telecommunications Commission and its activities, with a view to recommending its most effective conduct in the national interest.

IX. RECOMMENDATIONS

1. The federal government to conduct a thorough and comprehensive public review of the CRTC, its regulations, its mandate, and its conduct.
2. Enforcement of Government policy regarding competitive safeguards through the requirement of basic cable rate reductions equal in amount to the fees collected pursuant to subsections 18 (5) and 18 (6.3) in the month of December 1997.
3. Legislation to raise adequate funds from CRTC licensees in order to create an independent public interest organization with a mandate to organize and assist individuals and public interest groups to fully participate in the regulatory process.
4. Appointment of an independent Ombudsman, charged with protecting the rights of citizens in the regulatory process.
5. Adoption of Bill C-381 so as to (1) introduce a bi-partite administrative tribunal model, with equal representation of both public and private interests on the Commission; (2) eliminate secrecy in voting; and (3) entrench the concept of consumer rights into the *Broadcasting Act*.
6. Legislation to facilitate debate with regard to regulatory matters in the House of Commons. For example, the introduction of quarterly and/or special reports from the aforementioned Ombudsman.
7. Legislation addressing the requirement of full disclosure with the adoption of a lobby registry, creation of better rules of procedure, and the adoption of effective public notice requirements.