MA MAJOR RESEARCH PAPER

REGULATORY THEATRE:
THE DISAPPEARANCE OF THE 'PUBLIC' FROM THE CRTC PUBLIC PROCESS

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INTRODUCTION

The Broadcasting Act of 1991 lays out the Policy Objectives for the Canadian Broadcasting system. It defines it as a single system, owned and controlled by Canadians, comprising private, public and community elements, "which provides a public service essential to the maintenance and enhancement of national identity and cultural sovereignty"[1] Contrary to both the U.S. model where the broadcasting system was initially conceived as a purely private enterprise, and the European model where the broadcasters were government controlled entities; the Canadian system in its earliest stages evolved into a public-private system with both economic and cultural goals.

One of the basic means of achieving these goals is the public process utilized by the Canadian Radio-Television and Telecommunication Commission (CRTC) in the formulation of its broadcasting policies. The process is intended to be both transparent (as the Commissions' decisions as well as the submissions of all parties are made public) and participatory (as it invites and accepts submissions from all members of Canadian public). This process had been upheld as an example of a 'best practice' approach to

[1] Broadcasting Act, 3. (1)

dealing with regulatory questions arising from changes in broadcasting structures and technologies.[2] (Raboy, 1994).

Although the process has been used successfully in the past to identify the attitudes of the Canadian public, in more recent times the CRTC has been showing signs of *regulatory capture*, or increased domination by the interests of the industries it is supposed to regulate. A commonly used example of a captured regulator is the Federal Communications Commission in the U.S.

Recently the broadcasters have attempted to effect influence over the CRTC by taking over of the very public process whose intended purpose was to balance the interests of the broadcasters with those of the labour organizations, content producers, NGO's and the general public. The question that naturally arises is: What is the contribution of the public in the CRTC public process?

The intent of this paper is to set a critical eye on a number of recent developments in Canadian broadcasting policy and show that the public interest has become marginalized in the public process. Furthermore, we will show that the public process has increasingly become co-opted by the broadcasters and cable companies in search of de-regulation.

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[2] Marc Raboy. 1994. *The Role of the Public in Broadcasting Policy Making and Regulation: Lesson for Europe from Canada.*

We will look at examples of regulatory regimes in other regions before providing the historical and political background into the CRTC public process. Following that, we will concentrate on a number of recent CRTC decisions in attempt to establish the extent to which the public process has been co-opted by large broadcasters. The decisions in question deal with issues of ownership change[3], Canadian content regulations[4] and the support for Canadian programming[5] . The first two decisions concern the recent change in ownership of Bell Globemedia Inc, Canada's largest private broadcaster[6] and the transfer of ownership of the Canadian Documentary Channel from the Corus group to the CBC, Canada's Public Broadcaster[7] and the obligations by owners in such transactions to contribute materially to the Canadian broadcasting system in the form of a benefits package (Bell Globemedia argued against such a package, while the CBC used a loophole in the regulations which allowed for a minimization of their contribution). The third dealt with a proposal for significant decrease in Canadian programming and expenditures on Canadian programs by Discovery Health Canada. The last, and arguably most important for the future of Canadian produced content regards the ongoing struggle between the cable providers, broadcasters and independent producers regarding the administration and the future of the Canadian Television Fund, commonly known as the CTF-crisis. In the first three cases the broadcasters utilized the public process to create the appearance of wide-ranging support for their position (by directly soliciting support from producers, other broadcasters and public figures and providing them with talking points to be used in

[3] Broadcasting Decision CRTC 2006-309, Broadcasting Decision CRTC 2007-201
[4] Broadcasting decision 2006-384
[5] CRTC Broadcasting Public Notices 2007-70, The Report of the CRTC Taskforce on the Canadian Television Fund, June 29, 2007
[6] CRTC Decision 2006-309
[7] CRTC Decision 2007-201

their submissions to the CRTC). The case of the CTF crisis provides step-by-step insight into how the powerful actors in the communications industries influence and shape and control the policy-making discourse. In the first three cases, the large companies were successful in their application before the Commission. While the CTF crisis is ongoing, the report of the CTF taskforce creates a compromise that benefits the large media companies, disenfranchises the independent producers, and largely ignores the public.

Although the CRTC public process was originally intended to increase transparency as well as encourage public participation, the very same process has been subverted by broadcasters and cable companies. In order to realize their hegemonic project of further deregulation and market domination they have attempted to influence the public process through manufactured 'public support'. As we will see, this tactic has proved successful and throws serious doubt on the nature of the public process. In some cases, the public voice has been completely absent, raising an important question: in the absence of public input can the CRTC policy decision-making process still be called public?

REGULATORY EXAMPLES FROM U.S. AND EUROPE

Before taking a closer look at the Canadian regulatory landscape we will take a look at two other regulatory regimes: American and European. While the U.S. and E.U. regulators differ in their structure and approach, their decisions nonetheless have a strong influence on the Canadian regulatory landscape. Decisions by the FCC and the European

regulatory bodies are closely watched by broadcasters and cable companies and any moves towards deregulation are used to validate requests for similar actions in Canada.

The U.S. model – FCC, or the *captured* regulator

Broadcasting in the United States, as in Canada, falls under the jurisdiction of the federal government. The federal government derives its power from the constitution, which gives it authority to regulate the commerce between and among states. Through a number of court proceedings precedents have been established that confirm broadcasting as an interstate commerce, even if the signals are contained within the borders of a single state.

The Radio Act of 1927 represented the first attempt to deal with broadcasting and established the *public trustee* system, which grants private enterprises the licence to operate a broadcasting service for the benefit of the public. It also provided for the creation of a Federal Radio Commission, which was tasked with the regulation of radio broadcasting. Shortly thereafter, the Communications Act was adopted in 1934, which established and gave power over all communications regulation to the Federal Communications Commission (or the FCC). The Act was amended several times, most notably in 1967 with the purpose of creating a public broadcasting system, and in 1984 asserting federal, i.e. FCC authority over the cable industry[8] (a necessary closing of a

[8] John Zelezny. 2007. *Communications law : liberties, restraints, and the modern media*

loophole since cable wasn't broadcasting over the air and could be construed as a state rather than federal jurisdiction).

Although the FCC is conceived as an independent regulatory agency, this only means that neither of the branches of government can exact complete control over it. In reality, all the branches are able to exert political influence over the Commission.

The congress cannot specifically direct the FCC to undertake any particular action or create a specific regulatory regime. However, the Congress has direct oversight over the actions of the FCC and makes direct decisions regarding the FCC finances. Thereby, the Congress is able to reduce FCC's financial ability to act in certain areas, while providing more funds to act in others. By controlling the FCC's purse, the Congress has the ability to steer the FCC towards specific decisions or increase the enforcement of certain regulations at the expense of others.

The Executive branch (i.e. the President and his administration) nominates the members of the Commission and nominates one of the Commissioners as the FCC Chair. The Congress, or to be more particular, the Senate must approve all the nominations[9]. As Presidents (generally) strive for a confirmation hearing uninterrupted by partisan conflict, the nominations become a matter of consultation and consensus building between the Executive and the Senate. While the executive branch has no direct oversight over the

[9] John Zelezny. 2007. *Communications law : liberties, restraints, and the modern media*

FCC, the political connection nature of the appointments allows the executive branch a considerable level of influence over the actions of the Commission.

The Judiciary ensures that the FCC actions do not violate any of the established legal norms, laws or the Constitution. It is possible for FCC decisions to be appealed to the Courts, and the Courts do have the power to ask the Commission to reconsider an issue.[10]

Five commissioners, all of which are appointed by the President, head the FCC. The nomination rules limit the number of Commissioners from the same political party to three. The length of term the Commissioners serve is five years, with the opportunity to renew their term. Most commissioners, however, have been known not to seek a second term and many resign early (usually during the change if administrations). The FCC responsibilities are divided among seven Bureaus: Wireline Competition (i.e. fixed telephones), Wireless Telecommunication (i.e. mobile telephones, pagers, etc.), Media (broadcasters, cable, etc.), International, Enforcement, Consumer and Governmental Affairs, Public Safety and Homeland Security.[11]

The high level of political influence over the FCC has opened it up to regulatory *capture*, or control by the very industries it is supposed to regulate. The concept of capture in regards to the FCC has been well established in academic literature and dates

[10] John Zelezny. 2007. *Communications law : liberties, restraints, and the modern media*
[11] Wikipedia, http://en.wikipedia.org/wiki/FCC

back several decades[12]. Some authors have even suggested that capture might not be the best description, as the FCC was created in order to serve industry interests[13] Therefore there would have been nothing to subsequently capture as the regulator was captured from the very beginning.

Additionally, both Congress and the Executive are able to exert their own agendas, or more particularly, the agendas of their political affiliates and donors. Napoli (1998) has looked at how both the legislative and executive branches have used investigations and inquires to control the FCC. Largely qualitative and drawing solely on testimonies and interviews, these proceedings have served the purpose of signaling "government interest or displeasure [and] threatening the FCC into submission"[14] Furthermore, Napoli argues that these investigations also serve the purpose of either branch of the government (depending on who sponsored the investigation) asserting its authority over the Commission, rather than any public interest. . The result has been a Commission which largely disregards the opinions and needs of the public, catering to the industries instead and viewing the public as consumers rather than interested citizens.

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[12] Richard Olin Berner, 1975. *Constraints on the Regulatory Process: A Case Study of Regulation of Cable Television.*
[13] Robert Waterman McChesney. 1993. *Telecommunications, mass media, and democracy : the battle for the control of U.S. broadcasting, 1928-1935.*
[14] Phillip M Napoli, *Government Assessment of FCC performance,* p. 417

European model – bureaucrats and judges as regulators

Within the European Union there are a number of different bodies that claim some level of jurisdiction over the regulation of broadcasting. The competing interests of different levels of government as well as the interests of the member states limit the level of effective regulation of broadcasting. With no single regulatory agency, and a number of differing government bodies, the enforcement of regulation has fallen largely to the European Court of Justice.

The European Parliament, the legislative branch of the European community has generally been described as weak in legislative power[15]. In addition, the Committee on Youth, Culture, Education, Media and Sport (which among its many duties also tasked with responsibility for broadcasting) is perceived as a low status committee with relatively little influence.

The Commission is the executive branch of the E.U. and is composed of an ever expanding number of Directorates General (currently 37, compared to 24 in 1998) each tasked with a specific portfolio of duties and jurisdictional powers. A minimum of six directorates lays claims over some aspects of broadcasting regulations:

DG I (Directorate General I) is responsible for foreign economic relations and represents the EU at G8 and WTO meetings. In the media sector it has had an influence

[15] Stefan Verhulst and David Goldberg, 1998. European Media Policy: Complexity and Comprehensiveness. *Media Dynamics & Regulatory Concerns in the digital age*

over the international convergence of media, intellectual property rights, liberalization and de-regulation of media services. DG III is tasked with Industry and was the force behind the *Television without Frontiers* Green Paper, which set the stage for the corresponding directive (to be discussed below). DG IV is in charge of competition policy and is tasked with prevention of anti-competitive behavior. Consequently it has had an effect on preventing certain mergers and acquisitions, while at the same time influencing policy on public service broadcasting. As some of the public broadcaster receive their revenue from two streams (from advertising and user fees) they have recently come under scrutiny for being anti-competitive. DG X, responsible for Information, Communication, Culture and Audiovisual Media has intervened to provide protection and support to the European media industries. To that effect it had created two funding programs (MEDIA I and MEDIA II) with the purpose of increasing the competitiveness of the European audiovisual industry. DGXIII, looking after Telecommunications, Information Market and Exploitation of Research has been behind the major push to introduce and standardize new broadcasting technologies, such as satellite and HDTV. DG XV, responsible for the internal market and financial services has been mainly interested in the creation of a viable internal media market in Europe, mainly through liberalization and deregulation.

The process by which broadcasting regulations, directives, and most other EU legislation come into being is highly bureaucratic and reflects the interests represented by various branches of government, different departments within those branches and naturally the interests of various member states. Any actions taken by either the European

Parliament or the Commission also partially reflect attempts at legitimization and "institutional struggle for power"[16]. This assessment also applies to initiatives created by different directorate generals. The effects of this process can be seen in the *Television Without Frontiers* Directive, which was set up to encourage and facilitate the free movement of broadcasting services between member states, with the express purpose of creating a single European audio-visual market (in order to increase competitiveness of European media industries on the global market). While most member states could agree on the liberalizing measures of the Directive, quotas for European programming, although included, were largely watered down by the provisions that the quotas should "be achieved progressively"[17] as well as "where practicable and by appropriate means"[18] The original draft of the Directive also included a chapter or copyright which was omitted in its entirely because the member states could not come to an agreement.

In the absence of a single strong regulator, the enforcement of the various directives has fallen directly on the European court of Justice. The court has been instrumental in enforcing the Television Without Frontiers (TWF) directive, often running roughshod over national laws and regulations as well as "cultural considerations of the Member States in the goal of implementing the Single Market"[19]. The market goal, rather than public interest has been the overriding principle in ECJ decisions. In the pursuit of that goal, the ECJ has "legitimized the right of media companies to bypass

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[16] Alison Harcourt, *The European Union and the regulation of media markets*, p. 16
[17] Stefan Verhulst and David Goldberg, *European Media Policy, Complexity and Comprehensiveness,* in *Media Dynamics & Regulatory Concerns in the Digital Age*. p. 25
[18] ibid.
[19] Alison Harcourt, *The European Union and the regulation of media markets*, p. 24

national laws by moving their headquarters abroad"[20] since the TWF directive states that the laws and regulations of the country of origin of the broadcast prevail over those of the country of reception. This rule has been upheld by the ECJ even when the all of the efforts of a broadcaster are directed at a market outside of its country of origin. As a result, a number of broadcasters have established UK-based headquarters (due to particularly lax broadcast regulations there) in order to get around national regulations.

Whether the regulations have been established by the bureaucrats of the EP, the EC and its Directorates General or enforced by the ECJ the goal has been economic and "entirely market oriented, without regard for considerations of the public interest"[21]. Both the public interest and public consultation have been conspicuously absent from European broadcasting regulation.

CANADA'S BROADCAST REGULATOR

In contrast to the FCC and the European regulatory system, Canada's regulatory agency was deliberately set up as a regulatory agency independent from the federal government. While its counterparts are mostly concerned with market goals, CRTC's mandate (as per the Broadcasting Act) includes clear cultural goals, such as the maintenance of national identity and predominance of Canadian ownership and programming in the broadcasting sector.

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[20] ibid. p. 29
[21] Alison Harcourt, *The European Union and the regulation of media markets*, p. 33

Overview of the CRTC public process

The CRTC or the Canadian Radio-Television and Telecommunications Commission, was established as an independent public authority, with the purpose of regulating all aspects of Canadian broadcasting (through enforcement of the Broadcasting Act) and telecommunications. The Commission consists of 13 full-time commissioners with offices in Ottawa and 6 part-time regional commissioners with offices in different regions of the country (BC/Yukon, Alberta/NWT, Manitoba/Saskatchewan, Ontario, Quebec, Atlantic). While all commissioners participate in broadcasting matters, only the full-time commissioners are involved in the telecom decisions. In this paper we will concentrate on the broadcasting side of CRTC public process.

While the CRTC is set up as an independent public body, it must comply with the Broadcasting Act (which may be altered or amended by Parliament) and reports to the Parliament through the minister of Canadian Heritage. Furthermore the Cabinet has a variety of powers over the CRTC. It can ask the Commission to take another look at a decision, it can issue directions to the Commission (for example, directing the CRTC to undertake a policy review), and finally it can overrule CRTC decisions. The Cabinet measures, particularly the power to overrule, are used relatively infrequently as they

invalidate the purpose of an independent regulator. Most recently the Cabinet has overruled a CRTC Telecommunications decision regarding VoIP.[22]

On the broadcasting side the CRTC has the power to issue, alter and revoke broadcasting licences. It can also hold policy reviews and set its own policy goals as long as they are consistent with the Broadcasting Act. While the Commission has the power to act independently, its decision process is subject to external input by industry, interest groups and the general public.

All CRTC decisions require that the process be made public. In most cases this means that the public is invited to provide written comments to the commission on matters of policy, broadcaster's licence conditions, etc. In certain cases, where the matters to be decided might have a wide reaching impact, the CRTC will hold a public hearing, where broadcasters, lobby groups, and the public have the opportunity to make their presentations in a public forum.

Whether the process consists of written comments or public presentation, the Commission makes a public announcement (in the form of a CRTC Public Notice) that it is considering a certain broadcasting issue and invites public input on the matter. The notices are posted on the CRTC website and in some cases (such as licence renewals) the broadcasters will make the announcement on their respective channels. Once the

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[22] CBC Website, November 15th, 2006, *Conservatives overrule CRTC on regulation of internet phones* http://www.cbc.ca/money/story/2006/11/15/berniervoip.html?ref=rss

Commission has received the comments (or to use the CRTC terminology – interventions) the broadcasters (or cable providers) have a chance to issue a response to issues raised by the submissions.

In certain cases, where the issues at hand have a wider policy impact, the process is composed of two steps. The first step consists of initial submissions by the interveners (public, broadcasters, etc.). In the second step the interveners can reply to each other's submissions.

Once the CRTC receives documents pertaining to the public process, provided they do not refer to confidential corporate information (such as corporate financial data) they are placed on the public file which may be examined by the public either at the CRTC office in Ottawa or at any of the regional offices. The CRTC public files dating back to 1999 are also accessible via their website. According to Raboy (2004) this level of transparency is "remarkable and possibly unmatched"[23]

But transparency alone does not guarantee an equitable and healthy public policy process. As mentioned previously, the publicity campaigns waged by the broadcasters have an extensive influence on the public process particularly through soliciting written support for broadcaster applications. At the center of the public process is the notion that all the participants, including the public will (or at least should) act in their own best interest. The duty of the CRTC then is to weigh the interests of the broadcasters, cable

[23] Marc Raboy and David Taras, *Transparency and accountability in Canadian media policy* p. 60

companies, independent producers, labour unions and the public against each other. But as we will see in the following two cases, the broadcasters have successfully used publicity campaigns to get support for their applications from independent producers, charitable organizations, and other broadcasters even though the applications were contrary to the interest of supporting parties. In this way the broadcasters have managed to capture the regulator by controlling the very public process which was intended to present a balance of different interests.

CRTC: the 'best practice' model

The CRTC has been held up by both Canadian and international communications scholars as an exemplary model of a broadcasting regulator, both for its status as an independent agency and for its use of a transparent public process. However, the manner of the public process has changed over the years, with private companies increasing their control over policy setting.

The shift in the nature of the Canadian broadcasting policy making and the CRTC public process are mirrored in the shift in perspective of author Marc Raboy. In the early nineties, Raboy (1994) held up the CRTC as an example (though not without flaws) of a successful regulator in a mixed public/private broadcasting environment. He suggested the CRTC as a model to be followed by Europe as it was shifting away from the system dominated by strong public broadcasters. Conversely he used the FCC as an example of a "regulatory agency that has been 'captured' by the industry it is supposed to be

regulating"[24] and considers the rationale of setting up a regulatory framework which is merely used to legitimize industry practices.

He viewed the public process used by the CRTC as essential in balancing the interests of industry and the public. Moreover he was of the view that the process was dominated by the general public rather than industry groups, stressing that 'while economically interested groups participate in the public process, their efforts tend to be concentrated on (from their perspective) the more effective mechanisms of direct contact with decision makers"[25] He also strongly believed that the CRTC, despite its problems, had been successful in creating a "space for public debate about the general orientation of Canada's broadcasting as well as the performance of individual broadcasters"[26].

Although much has changed in the field of broadcasting since the early '90s when Raboy wrote those words, this particular view of the CRTC public process has held strong, not just in Canada, but internationally. As late as 2004, Bardoel and d'Haenens, in writing about public involvement in setting broadcasting policy in the Netherlands used the example of the CRTC as a *best practice* model of public consultation in media regulation. They laud the CRTC as a "model in which citizens – in all their geographic and ethnic diversity – are actively involved in the evaluation and possible steering of the

[24] Marc Raboy, *The Role of the Public in Broadcasting Policy Making and Regulation: Lesson for Europe from Canada*, p.6
[25] Marc Raboy, *The Role of the Public in Broadcasting Policy Making and Regulation: Lesson for Europe from Canada* p.16
[26] Marc Raboy, *ibid* p.19

concrete expression of public responsibility of the media"[27]. But it is not just the CRTC public process that they find important. In their view, the public consultation is just a part of the larger system which they believe is set up with "a general concern for transparency and a readiness to listen to the public."[28] While some scholars idealize the CRTC, at least in the way it has been conceived, media pundits and members of the public are quick to condemn its decisions, question its existence (sometimes calling for abolishment and replacement by a free-market) as well as questioning the nature of the public process. As we will see later in the analysis of recent CRTC decisions, the optimism displayed by Bardoel and d'Haenens may well have been misplaced.

Barriers to public participation

While the CRTC keeps most of the process public by providing access to submissions by various interested parties and publicly providing the rationale for its decisions, there are certain barriers in the process which prevent effective participation by the public.

The process itself functions in a semi-legal manner. Although an underpinning law exists in the form of the Broadcasting Act, the decisions of the Commission are informed largely by precedents established through prior CRTC proceedings. In this respect the proceedings resemble case law. Most of the entities appearing before the

[27] ,Jo Bardoel and Leen d'Haenens, *Media Meet the Citizen: Beyond Market Mechanism and Government Regulations* p.186
[28] ibid. p.186

commission will have engaged legal counsel for the proceedings (or have a permanent staff member in charge of regulatory affairs, in case of the larger companies). Without the expertise or at least some knowledge of the previous cases, members of the public risk making arguments that are largely irrelevant to the issues at hand. An example can be found in the CRTC hearings regarding the approval of Fox News for carriage on Canadian cable services. Members of the public assumed that the channel was denied access based on political reasons. One columnist summed up the overall sentiment, claiming that because Fox "airs opinions from people who aren't afraid to challenge prevailing orthodoxy or think differently [...] Liberals and the CRTC fear it."[29] Another columnist claimed that the government was engaging in censorship and "using the state, through the CRTC, to deny Canadians the right to choose"[30] Consequently the public provided submissions to the CRTC focusing on it as a freedom of speech issue, but these arguments made little difference to Commission's final decision, as it was based "purely on questions of competition with the Canadian 24-hour news broadcasters"[31]. Fox News was being denied access based on the non-competition rules, which state that foreign broadcasting services can't be directly competitive with Canadian services. As it turns out, CRTC had already granted a licence to Global to operate a service in partnership with Fox called Fox News Canada. Although the service had not began operations (there is a two-year leeway from granting of the licence to commencement of operations) Fox

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[29] Peter Worthington, *Fox News? Not in our henhouse,* Toronto Sun, April 26, 2004. http://www.canoe.ca/NewsStand/Columnists/Toronto/Peter_Worthington/2004/04/26/436506.html

[30] Rod Love, *Canadians Shouldn't be denied Fox News.* Globe and Mail, April 28th, 2004 http://www.friends.ca/News/Friends_News/archives/articles04280402.asp

[31] James Gordon, *'Fair and Balanced' Fox News coming to a channel near you.* The Edmonton Journal, November 19, 2004 http://www.friends.ca/News/Friends_News/archives/articles11190401.asp

News U.S. would have been in direct competition with it. Finally, Fox pulled out of the partnership with Global, ending the Fox News Canada channel, which cleared the way for Fox News to be granted carriage on Canadian cable. While the support (in sheer numbers) from the Canadian public for the inclusion of Fox News US was considerable, in the end the matter was decided based on a purely procedural basis, rather than as a response to the volume of public submissions.

As stated before, in preparing a submission that the Commission is likely to take into account, one has to consider the various previous cases. Since the Commission does not provide information as to what cases might be relevant, the common citizen is left largely to his own devices in his attempts to acquire any pertinent information. Some of this information is available on the CRTC website, but is hampered by poor design and lackluster search engine. For the information that is not readily available through the Web, the public needs to turn to the CRTC archives, housed at the CRTC offices in Gatineau, and to a lesser extent at a variety of regional offices across the country. But even in such cases one needs to know what one is looking for, or *what is missing* – and the CRTC website leaves very little clues. In addition, the geographic distance, as well as the amount of time needed to peruse the archive is generally prohibitive for most members of the public.

Although preparing a written submission is relatively inexpensive (requiring web access and time), an appearance before the Commission holds a greater amount of prestige (as it constitutes tacit recognition by the CRTC), but it also carries a number of

costs associated with it. When the CRTC schedules a public hearing there are no specific times given to any of the entities or persons appearing before the Commission. A number of days are simply allotted to the hearings, and order of appearance is given, but no specific times are issued. As a result, the members of the public wishing to appear before the commission might have to spend several days waiting for their turn. While large corporations might be able to afford to send a team to Gatineau (travel expenses, lodgings and per diems included), the cost of such a venture might be prohibitive to smaller organizations, public interest groups and private citizens, particularly if they are located outside the drivable range of Canada's capital.

THE PUBLIC AND THE POWER

The ignored public

While there exists a considerable body of literature on the nature and purpose of the CRTC and the Public Process, authors rarely focus on the specific Public Hearings and Processes themselves, but rather deal solely with the final decisions. Submissions by various parties (unless specifically mentioned in the CRTC Decisions themselves) are rarely analyzed. An interesting analysis of public participation in the regulatory process has been performed in the U.S. by McGregor (2006). In an attempt to discern why the FCC ignored general public input via e-mail in the 2003 proceedings on the relaxation of rules on media ownership. In total, the FCC received over 500,000 comments from

individual citizens, 10,000 of which were received via e-mail. However, most of these were ignored, as the FCC (according to Michael Powell, the Chairman at the time) found them to be "too general to be seriously considered by the agency in making its decisions"[32] As mentioned before the FCC (CRTC's American counterpart) is commonly considered a *captured* regulator, which pays more attention to the interests of the industry and special interest groups than those of the public. McGregor analyzed a sample of 1,400 submissions (from the 10,000 submitted via e-mail) and found that most of the commenters (from the general public) presented their opinions in a clear manner. In general they were opposed to the increase in concentration of ownership. He also found that their supporting arguments failed to address "the specific economic, legal and policy questions asked by the Commission"[33] One of the common strategies by consumer groups was to organize e-mail campaigns by their members, however the sheer number of letters written in opposition had little bearing on the FCC rulings. As McGregor points out, the FCC decision-making is not based on a democratic process, but rather on a quasi-legal one, where the strength of various arguments is examined rather than the amount of support they receive from the public. He goes on to agree with the statement by Powell, that the comments received from the public are much too general to be seriously considered. Instead, he advises any group intending to submit comments to the FCC should pour its energies into "a single, well-focused and sophisticated comment [...] representing all of their members"[34] because this approach "would probably have much

[32] Michael A. McGregor, *'When the "Public Interest" is Not What Interests the Public* p. 207
[33] ibid. p. 222
[34] ibid p.223

more impact on FCC decision making than thousands of identical brief comments"[35] However, McGregor does not endorse the FCC approach. His analysis shows that the citizens have an understanding of the issues, but lack the necessary tools to express their opinions in a way that would sway the Commission. Consequently, he concludes that "in this instance, the 'public interest' as defined by the FCC is not what interests the public"[36]. Despite the lack of interest by the FCC, the large volume of public comments did garner the attention of both the media and Congress, leading McGregor to conclude that public efforts were not in vain and that this "bodes well for citizens continuing to exercise their power to participate and stimulate change."[37]

Though McGregor specifically analyzed the regulatory policy making in respect of the FCC, his conclusions are also applicable in the Canadian setting

Broadcaster Hegemony

In the previous cases we have taken a look at the limitations placed on the public input in policy-making. In the following sections we will examine a different kind of input originating with the broadcasters. In recent cases the broadcasters have attempted (and succeeded) to subvert the public process by replacing the public input with manufactured input. They have solicited and generated 'public' input in support of their hegemonic project. This creates the appearance that the public process remains democratic and interactive, while the debate is mainly controlled by the broadcasters.

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[35] ibid. p.223
[36] ibid. p.224
[37] ibid. p224

Thus, the broadcasters have managed to effectively replace public input with hegemonic input.

One way to look at the CRTC public process is as a means of maintaining the corporate hegemony of large broadcasters. Young (2003), sees the corporate hegemony as connected to a *hegemonic project,* or a mobilization of support behind objectives that benefit the goals of hegemonic enterprises. In the field of broadcasting, the "project of neoliberal economic reform undertaken by the state or a supranational institution (such as the European Union) is assisted by efforts to establish general interest in a free market approach to broadcasting and the hegemony of private capital in broadcasting"[38]
He further points out that the maintenance of hegemony (in the broadcasting contest) involves a struggle between dominant agents (private broadcasters, cable, satellite companies) and subordinate agents (public broadcasters, trade unions, independent producers, community broadcasters, and community groups). Part of that struggle occurs in the form of CRTC hearings and other public processes. In order for the hegemony to be achieved or maintained, the dominant agents require popular support. Such support is achieved through marketing and publicity campaigns, but also through the skillful use of the CRTC public process.

As will be seen in the recent CRTC decisions, the broadcasters have moved to influence the public process and flood the debate with manufactured 'public support'.

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[38] David Young, *Discourses on Communication Technologies in Canadian and European Broadcasting Policy Debates* p. 219

The broadcasters have been able to create the appearance of a public process which involves public input, but through their solicitation of support they have effectively replaced public input with input they themselves control (as we will see later on). We can state that the broadcaster have replaced public input with hegemonic input, or input solicited and manufactured by the broadcasters in fulfillment of their hegemonic goals of deregulation (or beneficial re-regulation) in search of market dominance.

In the current environment it has become difficult to share Raboy's early '90s enthusiasm over the state of Canada's broadcasting policy. Although Raboy (with David Taras) later acknowledged that broadcasters attempt to influence CRTC by waging "campaigns to mobilize civic and community groups to their side by endorsing their applications"[39], he fails to address this practice as one that is undermining the public process.

Raboy (with Serge Proulx) has changed his perspective in light of the developments of the last ten years, particularly those resulting from convergence, development of new technologies and the dominance of neo-liberal discourse in national broadcasting policies[40]. In such an environment the dominant voice in the debate tends to be that of the broadcasters and cultural industry groups. The problem (aside from the withering away of the democratic debate) is that this results in a monochromatic view of the public (and their needs) which are only introduced into the debate as 'viewers' and

[39] Marc Raboy and David Taras, 2004. *Transparency and accountability in Canadian media policy* p. 65
[40] Serge Proulx and Marc Raboy. 2003. *Viewers on Television.*

'consumers' by various industry polls and studies. In order to re-introduce the public back into the public process 'the rhetoric of public interest must be articulated with data mined from corpuses which go beyond those generated by cultural industry lobbies'[41] With that in mind, Proulx and Raboy examine the state of Canadian broadcasting from the vantage point of viewers (in this particular case from Quebec). They interviewed a group of politically active individuals, collected their responses to a variety of questions and came up with two startling conclusions: first, the interviewees expressed dissatisfaction with the state of broadcasting (in Quebec) and secondly they expressed 'a clear sense of near-powerlessness with regard to the ability to concretely change programme contents.'[42]

The results of Raboy and Proulx's research, coupled with the recent abuses of the CRTC public process point to a potential crisis in Canadian broadcasting policy making, which will be further addressed in this paper.

RECENT CRTC DECISONS

Bell Globemedia Transfer of Ownership

The three cases we examine are both recent precedent-setting decisions by the CRTC, and represent a situation where the broadcasters successfully used the public

[41] Serge Proulx and Marc Raboy, *Viewers on Television*, p. 334
[42] Serge Proulx and Marc Raboy, *Viewers on Television*, p. 338

process to shift CRTC policy. In each case the broadcasters were able to inject manufactured support or hegemonic input into the policy debate and in each case they were able to achieve their goals. They have subverted the letter-writing process, which has been conceived as a way to easily involve the public in policy making. By flooding the CRTC public process with manufactured letters of support, the broadcasters have turned the public process into a hegemonic process - one in which the outcome always favors the goals of their hegemonic project.

The first case involves the transfer of ownership of Bell Globemedia and the subsequent decision by the CRTC not to impose the standard benefits package in the transaction. The second case regards the transfer of ownership of the Documentary Channel from Corus to the CBC, where the public broadcaster was able to use the process to reduce the amount of the benefits package required by the transaction. The third deals with the drastic change of the conditions of licence of Discovery Health Canada.

In late 2005, Bell Canada Enterprises announced that it would be divesting itself of a portion of its stake in Bell Globemedia - the largest Canadian media company (comprising of Canada's largest private network, largest collection of specialty channels as well as the Globe and Mail). BCE (which at that point owned 68.5% of the stock, with Woodbridge owning the remaining 31.5%) proposed to sell 48.5% of the stock - 20% each to Ontario Teacher's Pension Plan and Torstar, and 8.5% to Woodbridge.

Since every sale of a broadcaster requires CRTC approval, Bell Globe Media applied to change its "effective control"[43]. In most cases of ownership changes the Commission has required the creation of a "specific package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcast undertaking"[44] Traditionally, such benefits have amounted to approximately 10% of the value of the transaction. When BCE originally purchased CTV in 2000, the benefits package totaled $230 million for programming and non-programming purposes. Non-programming benefits consisted of scholarships, grants and donations – including, among others, $2.5 million for the creation of a BCE Chair in convergence and creative use of advanced technology at Ryerson and $3 million to APTN for the creation of six Aboriginal Television Service news bureaus across Canada[45]. The expected benefits from the sale of Bell Globemedia were valued at approximately $68.5 million.

However, Bell Globemedia and it's potential owners were of the view that this particular transaction did not constitute a "transfer of effective control"[46] since (according to their interpretation) no new entity would be in position of control over Bell Globemedia. Consequently, they argued that no benefits package was required in this particular case. The CRTC, as per its mandate, invited public input on the matter.

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[43] Broadcasting Public Notice CRTC 2006-24
[44] Broadcasting Public Notice CRTC 1993-68
[45] Broadcasting Public Notice CRTC 2000-747
[46] Broadcasting Public Notice CRTC 2006-24

Of the forty three interventions available on the CRTC public website, only seven were in opposition to the Bell Globemedia application, and of those, six were submitted by unions and trade organizations. Only one opposing letter was submitted by a private individual, who expressed his dismay at the process, calling it a "show trial"[47]. However, the letter was concerned with items which were of the interest to that individual (Closed Captioning Standards) rather than the matters relevant to the proceeding. A number of opposing submissions of the form-letter kind had been submitted via the Friends of Canadian Broadcasting website, but those have not been included in the on-line public record. As in the FCC case, mentioned earlier, these submissions were likely to be completely ignored by the CRTC. In essence, the public was silent on the issues of transfer of ownership and the required benefits package.

The support letters largely came from independent producers or individuals representing organizations and businesses which have benefited from Bell Globemedia patronage in the past.

It seemed surprising that independent producers showed such support for the application, especially considering that they stand to lose the most if no benefits were to flow from this transaction. A closer look revealed that most of the letters contained similar, if not identical elements. Most of them referred to a great working relationship with CTV, and touted the broadcaster as a "top quality provider of [sic] quality Canadian

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[47] Joe Clark, *Application No. 2005-1504-1 by Bell Globemedia Inc.* http://support.crtc.gc.ca/applicant/docs.aspx?pn_ph_no=pb2006-24&call_id=30208&lang=E&defaultName=Clark_Joe

content and a strong supporter of the Canadian independent production community"[48] Few of the supporting interveners even acknowledged the issue of tangible benefits.

In the end, the CRTC ruled in favour of Bell Globemedia, approving the transaction without imposing a benefits package[49].

The strong similarities between different submissions lead one to suspect that Bell Globemedia had actively sought support for its application among independent producers and other previous beneficiaries of benefits package funds. In the third case we examine, this suspicion is confirmed by a form letter issued by a broadcaster to independent producers This means that BGM managed to exact a successful marketing campaign by convincing those who have benefited from the previous benefits package to support BGM's case, without informing them that this would mean no further benefits funds would be forthcoming. If these letters of support carry any weight with the CRTC, BGM has managed to subvert the CRTC public process by creating the appearance of public support. Furthermore, they have increased their power by creating a precedent which would allow for the engineering of transactions in a way which would eliminate the need for the payment of benefits packages.

. But the question remains, do these *form letters* actually influence the decisions of the Commission? As we will see in the subsequent case, their impact can be significant.

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[48] Jeff Newman, *Application No. 2005-1504-1 by Bell Globemedia Inc.* http://support.crtc.gc.ca/applicant/docs.aspx?pn_ph_no=pb2006-24&call_id=30029&lang=E&defaultName=Newman_Jeff

[49] Broadcasting Decision CRTC 2006-309

The Documentary Channel Purchase

In the spring of 2006, the rumor was circulating in the industry that Corus was intending to divest itself of its interest in the Canadian Documentary Channel. The Documentary Channel, at that point, was a mixed public-private enterprise with Corus owning the majority of the shares (53%), CBC owning 29%, National Film Board owning 14% and the remaining 4% being equally split between four independent production companies.

By May 11th, the rumors were confirmed by a joint CBC-Corus press release outlining the transfer of the Corus share to the CBC, pending approval by the CRTC. However, it would be another four months before a formal application was made before the commission. In the intervening period the independent producers (i.e. the organizations representing them) had made various attempts to consult with the CBC on the matters regarding the purchase, particularly the issues regarding valuation, proposed benefits, in-house production and editorial independence.

The value of the transaction had been set by Corus and CBC at $1,000,000 dollars. Independent producers had questioned this figure which they deemed arbitrarily low, considering that a recent transfer of ownership of a specialty service of similar

nature, the Biography Channel, was valued at $5,000,000[50]. In addition to the low value of the transaction was also the fact that Corus was absorbing all of the debt (to the tune of $15.03 million dollars) for the Documentary Channel and writing it off as a loss. Commonly, during the transactions of such nature, the debt is assumed by the purchaser. The independent producers were suspicious of such low valuation, particularly since the CBC was also proposing a benefits package based on the purchase price. As in the Bell Globemedia case, and all other transfers of ownership, the benefits package is estimated as 10% of the value of the transaction. The CBC had interpreted that to mean a benefits package of $100,000 which they were intending to use for a scholarship. The independent producers were of the view that the benefits package should be based on the value of the channel rather than the purchase price. They were of the view that the purchase price was being kept artificially low in order to decrease the amount of the benefits package.

One of the reasons for the independent producers' suspicion was an item included in the May 11th press release which announced that in addition to the sale of the Documentary Channel, Corus had renewed CBC affiliation agreements for two of its stations in Kingston and Peterborough. This, the producers argued, was the explanation for Corus' willingness to divest itself of the Documentary Channel for such a low price while at the same time absorbing the debt.

Another aspect that was troublesome for the producers was the issue of in-house production. The original terms of licence had given the documentary channel the

[50] Broadcasting Public Notice CRTC 2006-107

opportunity to devote as much as 75% of its programming time to in-house productions. In a lucky twist for the independent production community, the Documentary Channel never established an in-house department, preferring to acquire large amounts of content from the independent producers. However, the CBC purchase would likely lead to a drastic change, as the public broadcaster possessed a strong in-house documentary unit that was apt at producing large-scale documentary projects such as "Canada: A People's History". The independent producers expressed their concerns that the CBC would use its formidable in-house team to take advantage of the conditions of licence and fill as much as 3/4 of the Documentary Channel slate with in-house programming[51].

As in the case of Bell Globemedia transfer, a number of independent producers had submitted letters of support for the transfer of ownership. Once again there were a number of similarities between the letters of support, particularly in their praise of their working relationship with the CBC and importance of the national public broadcaster. If these similarities were the result of a common source (such as a form letter), would the Commission recognize it as such? Furthermore, would the Commission dismiss these letters when making their final decision?

In this particular case, not only did the CRTC not dismiss the letters, but used them in order to provide rationale for their decision. Firstly, the Commission stated that they "received twelve interventions in connection with this application by members of the Canadian independent production sector including documentary producers: six in

[51] CRTC Broadcasting Public Hearing 2007-1, March 29th, 2007

support, one in opposition and five comments."[52] By stating it in such a way the Commission created the appearance that the independent production community largely supported the transfer of ownership. However, when the interventions are scrutinized more closely, a different picture emerges. Of those six supporting interventions each of them were provided by single independent producers. The one opposing intervention was also provided by a single independent producer. Of the "five comments"[53], two were provided by organizations representing independent producers across Canada (CFTPA and DOC). Both of the organizations strongly opposed the Documentary Channel transfer of ownership, as long as the current conditions of the transfer remained intact. Both organizations were concerned about valuation, proposed benefits package and level of in-house production. Together, these organizations represent over 1000 independent producers. In contrast to the Commission's summary of the interventions in the process, which creates the appearance of support from the independent production community, the independent producers overwhelmingly opposed the sale of the Documentary Channel.

Going one step further, the CRTC dismissed the concerns of the independent producer's organizations by repeating the claims made in those strikingly similar letters of support. The letters stated "the CBC's record demonstrates its commitment to the documentary genre and to independent producers. These interveners maintained that the proposed transaction would provide more opportunities for independent producers"[54]

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[52] CRTC Broadcasting Decision 2007-201
[53] ibid.
[54] ibid.

The CRTC sided in favor of the CBC on issues of valuation and the proposed benefits package and ignored the concerns regarding in-house production, approving the transfer of ownership without imposing any conditions. Once again, the broadcasters managed to create a new powerful precedent which would allow purchase prices to be set arbitrarily low in order to minimize the amount of benefits packages.

Discovery Health Canada

The last case of broadcasters utilizing hegemonic input to achieve favorable regulatory change concerns the modification of condition of licence for the Discovery Health Canada channel. In this case, the broadcaster was able to overwhelm the public process with manufactured support (25 out of 26 responses were favorable) and succeeded in decreasing their required Canadian content exhibition and expenditure requirements.

In March of 2006, the CRTC announced that Discovery Health Canada, a national Category I specialty channel owned by Alliance Atlantis, had applied to change its conditions of licence pertaining to exhibition of Canadian programs and minimum expenditures on Canadian programming[55]. Category I specialty services are deemed to have a special significance to the Canadian broadcasting system and as such receive preferential treatment and protection from competition (by requiring the cable and satellite providers to include them in their packages). In return for such preferential

[55] Broadcasting Public Notice CRTC 2006-33

treatment these services are expected to devote a large portion of their funds and screen time to Canadian programs.

Based on its original conditions of licence, Discovery Health was required to devote 65% of airtime to the exhibition of Canadian programs and had to spend 51% of the previous year's gross revenues on Canadian programming. These levels were consistent with other Category I services.

In its application Discovery Health argued that due to financial constraints, high cost of production in the medical genre and the lack of supply of high-quality Canadian programs the channel was quickly becoming financially unviable. Rather then risk bankruptcy and closure, Discovery Health requested that the Canadian expenditure requirements be dropped to 20% and the exhibition requirement to be dropped to 35%.

The examination of the CRTC public record once again revealed overwhelming support for the broadcaster application. Out of twenty six interventions only one, by the Canadian Film and Television Producers Association, was in opposition. The supporting letters once again came mostly from independent producers. Much like the Bell Globemedia case, most of the letters contained similar, and sometimes identical elements. While in the Bell Globemedia case one could only infer the possibility that these similarities stem from a broadcaster letter campaign, in this case such suspicions are confirmed by a letter (appended at the end of this paper) requesting independent producer support and outlining main points to include in composing a letter of support.

These points were repeated numerous times in the supporting interventions and included praising Discovery Health for its contribution to Canadian broadcasting and proclaiming that "the independent production community will be best served by a Canadian Health service that is financially viable"[56]

Just like the Bell Globemedia and Discovery Channel cases, the CRTC approved the Discovery Health application.[57] Once again, a broadcaster managed to create the appearance of public support for their goal of decreased regulatory requirements. In this case it was achieved by courting independent producers they have worked with, without informing them that they were being asked to support a proposal which would lead to a decrease of funds and screen time available to the producers.

The three previous examples provided the insight into specific cases appearing before the CRTC. The last case we will look at, i.e. the threat by Shaw and Quebecor to stop contribution payments to the Canadian Television Fund (commonly referred to as the *CTF Crisis*), follows a different pattern in that it completely excluded the public from the decision making process. It also provides an insight into how the various powerful actors in the broadcasting policy arena including the broadcasters, cable companies, telecom industry, the CRTC and the government of the day, while acting separately, end up jointly affecting the nature of policy development. The case can potentially be seen as

[56] Phyllis Yaffe, CEO, Alliance Atlantis Communications Inc., *Discovery Health Channel Application,* corporate communication to an independent producer, p.2 (included in appendix)
[57] Broadcasting Decision CRTC 2006-384

a new approach by the broadcasters and cable companies to completely circumvent the public process in order to achieve their hegemonic goals in a more efficient manner.

CTF CRISIS – Beyond Hegemonic Input

In December of 2006 Jim Shaw announced that Shaw Communications will be stopping the monthly installment payments to the Canadian Television fund[58]. Shaw's yearly contribution to the CTF amounts to $56 million, and the withdrawal of funds threatened to cripple the fund.

A month after the Shaw announcement, Pierre Karl Péladeau, the majority owner of Quebecor, announced that Videotron (Quebecor's TV distribution arm) will suspend payments to the CTF as well[59]. Videotron's yearly contribution to the fund equals $16 million. Both Quebecor and Shaw cited problems with CTF governance, mandate and accountability as a reason for their pull-out, but provided no other details in their announcements.

Undoubtedly this was a drastic move for both companies. They both could have chosen to lodge a complaint with the CRTC regarding the inadequacies of the CTF and asked for an inquiry or a hearing in order to resolve the perceived failures. There are a number of reasons why they decided to circumvent the public process and instead chose

[58] Jim Shaw in a letter to the CTF, dated December 20th. See Appendix A
[59] Grant Robertson and Simon Tuck, *Cable companies rebel against Ottawa's TV fund*, Globe and Mail, January 24th, 2007.

to exert their considerable power to directly shape public policy. Firstly, a number of circumstances seemingly unrelated to the CTF have created a political (and policy making) climate which encouraged Shaw and Videotron decisions. Secondly, going through a hearing would have taken both time and a considerable amount of effort in order to secure support during the CRTC public process – with no guarantee that such support would be forthcoming.

The first sign of the things to come was the announcement in February, 2006 by the Canadian Cable Telecommunications Association (CCTA) that it will dissolve; stating that convergence has changed the nature of the cable business, making it difficult to represent members with a unified voice.[60] The association had been representing cable operators at policy hearings. However, as cable companies have grown and become broadcasters, phone operators and internet providers both their hegemonic goals and perspectives on regulation have changed.

Around the same time the CRTC released its Digital Migration Framework[61] which called for *unbundling* of channels by as early as 2010. Currently, Canadian cable and specialty channels are offered to the public in bundles with other channels (both Canadian and foreign) in order to increase the market exposure of Canadian channels. Unbundling and moving to an *a la carte* system could mean great losses for Canadian broadcasters as public abandons some channels in favor of others.

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[60]Simon Tuck and Catherine McLean, *Cable Group Switches Off.* Globe and Mail. February 10, 2006.
[61] Public Notice 2006-23, February 27th, 2006

In order to secure themselves against losses in one of their most important revenue streams, the broadcasters used the CRTC Over-the-Air (OTA) Television policy hearings to demand *fees-for-carriage*. Traditionally, BDU's have had the access to the over-the-air signal without having to compensate the broadcasters. The rationale was that the signals are already available to the general public at no cost.

During the policy hearings the broadcasters argued that the situation has changed drastically with the introduction of "time-shifting". Consumers now have access to signals from other time zones allowing them to view the programs they want to watch at a different time. The broadcasters argue that they should be compensated as the BDU's are providing the customers with a signal that is not freely available over the air (i.e. a signal from another city and/or province)

Essentially, a set of two different hegemonic projects came to a head: the broadcasters were seeking re-regulation in order to increase their profits and secure against potential future losses while BDU's were seeking de-regulation in order to guard against a decrease in their profits.

The withdrawal of CTF funds was an indirect attack on the broadcasters who depend on those funds to fund their programming. CTF funds also count as part of broadcasters' minimum spending requirements on Canadian programming.

Although the funds flow through wholly and directly to independent producers they have become an important source of closing the gaps in financing of Canadian television programs. The withdrawal of BDU's contributions to CTF threatened to shut down a number of projects slated for production in spring and summer of 2007.

Simultaneous developments in telecom policy and the chilling of relations between the CRTC and the federal cabinet sent a strong message to both telecom and broadcasting industries regarding the policymaking attitude of the government in power. After only three months in power, the Conservative Cabinet asked CRTC to reconsider VoIP (Voice over Internet Protocol) telephone policy[62]. The rules at the time mandated that incumbent telephone companies must have their tariffs for VoIp services regulated, while newcomers in the telephone market (such as cable companies) would be free from price regulation. The CRTC responded by upholding the original ruling, prompting the government to order the Commission to change its ruling[63].

The government decision sent shockwaves through the industry. The Cabinet rarely overturns CRTC decisions because such incursions are perceived as weakening the independence of the regulatory agency. The entire process sent a strong signal to the telecom industry that the current Conservative government was willing to go to great lengths to support the telecom companies' hegemonic project of market liberalization and de-regulation. The meaning of the Cabinet decision was not lost on the broadcasting

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[62] Paul Vieira, *Conservatives put CRTC on notice.* Montreal Gazette. May 6th, 2006
[63] Simon Tuck, *Ottawa to block CRTC on Internet phone regulation.* Globe and Mail. November 15, 2006

industry either, and created a political climate which undoubtedly encouraged Shaw and Videotron to withdraw from the Canadian Television Fund. The manner in which the VoIP file had been handled created the impression that the CRTC had been weakened and that its role in policymaking would to be secondary to the will of the government in power. This perception was further exacerbated by the decision of Charles Dalfen, the CRTC chairman at the time, not to seek a second term[64] and the low priority the Cabinet put on finding a successor. Although Dalfen announced his decision 2 months before the end of his term (which was slated for end of 2006), the new chairman, Konrad von Finckenstein was not appointed until late January[65], leaving the commission in the state of interregnum for one month - within which the CTF crisis intensified. Shaw representatives claimed that the "Fund can't be fixed.. It's dead, done, gone"[66], while Pierre Karl Péladeau, President and CEO of Québecor called on the government to "carry out to its logical conclusion the thinking that guided the Industry Minister, Maxime Bernier, and his decision to accelerate the deregulation of the residential telephone sector and to deregulate the cable television sector as completely as possible"[67]

Once the new chairman had been appointed the CRTC engaged in efforts to bring the situation under control and proceeded to consult with both Shaw and Videotron. Both companies agreed to resume payments.[68] In order to satisfy the cable companies, CRTC created a Task Force on the Canadian Television Fund. For a period of

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[64] Simon Tuck, *Dalfen to end reign as CRTC chairman at the end of 2006.* Globe and Mail. October 31, 2006

[65] Grant Robertson, *CRTC chief seen as 'pro-consumer',* Globe and Mail, January 27th

[66] CBC News Website: *Cable firms declare CTF 'dead,' while NDP wants hearings* http://www.cbc.ca/canada/story/2007/02/01/ctf-hearings.html?ref=rss

[67] Pierre Karl Péladeau, Testimony before the Standing Committee on Canadian Heritage, February 20th, 2007.

[68] Simon Tuck, *Shaw to resume contributions to television fund,* Globe and Mail, February 20, 2007

three months, the CRTC held private meetings with various stakeholders in the Canadian Television Fund, including broadcasters, BDU's, independent producers, Department of Heritage and the CTF itself. Conspicuously absent, once again, was the Canadian public. In this particular case, not only did the Commission not seek input from the public at large, the entire proceedings were conducted *in camera*.

The private nature of the CRTC inquiry was of great importance to Shaw and Videotron, much like their decision to circumvent the public process and attempt to directly influence public policy. In the previous cases we have examined the broadcasters had managed to gather public support from those groups who would be directly affected by their hegemonic project - primarily independent producers in all three cases and in case of Bell Globemedia also the prior recipients of benefits funds. In this case it would have been exceedingly difficult for Shaw and Videotron to generate hegemonic input for a number of reasons. Independent producers, who have been the number one source of hegemonic input for broadcasters (as we have seen in the first three cases), depend on the CTF to finance their productions and would have been reluctant to support the cable companies' hegemonic project regardless of how well the argument was stated. Producers have been engaged in an ongoing dispute with both Shaw and Videotron (or their related companies) over cross-platform rights.

It is important to remember that both Shaw and Quebecor are involved in broadcasting enterprises as well as cable. Shaw owns the Corus group of channels (Teletoon, YTV, Dicovery Kids, etc.), while Quebecor owns TVA group of channels,

Sun TV, as well as number of specialty channels. As broadcasters, they are interested in retaining the maximum subsidiary rights in the productions they acquire from producers, including the right to distribute the production across various media including pay-per-view, VOD and new media (internet, mobile, etc.).The producers have been reluctant to assign all of those rights (commonly referred to as cross-platform rights) to broadcasters, since broadcasters generally only contribute approximately 15-20% of the budget of the production. CTF has proven to be a thorn in the broadcasters' side, by taking the producers' side and disallowing CTF funding for projects where broadcasters require all the rights. Removal of independent producers from the Board of Directors would allow broadcasters and BDU's to set CTF criteria in ways that are primarily beneficial to them alone.

While no definitive decisions have been made as of the writing of this paper, the CRTC Task Force on the Canadian Television Fund released its report in late June. While many of the findings maintain the status quo, several recommendations (if implemented) are likely to have a major impact. One of the recommendations asks for the removal of the independent producers from the CTF Board and replacing them with representatives from the satellite BDU's, while the other asks for a reduction in Canadian Content requirements needed to qualify for CTF funding (up till now all key creative positions had to be held by Canadians). In any case if these recommendations are implemented they would be a major step towards BDU's achieving their hegemonic project – they will have increased their control of the CTF and succeeded in relaxing Canadian content regulations.

At face value it could be assumed that the CTF crisis was an anomalous occurrence within the realm of Canadian broadcasting policy, but it might also represent the beginnings of a new policy setting approach by broadcasters and BDU's. Both the power vacuum within the CRTC and the current political climate allowed the BDU's to circumvent the public process and exert their economic and political influence in order to foment a crisis in pursuit of their hegemonic projects. Although the results are still pending, a victory for the BDU's would mean that they have succeeded in both setting the terms of the policy debates as well as controlling the outcome.

Conclusion

The three examples of the cases before the CRTC process exemplify a serious deficiency in the CRTC public process, i.e. the ability of the broadcasters to control the discourse of policy by replacing public input with manufactured or hegemonic input. The CTF Crisis provides an example of what might become a new approach by powerful players in the broadcasting industry to control policymaking – instead of engaging in the public process, they have completely circumvented it and exerted their considerable economic and political influence in an attempt to realize their hegemonic project.

In the three CRTC public processes the broadcasters were able to get approval for applications that ran contrary to the established Commission policies. In all three cases the broadcasters were able to generate overwhelming support for their hegemonic projects from independent producers. What is particularly striking is that the producers would support measures which will negatively impact them the most. Both the support of independent producers and the utter absence of public involvement can be understood as a

successful attempt by broadcasters to engineer hegemonic input or appearance of public support (for utter lack of opposition can be taken as implicit support) in the attempt to preserve their hegemony.

In each single case the broadcasters were able to wage a successful marketing/publicity campaign in order to secure producer and public support (i.e. hegemonic input). In the BGM case, the broadcaster sought support of previous recipients of benefits package funds (universities, charities and independent producers), without informing them that the proposed transaction would mean no new benefits funds would be available. In the case of Health Canada, Alliance sought support from producers they have previously worked with, but failed to inform them that support for their proposal would mean a definite decrease in funds available to independent productions. In the Documentary Channel case, the producers were asked to support a transaction which would result in a drastic decrease of both the number of independent productions and the funds available to them.

While the CTF case can be seen as anomalous one-time occurrence in the broadcasting policy landscape it might very well be the beginning of a new stage of policymaking in which the powerful actors in the Canadian broadcasting sector (broadcasters and BDU's) are able to exert their power directly on the CRTC (rather than through a public process) in order to achieve their hegemonic projects.
In the case of the CTF the BDU's were able to exert their considerable political influence and take advantage of the political climate and the power vacuum within the CRTC to

foment a crisis in television funding. While the crisis has not yet reached a conclusion, it is likely that one of the results will be the expulsion of the independent producers from the CTF Board of Directors, and a decrease of exposure for Canadian talent. The approach taken by the BDU's is troubling because it represents a complete circumvention of the public process and the successful attempt to both set the agenda and control the outcomes of the policymaking process.

In all cases the Broadcasters and the BDU's have increased their hegemonic power at the expense of subordinate agents (i.e. independent producers and the public) and while this success may be a boon for the broadcasters and cable companies it points to a troubling deficiency in the way broadcasting policy is set in Canada. If the CRTC process is controlled (or can be completely circumvented) by the broadcasters and BDU's as the examination of these four cases suggests, then it has truly become a captured regulator. The findings also raise questions about the validity of various submissions, particularly those by the independent producers. Are the producers misinformed about the nature of the application? Are they aware of the consequences, but assume that their support will afford them favorable treatment by the broadcasters? If so, how should the CRTC treat the submissions by independent producers? These concerns suggest that a more comprehensive examination of the CRTC regulatory decision-making is warranted in order to ascertain the true extent of independence of Canada's broadcast regulator. This study only looked at only four particular CRTC proceedings, while future studies should take a closer look at a much greater number of CRTC decisions.

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APPENDIX A

Phyllis Yaffe, CEO, Alliance Atlantis Communications Inc.,
Discovery Health Channel Application - corporate communication to an independent producer

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I am writing to ask for your written support of our application to the CRTC to change the conditions of licence for Discovery Health Channel Canada. We are requesting a decrease in the minimum requirements for Canadian content and expenditures in order to ensure the future viability of the service. As part of the process, the CRTC considers letters of support in its deliberations on applications such as this one.

Since the launch of Discovery Health Channel on September 7, 2001, Alliance Atlantis and its partner Discovery Communications Inc. (DCI) have worked diligently and passionately to provide a high quality Canadian health service. Discovery Health has been a significant contributor to the broadcasting system, to Canadian programming and production, and to diversity in program offerings. And, the channel has met all of its requirements under its CRTC licence. In fact, all of the required Canadian programming expenditures for the licence term have already been spent. However, under its existing requirements – at 65% Canadian content and 51% expenditure of gross revenues on Canadian programming – Discovery Health Channel will never break even. As shareholders, Alliance Atlantis and DCI must look for a solution.

The challenge is in the unique nature of the health programming genre. What we found when we launched the service was that there was very limited supply of Canadian health programming. In

addition, health programming cannot be repeated indefinitely as the channel has a responsibility to provide viewers with the most up-to-date health-related information. Our response to these challenges was to do everything in our power to make the service a success. As a result, we needed to invest heavily in Canadian programming; we worked with our partner, DCI, to build the brand and offer the best in international programming for viewers; and we developed expertise in health programming. We also faced an ever-increasing business challenge. As a result, we have applied to the CRTC to reduce the Canadian content for the channel to 35% and the Canadian expenditure level to 20% to make the service viable for the future.

With these changes, Alliance Atlantis and DCI, together, are in the best position to make this service work: we have made the investment, worked with the independent production community to create Gemini award-winning programming, built brand equity and customer loyalty, developed the expertise and have the deep commitment to making these efforts into a sustainable business.

To make the health genre a success in Canada, we must acknowledge the unique challenges that require it to have lower Canadian content levels than other genres. With your support of our CRTC application, we will be able to make the channel a viable one over the long term.

In composing your letter to the CRTC, we urge you to consider expanding on the following:

- Discovery Health Channel Canada has exceeded its required expenditure on Canadian programming in the first 5 years of its licence, working with producers to develop award-winning Canadian health programming;
- The service has met all of its conditions of licence;
- Discovery Health has contributed significantly to Canadian broadcasting and to our independent production community. The independent production community will be best served by a Canadian health service that is financially viable;
- Alliance Atlantis and DCI have passionately committed to the service to date and are in the best position to make a Canadian health service a success;
- The health genre requires a reduction in Canadian content requirements, to 35% of the hours and 20% of the expenditures on Canadian programming.

In order for your views to be considered by the CRTC, you must submit a letter to the Secretary General of the CRTC with the application number **2006-0005-8** clearly labeled within the subject header. This submission can be sent to the CRTC via e-mail at procedure@crtc.gc.ca or faxed to (819) 994-0218. **A copy must be sent to the attention of Du-Yi Leu at du-yi.leu@allianceatlantis.com or fax (416) 967-4082.** For your convenience, we have attached a sample letter for your perusal. Alternatively, you may use the CRTC's electronic intervention form by accessing the web site at www.crtc.gc.ca under Public Proceedings and clicking on "Broadcasting and Telecom Intervention/Comments Form".

Please note that the deadline for submissions is **April 20th, 2006**. If you have any questions, or

require additional information, please call

Ms. Du-Yi Leu at 416-967-3269.

We thank you for your support.

Yours truly,

Phyllis Yaffe

Chief Executive Officer

Alliance Atlantis Communications Inc.

<<DHC sample support letter.doc>>