**Field of Dreams?: Public Participation in Canadian Digital Law and Policy**

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**Introduction**

Within one year of the 2006 election that brought the Conservatives to power, digital issues began to command centre stage for both policy makers and regulators. Led by then-Industry Minister Maxime Bernier, the government issued a policy direction to the Canadian Radio-television and Telecommunications Commission to adopt a hands-off regulatory approach for telecommunications even as consumer prices for Internet and wireless services were increasing.[[1]](#footnote-1) Moreover, the CRTC had largely rejected mounting concerns with the way Internet providers managed their networks (often called network neutrality), there were doubts about new wireless competitors entering the marketplace, and the Commission introduced an exemption from regulation for mobile television broadcasting services.[[2]](#footnote-2)

Government departments were similarly engaged on digital policy. Public Safety Canada conducted a semi-secret consultation on Internet surveillance where mandatory disclosure of subscriber information was assumed.[[3]](#footnote-3) Anti-spam legislation was nowhere in sight despite a unanimous National Task Force on Spam report that recommended its introduction. Industry Canada considered, but did not act on, privacy reform proposals raised during a statutory review of the Personal Information Protection and Electronic Documents Act. Intellectual property issues were also major government preoccupation, with Canada’s decision to participate in the Anti-Counterfeiting Trade Agreement negotiations in the fall of 2007[[4]](#footnote-4) and the drafting of a copyright bill scheduled for tabling in December 2007 without public consultation and that contained virtually no user-oriented provisions.

The common thread throughout these issues – from telecom to copyright – was that the voices of individual Canadians, much less a consumer-oriented policy perspective, were sorely lacking. Digital policies were largely viewed within a conventional prism of “industry stakeholders” with policy makers and regulators unable or unwilling to incorporate the budding public interest in copyright, privacy, and communications policy.

Fast forward seven years later and the Canadian digital policy landscape is scarcely recognizable. With behind-the-scenes encouragement from the government, the CRTC has positioned itself as a staunch defender of the public interest with consumer concerns occupying one of the foundations of its policy making process. The result has been the introduction of new net neutrality rules, a reassessment of a controversial usage based billing decision, the implementation of a consumer wireless code, a wide ranging consultation on the future of television, and regulatory consideration of new pro-consumer measures.

The government has not limited consumer-oriented policy development to the CRTC. A lawful access bill was introduced in the spring of 2012 but effectively died days later under the weight of public outrage. Anti-spam legislation has been enacted, many telecom foreign investment restrictions have been removed, the Anti-Counterfeiting Trade Agreement lies discredited after being rejected by the European Parliament, and Canadian copyright law is viewed as the most user-friendly in the world following a host of reforms featuring new user safeguards and rights.

The shift toward public interest and participation in the development of Canadian digital policies ranks as one of the most remarkable policy transformations of the current Conservative government. In a relatively short time frame, consumer perspectives have become actively solicited into policy processes and consumer-friendly policies frequently adopted. There are undoubtedly many factors behind the shift, but topping the list was the confluence of three inter-related developments.

First, Internet and digital policy issues went from niche issues to the mainstream since the rules associated with Internet access, wireless services, social media, user generated content, and privacy became far more personal with implications for millions of people. Digital policy may have once focused chiefly on commercial concerns attracting limited public attention, but the public has increasingly connected these policies to their own lives.

Second, the Internet was not only a serious concern for many Canadians, but it also provided the mechanisms to ensure their voices were heard. Social media sites such as Facebook and Twitter, blogs, and online video provided an avenue for Canadians to become informed about the issues and the means to speak out.

Third, the government gradually realized that missteps on digital policy could be politically costly, while good policy was also good politics. The payoff may be slow in coming, but the emergence of digital policies that prioritize public concerns leave opposition parties with less ammunition for criticism and the promise of greater competition and innovation.

Many have been quick to dismiss the public voice on digital issues, deriding Canadians that speak out as seeking a free ride, or being uniformed or ignorant of the complexity of the issues. The same groups often simply ignore those views altogether, as if the public submissions were just noise with no discernable impact. Yet the Canadian experience of the past seven years demonstrates a clear shift in approach with legislation, regulation, and policy outcomes that once seemed highly unlikely.

This paper seeks to better understand the changing role of the public in Canadian digital policy making by framing the developments as an ongoing policy development process featuring a series of closely linked changes and responses. The first change involves the emergence of public participation on digital policy issues. This occurred across a spectrum of issues, yet the traits were strikingly similar: grassroots efforts reliant on social media and the Internet to capture media and public attention on consumer perspectives, minimal interest from government and regulators; and initial dismissal giving way to hostility from incumbent stakeholders.

Once the emergence of public participation becomes too prominent to ignore, governments, regulators and incumbent stakeholders craft their responses. For government and regulators, this has involved a form of “regulatory catch-up” as they endeavor to develop the means to better incorporate the public into the policy and regulatory world. For the incumbent stakeholders, their initial responses have typically involved efforts to discredit the public voice in the hope of maintaining their policy influence. Since those efforts have largely failed, many have begun to mirror the public participation strategies, with regular use of social media and a reframing of policy positions with a more obvious consumer perspective.

With public participation more fully entrenched, the next response focuses on the real challenges posed by opening relatively closed policy making processes to the public. The third part is particularly important since policy is more than a proverbial “Field of Dreams” where if you build it and they will come. Once the public has come and provided their perspectives, ensuring that those views are effectively incorporated into government or regulatory policy is enormously difficult and represents the key challenge for the development of a successful open public policy process.

**Stage One: Here Comes Everybody**

Social media has emerged in recent years as an essential tool for hundreds of millions of Internet users worldwide. From status updates to photos to voice communication, many rely on social media services such as Facebook, Twitter, LinkedIn, and Google Plus as a key source for online social interaction, news gathering, creative sharing, and advocacy. Indeed, for a growing number of Internet users, social media and the Internet are virtually synonymous, since most of their “online time” is spent interacting in a social media environment.

The use of social media and the Internet for advocacy and public policy participation has been particularly pronounced in Canada around digital issues. Although a comprehensive review of Canadian activities is beyond the scope of this paper, battles over usage based billing, copyright, and lawful access illustrate how the public policy field in Canada has evolved in recent years.

i. UBB

Internet data caps – frequently referred to as usage based billing - seems an unlikely issue to galvanize hundreds of thousands of people. Yet the issue emerged as a major political issue in Canada in early 2011 when over 500,000 Canadians signed a petition calling for an end to the common practice.[[5]](#footnote-5) After the federal government indicated that it would order the CRTC to reconsider its decision to allow large Internet providers (ISPs) such as Bell to implement UBB when it sells wholesale access to independent ISPs, the CRTC announced that it would delay implementing the decision for at least 60 days so it could review it on the merits.[[6]](#footnote-6) The Commission followed up with an oral hearing in July 2011[[7]](#footnote-7) and then-Industry Minister Tony Clement intimated plans to address the broader policy issues as part of a national digital economy strategy.[[8]](#footnote-8)

The digital strategy would take many years to come to fruition, but months after the initial public protests, the CRTC revised its approach, rejecting the UBB model it had approved less than a year earlier. The Commission acknowledged that the policy was too inflexible and that it could block independent ISPs from differentiating their services. The issue then boiled down to Bell's preferred model based on volume and the independent ISPs' approach who preferred capacity based models. The Commission ruled that capacity-based models are a better approach since they are more consistent with how network providers plan their networks and less susceptible to billing disputes.[[9]](#footnote-9)

While the public outrage over data caps has faded, the reverberations over the UBB experience continue to be felt. The UBB reaction was among the largest public response to a policy issue in the Conservative government’s history, causing many to re-examine the importance of telecom and digital policies as well as the need to incorporate consumer-oriented perspectives into the policy process.

ii. Copyright

Telecom policy was one of many digital policy areas where Canadians began to more aggressively assert their perspective and their desire for greater participatory opportunities. In 2007, the government was expected to introduce copyright reform legislation that had been under development for many years. Days before the bill was scheduled to tabled, a Facebook group started by the author (Fair Copyright for Canada) galvanized opposition to the forthcoming bill. Within a week, 10,000 members had joined the group, within two weeks there 25,000 members, and within months over 90,000 Canadians had joined the Facebook group.[[10]](#footnote-10) Moreover, local Facebook chapters sprung up in communities across the country as the public sought out ways to influence government policy.

While Facebook was not the only source of action – there was mounting coverage from the mainstream media along with hundreds of blog postings – the momentum was unquestionably built on thousands of Canadians who were determined to have their voices heard.

Much to the surprise of skeptics who paint government as unable or unwilling to listen to public concerns, those voices had an immediate impact. Ten days after the Facebook group’s launch, then-Industry Minister Jim Prentice delayed introducing the new copyright reforms, seemingly struck by the rapid formation of concerned citizens who were writing letters and raising awareness.[[11]](#footnote-11) The bill was later introduced in June 2008, but died soon thereafter following an election call. Much like UBB, the death of a single copyright bill was only part of the story. For the government, copyright was recognized as a contentious policy issue that required greater care, consultation, and public acceptance.

In fact, the Canadian experience foreshadowed global engagement on copyright policy. In 2009, thousands of people in New Zealand launched an Internet blackout campaign against proposed “three strikes and you’re out” copyright legislation that would have led to Internet users losing access based on three allegations of infringement. Users blacked out websites and profiles on Facebook and Twitter and the New Zealand government responded by withdrawing the legislation.[[12]](#footnote-12)

In January 2012, the worldwide protests over the Stop Online Piracy Act (SOPA), hailed by some as the Internet Spring, marked the day that millions spoke out against restrictive legislative proposals that posed a serious threat to an open Internet. On a single day, Wikipedia reported that 162 million people viewed its blackout page during the 24-hour protest period.[[13]](#footnote-13) By comparison, the most-watched television program of 2011, the Super Bowl, attracted 111 million viewers.

More impressive were the number of people who took action. Eight million Wikipedia visitors looked up contact information for their elected representatives, seven million people signed a Google petition, and Engine Advocacy reported that it completed 2,000 phone calls per second to local members of Congress. The protest launched a political earthquake as previously supportive politicians raced for the exits. According to ProPublica, the day before the protest, 80 members of Congress supported the legislation and 31 opposed. Two days later, there were only 63 supporters and 122 opposed. The contentious bill was legislatively dead by the end of the week.[[14]](#footnote-14) Similar copyright proposals are currently viewed as untouchable in light of the SOPA protests.[[15]](#footnote-15)

iii. Lawful Access

On February 13, 2012, then-Public Safety Minister Vic Toews infamously told the House of Commons that critics of his forthcoming lawful access bill could stand with the government or with the child pornographers.[[16]](#footnote-16) Bill C-30 was introduced the following day, but within two weeks, a massive public outcry - much of it online - forced the government to quietly suspend the bill and a year later openly acknowledge that it was dead.  
  
Once again, the public concern should not have come as a surprise. The push for new Internet surveillance capabilities dates back to 1999, when government officials began crafting proposals to institute new surveillance technologies within Canadian networks along with additional legal powers to access surveillance and subscriber information. There have been several attempts at passing lawful access legislation, but each has died on the order paper.

The use of social media evolved from the Facebook protests of 2007 to the Twitter-based #tellviceverything campaign that provided a perfect illustration of how the Internet can fuel awareness and action at remarkable speed.[[17]](#footnote-17) Through thousands of tweets, Canadians used humour to send a strong message that the government has overstepped with Bill C-30. Alongside the Twitter activity were dedicated websites, hundreds of blog postings from commentators on the left and right of the political spectrum, thousands of calls and letters to MPs, and nearly 100,000 signatures on the Stop Spying petition hosted by the organization Open Media.

There are undoubtedly many factors that led to the early successful fight against the bill. Toews' comments placed the government on the defensive from the outset. The substance of the bill resonated with both sides of the political spectrum with criticism from Conservative MPs and supporters particularly telling. Yet the bigger story was again the emergence of the public voice on digital policy. Government ministers often make ill-advised comments, yet few sink support for legislation so quickly. Privacy is a major concern, but it rarely generates this level of interest (the Privacy Act has not been amended in over 30 years despite repeated efforts to do so).

Justice Minister Rob Nicholson’s comments in announcing the death of Bill C-30 were particularly telling:

*We will not be proceeding with Bill C-30 and any attempts that we will continue to have to modernize the Criminal Code will not contain the measures contained in C-30, including the warrantless mandatory disclosure of basic subscriber information or the requirement for telecommunications service providers to build intercept capability within their systems. We've listened to the concerns of Canadians who have been very clear on this and responding to that.[[18]](#footnote-18)*  
  
The emphasis on responding to public concern highlights the effectiveness of the public campaign and the recognition of the need to incorporate broader perspectives into legislative and policy development.

**Stage Two: Responding to the Emerging Public Voice**

If stage one involved the public using social media and the Internet to assert itself on digital policies, stage two focuses on the response from governments, regulators, and the incumbent stakeholders who may view new participants as a threat.

i. Government Response

Public participation in government policy is frequently assumed since the structure of policy making – meetings with officials, hearings on proposed legislation, and direct contact with elected representatives – is largely based on a consultative model that actively engages with stakeholders. Yet the reality is that the general public is typically absent from policy debates and discussion. In some instances, their views may be effectively represented through consumer or public interest organizations. In others, the field is left to business groups and other vested interests that possess the resources to participate in the policy process.

Interestingly, some Canadian statutes invoke public participation and consultation. For example, the *Official Languages Act* provides:

*The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to ensure public consultation in the development of policies and review of programs relating to the advancement and the equality of status and use of English and French in Canadian society.* [[19]](#footnote-19)

Even where there is no statutory requirement, enhanced public consultation has gradually emerged as a critical component to policy development. In 2009, the government responded to public criticism over copyright reform by launching a national consultation on the issue that actively engaged government ministers and thousands of Canadians.[[20]](#footnote-20) It included a website that offered Canadians several ways to ensure that their voices were heard.  There was a direct submission process, an online discussion forum, and a calendar that included information on roundtables (which were by invitation only) and public town halls that were open to the public and streamed online.  The site also features an RSS feed, audio and video transcripts of the roundtables, and an official Twitter feed. The consultation ultimately garnered over 8,300 responses. A year later, then-Industry Minister Tony Clement launched a national digital economy consultation with a consultation paper, online forum, and policy roundtables.[[21]](#footnote-21)

In April 2012, Clement released Canada’s Action Plan on Open Government.[[22]](#footnote-22) The plan includes a commitment to open dialogue and open regulation:

*To simplify access and participation in online consultations by Canadians, we will explore options...for the development of a new Web 2.0 citizen engagement platform that federal organizations can use to conduct public consultations...develop a standard approach to the use of social media and Web 2.0...to augment engagement activities...as well as pilot a crowdsourcing initiative to involve Canadians in developing ideas and solutions for greater online dialogue and engagement...*

In 2013, the government established a new position for the Deputy Minister Committee on Social Media and Policy Development, with the goal of harnessing new technologies to engage citizens and networks in the policymaking process.[[23]](#footnote-23) The position was later recast as the Deputy Minister Committee on Policy Innovation, perhaps recognizing that social media is not the only vehicle for innovative public engagement.

While these efforts suggest a serious commitment to public participation, in January 2014, the Open Government Partnership issued its own Independent Progress Report for Canada’s efforts toward open dialogue and open regulation. The results were less than stellar, indicating “limited” progress and “minor potential impact.” The report noted that posting regulatory plans was a pre-existing practice, and is more accurately categorized as open information rather than open dialogue.[[24]](#footnote-24)

In fact, other countries provide notable examples for more innovative mechanisms to engage public participation in policy development. Crowdsourcing legislation has been attempted in several countries. Coinciding with the Obama administration’s Open Government Initiative, several federal agencies and state governments have begun using Ideascale, a crowdsourcing tool that  allows citizens to submit ideas to a site and then vote on their favourite ideas via a Digg-like voting system with the most popular ideas rising to the top.[[25]](#footnote-25) Agency staff also participate by commenting on ideas and posting updates, effectively creating a community around idea creation.

In January 2013, the Finnish Ministry for Environment utilized legislative crowdsourcing with an online platform to establish a new off-road traffic law. This initiative is of particular interest since it allowed participants to deliberate on broader questions of policymaking procedures themselves, and not just the preferred policy outcome.[[26]](#footnote-26)

In the spring of 2011, Iceland became the first country to use crowdsourcing as a means for constitutional revision. A forum of 950 citizens elected the Constitutional Council. In turn, the 25 members of the council utilized social media such as Youtube, Twitter, Facebook, and Flickr to elicit feedback for the new constitution. Council meetings were conducted live on the Internet, and the public was invited to respond to the Council’s written work step by step.[[27]](#footnote-27)

South Korea was one of the first countries to actively engage its citizens online for policy development purposes. In 2005, the South Korean government launched e-People, an online citizen participation portal to engage the public in e-decision making.[[28]](#footnote-28) By 2008, the portal had integrated all administrative agency channels whose main purpose is to provide methods for public participation including forums for civil complaint, civil proposal, and policy participation. The government also decided to integrate e-People with popular portals initiated by civil society groups. These portals already had well established user bases and their own online discussion forums raised significant socio-political issues to engage the public. To make the portal readily available to migrant populations within South Korea, the site became available for use in 11 languages including English, Chinese, Japanese, Vietnamese, Thai, and the Sinhala language.

There are currently five main sections within e-People: Civil Petition, Civil Proposal, Policy Discussion, Corruption Reporting, and Administrative Judgement. The first three function effectively as citizen engagement and online discussion channels. Citizens use Civil Petition to ask for consultation on administrative processes, to request the release of government information, to complain about unreasonable behaviour by public organizations, or to suggest better policies or administrative procedures. Users select the relevant agency to address their concerns when they post their petition. Each petition is then forwarded to the appropriate organization where staff follow-up by providing the petitioner with an estimated timeline for an official response. Upon receipt of government feedback, they are able to report their satisfaction with the response. Citizens are notified of each stage of the process of responding to citizen petitions by email or by mobile text message.

Civil Proposal functions as a forum where citizens submit proposals online. A team of public servants from the General Administrative System Division considers the potential, cost- effectiveness, and creativity of the proposals. Subsequently, each government agency chooses the best proposal, and grants an award to the citizen who posted the idea. Award-winning proposals then get discussed on the Policy Discussion section of e-People.

The Policy Discussion section provides a forum for citizens to engage directly in deliberative democracy. Citizen opinions on administrative policies are posted here, and participants discuss government policies. There are three subsections within Policy Discussion: e-Forum, Online Public Hearing, and e-Survey. In e-Forum, there are multiple discussion threads on various topics that users can engage. When participants go to the e-Forum site, a pop-up screen presents an award-winning proposal (along with the name of its contributor) that is currently being highlighted. When each forum discussion is finished, the agency managing the consultation posts a summary of the discussion and announces the final government decision on the issue. Online Public Hearing provides information on the new policies; and citizens, interest groups, and experts are invited to discuss the pros and cons before the new rules are finalized. E-survey is used for gathering citizens’ input on specific issues regarding the administrative system, policy reforms, policy operations, and improvements to policy.

ii. Regulator Response

a. New Communications Strategies

The response from regulators to greater public participations has frequently involved two components: adopting new communications strategies and working to incorporate public participation into regulatory processes. The communications piece is the easier of the two.

Regulators have increasingly shed conventional, low-risk communication strategies in favour of approaches that incorporate social media into a core part of their communications mandate. Regulators that shy away from social media run the risk of failing to deliver their information quickly and authoritatively to interested parties. Moreover, given the close connection between digital issues and regulators such as the CRTC, the absence of a social media communications strategy is likely to attract negative attention, with critics labeling the regulator as “luddite” or “out-of-touch”, raising questions about their competence to address issues involving emerging technology or Internet issues.

Given the similarities with conventional press releases, several global regulators maintain active Twitter accounts that are used to disseminate information to interested followers. Regulators with Twitter accounts include the Australia Communications and Media Authority, the Communications Commission of Kenya, the Telecommunication Authority of Bahrain, the U.S. Federal Communications Commission, the Canadian Radio-television and Telecommunications Commission, the Malta Communications Authority, the United Kingdom’s OFCOM.

The Twitter usage of these entities varies. While some use Twitter primarily as a secondary venue for press releases, others use it for more interactive purposes. For example, the FCC Twitter account actively forwards interesting content (“retweeting”), promotes agency developments, and encourages public participation in contests and other activities. The FCC account has over 550,000 followers, the largest of any telecom regulatory agency in the world.

Some regulators have also incorporated Twitter use into live hearings. In July 2011, the CRTC conducted a two-week hearing on wholesale Internet access. The Commission used Twitter to provide its hundreds of followers with near-instant access to document submissions as they occurred. Moreover, Commission officials followed the Twitter feed discussing the hearing and responding to real-time queries regarding agenda, speakers, Internet video streams, and access to documentation. Given its bilingual mandate, the CRTC posts tweets in both English and French.

In the U.S., the FCC connected itself to social media in 2009, adding Facebook, Twitter, and YouTube. It enabled RSS feeds to a variety of categories of documents, began streaming and archiving formal meetings, speeches, and workshops on issues facing the FCC. In addition, the agency produced OpenInternet.gov to provide public access to high profile proceedings, such as “net neutrality,” give access to Commissioners’ public speeches, and to provide a video portal for live-streamed public workshops on open Internet rulemaking. Viewers may submit questions for the panels via email and Twitter in real time.

The FCC rebooted its website in April 2011 as part of the Open Government Initiative. The new site allowed the agency to use data analytics to monitor website traffic, interact and engage with citizens online, deliver e-services, and provide information. The site enhances e-participation by allowing for comment submissions and by streaming live hearings. For example, over 300,000 comments were submitted for the Open Internet proceeding.

b. New Participation Strategies and Policies

While new communications strategies are important, identifying avenues for public participation represents a greater challenge. The Canadian experience was best illustrated by the initial hearing on a proposed merger between Bell and Astral Media. CRTC reviews of the merger transactions had historically focused on the "tangible benefits" package that often provide millions in funding for new Canadian television and radio productions. Critics maintained that the result was largely regulatory theatre. The purchaser would typically unveil a benefits package featuring self-interested proposals, often amend those plans at the CRTC hearing to demonstrate it was sensitive to criticisms from various groups, and the CRTC would proceed to further tweak the package to show it was not ready to rubber stamp the transaction.

The process generally served the companies and the tangible benefits recipients well. The merging companies were reasonably assured of getting their deal approved and the tangible benefits recipients received hundreds of millions in funding with few strings attached.   
  
The problem was that the public was missing from this process. Tough policy issues with a direct impact on the public were put off for another day as the public interest was supposedly served by trickle down benefits generated by market efficiencies or the creation of new Canadian programming.

The most important aspect of the first CRTC Bell - Astral decision, which surprisingly rejected the proposed merger, was the unmistakable signal that the Commission put the public and the public interest at the heart of the review process. CRTC Chair Jean-Pierre Blais made that clear during the Bell - Astral hearing and later reiterated that "it is my intent to put Canadians back at the centre of their communications system."[[29]](#footnote-29)  
  
The change in approach is obvious when comparing the Bell - Astral decision with the Bell purchase of CTVglobemedia only two years earlier.  In the Bell - CTVglobemedia deal, the words "public interest" appear only four times, each with reference to public interest groups and their participation in the regulatory process. The analysis of the transaction was based largely on the tangible benefits package, which supposedly served as a proxy for the public interest.[[30]](#footnote-30)

In the first Bell - Astral decision, the Commission stated clearly that the tangible benefits are only part of the analysis, repeatedly emphasizing "the applicant's burden to prove that the transaction is in the public interest extends beyond the tangible benefits requirement."[[31]](#footnote-31) This represents an enormous change in the review process, providing consumer and public interest groups with far more power since their submissions will now play a crucial evidentiary role in assessing the public interest effect of the transaction.

This approach had been building for several months since the appointment of Blais as CRTC chair. A CRTC priorities document released weeks after Blais’ appointment identified a single overarching objective: “ensuring that Canadians have access to a world-class communication system.”[[32]](#footnote-32) Given the myriad of policy objectives contained in both the Telecommunications Act and the Broadcasting Act, the singular focus on consumer access was a subtle but important change from the approach of the previous chair, Konrad von Finckenstein.

Von Finckenstein was certainly concerned with consumer issues, focusing early in his mandate on the creation of a telecom consumer agency that became the Commissioner for Complaints for Telecommunications Services. However, he also supported new fees to support broadcasters and was careful to emphasize balance, stating that “we will aim to strike the right balance between the needs of the industry and the expectations of consumers.”[[33]](#footnote-33)

The new CRTC moved the consumer perspective to the forefront of its policy making and priorities. In the nearly two years that have followed, the CRTC has consistently placed consumer issues at the forefront and actively solicited broader public participation.

For example, in the summer of 2012, it announced that it was establishing a chief consumer officer post with responsibilities of ensuring that the public interest was at the heart of its policy making.[[34]](#footnote-34) On the broadcast side, in the summer of 2012, the CRTC announced that it was terminating the Local Programming Improvement Fund, which had generated over $300 million.[[35]](#footnote-35) The following year it issued its much-anticipated mandatory carriage ruling, which largely rejected new mandatory carriage or cost increases in order to maintain lower prices.[[36]](#footnote-36)

The CRTC recently launched *Let’s Talk TV*, a public consultation in anticipation of a public hearing to review the Canadian television system.[[37]](#footnote-37) Over 1,300 comments poured in through email, an online discussion forum, fax, mail, and a 1-800 number. In addition, more than 25 “Flash!” conferences were hosted, in which 1,250 people participated in deliberative discussions on the future of Canadian television. In February 2014, the second phase of *Let’s Talk TV* involved an interactive questionnaire about the issues raised in Phase I. The information culled from the “Flash!” conferences and the questionnaire will be examined at the official hearing in September 2014. Proposals will be posted for comment several months prior to the public hearing.

The new CRTC approach is not limited to broadcast issues. In 2012, it invited the public to help create a national code of conduct for wireless companies such as Bell, Rogers, and Telus.[[38]](#footnote-38) The consultation generated widespread interest, providing frustrated consumers with an outlet for grievances on lengthy contracts, problematic terms and conditions, roaming costs, or onerous cancellation fees. Prior to the public hearing, the Commission set up an online discussion forum, and utilized social media to encourage participation in the hearing. Canadians were able to contribute during the hearing through Skype and via the online discussion forum in real-time, providing a robust public-interest counterweight to traditional participants.

The decision to embark on a national, enforceable code of conduct for wireless services supported by the wireless carriers represented a dramatic policy shift that was scarcely imaginable only a few years earlier. Indeed, when then-Industry Minister Maxime Bernier pushed through a policy direction to the CRTC in 2006 aimed at limiting regulation by calling for “greater reliance on market forces”, consumer-focused regulations were viewed as an impossibility. Consistent with the market-led approach, the Canadian Wireless Telecommunications Association introduced a voluntary code of conduct in 2009 with no expectation of government regulation.

The new code of conduct was released in June 2013, ushering in new regulation of retail wireless services. The code effectively sets a two-year limit on wireless contracts, creates caps on data roaming fees to address bill shock, and requires that carriers offer device unlocking services.

While the CRTC has attracted the lion share of attention for its efforts, other regulators have also focused on increasing public participation. For example, in anticipation of the next review process for the Personal Information Protection and Electronic Documents Act (PIPEDA), the Office of the Privacy Commission of Canada (OPC) launched a public consultation on online tracking, profiling, and targeting, and cloud computing in January 2010.[[39]](#footnote-39) This was a traditional citizen engagement entailing formal written comments and discussion panels held in Toronto, Montreal, and Calgary. The Calgary event was webcast, but otherwise, these initiatives did not utilize technologies that may have enhanced their outreach. Representatives of other privacy commissioner offices and industry as well as academics, advocates and members of the public attended the events.

The Competition Bureau of Canada has also extended its public outreach. In addition to becoming engaged in consumer-oriented issues such as wireless competition and electronic book pricing, the Bureau has emphasized its public advocacy role. This includes creating an “Advocacy Portal” that identifies its advocacy activities (which include formal investigations and policy submissions)[[40]](#footnote-40) and launching a public consultation in the fall of 2013 in which participants were invited to identify areas for future policy advocacy.[[41]](#footnote-41)

iii. Incumbent Stakeholders

Incumbent stakeholders, whether large telecom companies, broadcasters, copyright industry associations, or business groups, have typically (and unsurprisingly) reacted with the most skepticism about broader public participation in policy development. Indeed, the emergence of a stronger public voice on digital policy issues is often viewed as a threat, since their interests may not align with public sentiment. Interestingly, the incumbent stakeholder strategic responses share many similarities to the broader consumer and public interest approach. The response often evolves over three stages: (1) disbelief or anger over the policy reform; (2) opposition to the groups leading the public participation with attempts to discredit their contributions; and (3) adoption of similar strategies to sway public and regulator opinion.

a. Disbelief and Anger

The initial response to an effective public backlash to legislative or regulatory decision is typically to express disbelief, surprise or disappointment at the prospect of revisiting or delaying the outcome. For example, when the federal government opened the door to re-examining the UBB decision, Bell quickly reacted in an editorial defending the initial CRTC decision:

*It was a well-considered decision by Canada’s regulator following an 18-month process that included intense examination of Internet traffic volumes and network costs, and detailed submissions by network operators like Bell, the wholesale ISPs and Internet customers themselves.[[42]](#footnote-42)*

Bell also issued a strongly worded release indicating it was shocked and appalled at the CRTC decision rejecting its proposed merger with Astral.[[43]](#footnote-43)

The reaction was similar when the government delayed introducing copyright reforms in 2007. For example, ACTRA urged Prentice “to do the right thing” by ignoring the protests of a “vocal minority.”[[44]](#footnote-44) Several music associations also issued a press release expressing their “growing concern” with the legislative delays.[[45]](#footnote-45)

b. Opposition

Once the reality of a decision sets in, many incumbent stakeholders have actively opposed consumer and public interest groups in an effort to reduce their influence or create doubts about their positions and tactics. The opposition often features several strategies. First, incumbent stakeholders frequently seek to undermine the credibility of the the groups by claiming that they are engaged in “astroturfing”, where they rely upon form letters or social media “likes” to create an aura of support that may be relatively weak or poorly informed.

In the copyright context, Richard Owens wrote critically about the use of form letters in the public participation in the 2009 copyright consultation,[[46]](#footnote-46) while Barry Sookman took the Fair Copyright for Canada Facebook group to task for the “the unbalanced manner in which information and arguments about the Government‘s proposed copyright bill and its likely effects have been presented at the site.”[[47]](#footnote-47)

It is certainly true that some of the largest public participation initiatives on digital policies have leveraged social media to encourage the public to register its support through online petitions, form letters, and social media support. Yet the practices are not dissimilar to those employed by the incumbent stakeholders. In the 2009 copyright consultation, form letters were so widely used that Industry Canada segregated the submissions. The form letters included submissions from employees working in the music industry,[[48]](#footnote-48) music rights holders,[[49]](#footnote-49) and employees of a publishing company.[[50]](#footnote-50) The Balanced Copyright for Canada website, launched by the music industry, sent hundreds of thousands emails and tweets at Parliamentarians throughout the Bill C-32 debate.

Form letters have also long been a part of CRTC hearings. For example, as part of the CRTC hearing on the Bell – CTV Globemedia merger, numerous local organizations and businesses were encouraged to provide effusive praise for the transaction. This led to interventions from a wide range of non-expert groups: everyone from the Ottawa Senators to retailer Tommy & Lefebvre to the Westin Hotel in Ottawa to the Surrey Honda auto dealership to Dodd’s Furniture and Mattress in Victoria, BC to the Soho Bar and Grill in Calgary took the time to write with their support using similar language.[[51]](#footnote-51)

Politicians from across the political spectrum also wrote in support of the merger, using nearly identical language. For example, Ontario MPP Bob Chiarelli said:  
  
*Bell has proposed a benefits package that is supportive of local news. Among the initiatives that are beneficial to local news is Bell's proposal to allocate money to enhance local news on television with the view to expanding the content on new media platforms as well as its proposal to convert local station production facilities to HD.[[52]](#footnote-52)*  
  
Ottawa Mayor Jim Watson matched the Chiarelli comment:  
  
*Bell has proposed a benefits package that is supportive of local news. Among the initiatives that are beneficial to local news is Bell's proposal to allocate money to enhance local news on television with the view to expanding the content on new media platforms as well as its proposal to convert local station production facilities to HD.[[53]](#footnote-53)*  
  
Similarly, Conservative MP Patrick Brown said:  
 *CTV has stated at various proceedings that the /A\ stations have sustained sizable losses over the years.  BCE's acquisition includes a proposal to be discussed that would dedicate a portion of benefit resources to these stations over the coming years providing much needed stability.[[54]](#footnote-54)*  
while Nanaimo Mayor John Ruttan wrote:

*CTV has stated at various proceedings that the /A\ stations have sustained sizable losses over the years.  BCE's acquisition includes a proposal to be discussed that would dedicate a portion of benefit resources to these stations over the coming years providing much needed stability.[[55]](#footnote-55)*

The use of the same submission template in CRTC matters bears a strong resemblance to the public participation tactic of using form letters to encourage participation.

Second, incumbent stakeholders also point to the perceived lack of expertise among the public as a reason to diminish the value of their contributions. For example, Bell Media CEO Kevin Crull recently responded to the issue of unbundling of television channels by arguing that the broadcasting executives are the experts in the field and that public demands for paying only for channels they watch “falls apart when you follow that down logically.”[[56]](#footnote-56) The same claims were made during the Canadian copyright reform process, with public interventions often regarded as non-expert.[[57]](#footnote-57)

While it is true that not all public submissions are based on years of study or expertise in the field, incumbent stakeholders also frequently rely on non-experts during policy processes. For example, in the 2009 battle over fee-for-carriage, proponents of a carriage fee presented public opinion polls that they argued supported the policy measure.[[58]](#footnote-58) During the legislative hearing on Bill C-32, the copyright reform bill, incumbent stakeholders brought non-expert witnesses, who had little background in copyright law, to present their perspective on the issue.

Third, incumbent stakeholders often argue that public participation masks corporate interests that lie behind the public face. In other words, the suggestion is that grassroots efforts are actually conventional lobbying activities in disguise. It is true that public participation often aligns with the interests of some private sector participants. Public advocacy on telecom may often benefit new entrants, broadcasting issues may benefit new media organizations, and copyright reform may benefit Internet intermediaries. Yet a comprehensive study on the effectiveness of these efforts within the SOPA context by Harvard professor Yochai Benkler found that the private sector participants played at most a peripheral role in the grassroots advocacy efforts.[[59]](#footnote-59)

Moreover, incumbent stakeholders actively deploy a far wider range of lobbying tools to ensure that their perspective is fully considered. For example, in 2011, Bell added former Industry Minister Jim Prentice to its board of directors[[60]](#footnote-60) and Telus did the same with former Public Safety Minister and Treasury Board President Stockwell Day.[[61]](#footnote-61) The addition of two prominent Conservative cabinet ministers made it clear that the companies recognized the increasing politicization of telecom policy.  
  
The addition of former politicians to telecom boards was nothing new. Indeed, the path between politics and telecom boardrooms is well trodden, with the likes of Brian Mulroney (Quebecor), former Liberal cabinet minister Ed Lumley (Bell), former BC Finance Minister Carole Taylor (Bell), and former Ontario premier David Peterson (Rogers) all making the jump. Moreover, former New Brunswick premier Bernard Lord heads the Canadian Wireless Telecommunications Association.

c. Emulation

The use of social media is not limited to grassroots or public participation efforts. Indeed, in recent years, incumbent stakeholders have used the same strategies to curry public support for their positions. The 2009 fee-for-carriage policy battle featured prominent campaigns pitting “localtvmatters” vs. “stopthetvtax”. More recently, the wireless spectrum auction and the potential entry of Verizon into the Canadian marketplace led to massive public campaign that featured extensive use of websites, Facebook, and Twitter. The same is true for copyright advocacy. In 2010, the Canadian Recording Industry Association backed the creation of “Balanced Copyright for Canada”, a website that urged users to tweet at Parliamentarians, respond to opinion pieces in the media, and write directly to Members of Parliament.[[62]](#footnote-62)

In fact, even then-Canadian Heritage Minister James Moore urged incumbent stakeholders to emulate the public participation approach. In a speech to the Canadian Intellectual Property Council weeks after the tabling of Bill C-32, Moore stated:

*These voices that are out there, these people that are out there who pretend to be experts that the media cite all the time. They don't believe in any copyright reform whatsoever.  They will find any excuse to oppose this bill, to drum up fear, to mislead, to misdirect, and to push people in the wrong direction and to undermine what has been a meaningful comprehensive year-long effort to get something right*..*When they speak, they need to be confronted.  If it's on Facebook, if it's on Twitter, or if it's on a talk show or if it is a newspaper, confront them and tell they are wrong.[[63]](#footnote-63)*

**Stage Three: Beyond Consultation**

The enthusiasm for public participation in Canadian digital policy may vary, but the developments of the past seven years suggest that the public is firmly ensconced as a “stakeholder” in the process. Governments, regulators, and incumbent stakeholders are gradually adapting to the new policy environment, with some (notably the CRTC) embracing the importance of consumer policy perspectives and participation in virtually all aspects of its mandate.

While much progress has been made, significant challenges lie ahead if Canada is to maximize public participation and fully benefit from their contributions. The challenges fall broadly into two camps: (1) maintaining robust public participation in policy and regulatory processes; and (2) incorporating public input into policies to ensure that the process does not devolve into mere “regulatory theatre.”

i. Robust Public Participation

The challenges of fostering robust, ongoing public participation in policy development should not be underestimated. As noted earlier, policy development is no field of dreams. Simply incorporating the tools to enable public participation will rarely generate a significant response due to well-understood collective action problems that invariably mean that incumbent stakeholders dominate the conversation.

How to address the ongoing challenge of maximizing public participation?

Part of the solution likely lies in experimentation. There is no single solution and each issue may resonate with the public in different ways. Moreover, public interest and understanding of specific issues will play a crucial role in determining whether a sizable number of Canadians choose to participate in consultation and policy processes. Unfortunately, governments rarely reward experimentation, particularly since some efforts are likely to fail and may cause embarrassment.

The CRTC has provided a template for experimentation with its recent *Let’s Talk TV* consultation, which has incorporated a wide range of online channels to encourage feedback and public commentary. While some initiatives have faced criticism (including from the author), the approach is precisely what is needed since drawing from the experience – whether positive or negative – should result in a better understanding of how to best engage different communities.

Another positive aspect of the consultation is that it seeks to engage the public relatively early in the policy process. Rather than simply soliciting feedback on proposed rules or regulations, the consultation builds public participation from the outset. While the outcome remains many months away, the consultation holds the potential fully engage the public in all aspects of the policy cycle including agenda setting, design, implementation, and (ultimately) evaluation.

The form of consultation requires flexibility and creativity, but some groups may still be unable to participate in regulatory and policy processes due to a lack of resources. The problem is particularly pronounced where the issue proceeds beyond consultation to formal hearings or legal process. Facilitating a level playing field is crucial in such circumstances and the CRTC’s funding mechanisms (including the newly established broadcast participation fund) may provide part of the solution.

Even where public participation is facilitated, the biggest long-term issue for ongoing engagement may well be how the public input is incorporated into the policy process. The public can be enticed to participate in policy and regulatory issue so long as they are convinced their opinions will be considered and factored into the final policy decisions. If the outputs bear little resemblance to public feedback, they are likely to reject both the policy and the opportunities to participate.

ii. Incorporating Public Input

While encouraging public participation has its challenges, far more difficult is incorporating that input into the policy process in a meaningful way. Indeed, the difficulty is directly connected: the greater the public participation, the more difficult it is to fully process and incorporate it into government or regulatory policy. However, if governments and regulators fail to adequately incorporate the public feedback, future participation is far less likely as potential participants become disillusioned with a process they (rightly) perceive to be primarily theatre.

The challenge is highlighted by a recent critique of open policy making in the United Kingdom, where researchers found that there is a danger of creating greater public cynicism and distrust if the substantive outcomes do not reflect the public feedback. This is a real challenge since some studies have found that a minority of consultations result in a clear link between public feedback and policy outcomes.[[64]](#footnote-64)

The CRTC acknowledged the challenge in a recent decision involving prepaid wireless cards. In a request to vary and review the initial decision, the Commission stated:

*In the proceeding that led to the Wireless Code Decision, the Commission received submissions from over 5,000 individuals and organizations, and considered approximately 25 topics related to the content and clarity of retail wireless service contracts. Given the scope of the issues considered and the number of submissions received, the Commission could not reasonably be expected to address specifically in its decision every piece of evidence and argument put forward in the proceeding. In order to produce a concise Wireless Code Decision, the Commission necessarily summarized the positions, evidence, and arguments made by all parties.[[65]](#footnote-65)*

The Commission’s position is understandable as it unreasonable to expect it to specifically address thousands of individual comments. Yet for individuals who feel that their input was not adequately considered, the reasonable constraints on any regulator will not matter much.

Further, there are real challenges in separating genuinely valuable feedback that may identify new policy options or approaches from opinions that shed light on public perspectives but do not necessarily advance policy analysis. The challenge exists for all submissions – whether from the general public or incumbent stakeholders – however, the volume of submissions render the issue far more challenging in a more open, inclusive policy environment.

Similar issues arise within the context of government consultations. As discussed above, the government conducted extensive consultations on copyright (2009) and the digital economy (2010). Neither consultation generated even a summary document on the public perspective. In fact, the digital economy strategy, which took years to release, makes no mention of the consultation at all. If the government is serious about public consultation, those that take the time to provide their views deserve better.

Members of Parliament are also frequently guilty of failing to provide a meaningful response to constituent feedback. Form letters, invariably drafted by departmental staff, are often the only formal response and contain little or no connection to the actual issues raised by the public. For members of the public that may have spent hours studying the issue and crafting a letter in the hope of making their concerns known to their elected representative, the largely irrelevant response can cause far more political harm than the actual policy that is adopted.

Effectively incorporating public participation is the ultimate goal behind efforts to open the policy process to broader public participation. Policy makers, politicians, and regulators generally recognize the benefits of broader public participation on digital issues: policies that better reflect societal values and goals, greater public confidence in the policy and regulatory institutions, and a more democratic, inclusive approach to rulemaking. Yet the challenge of successful public participation involves more than just building consultation platforms that enable broader participation. To fully realize the benefits of public participation, governments and regulators must turn their minds to what happens after the public arrives ready to provide their views, opinions, and perspectives on emerging digital policy issues.

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