AN INSTITUTIONAL ANALYSIS OF THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION

by

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Abstract

This paper analyzes the effects of Canadian institutions on the development, structure, and mandate of the Canadian Radio-Television and Telecommunications Commission as a modern regulatory agency. The research focuses on Canadian institutions of federalism and Westminster Parliamentary Government in order to identify key features and outcomes of the CRTC that reflect these institutions. This analysis is developed by beginning with a general overview of the literature regarding the effects of institutions in order to identify the significance according to institutional theory. Further, the rise of regulatory regimes and status of regulatory agencies are detailed in order to give greater context to the CRTC. The evidence suggests that the institutions of both federalism and Westminster Parliamentary Government have influence on the structure and mandate of the CRTC. The primary conclusion of the research is that the CRTC is an institution of Westminster Parliamentary Government but it is not an institution of federalism per se; rather, it is an institution that results from efforts to manage the effects of Canadian federalism. The research concludes that institutional analysis of regulatory agencies is a legitimate and viable research area, and suggests several valuable future research pursuits.
Preface

This thesis is original, unpublished, independent work by the author, Kyle Falk-Varcoe.
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Introduction

As telecommunications become more important, the decisions and capacities of such organizations as the Canadian Radio-Television and Telecommunications Commission (CRTC) necessarily come under increasing scrutiny. The following essay identifies how Canadian political institutions, specifically Westminster Parliamentary Government and federalism, influence the development of regulatory agencies. The analysis examines the impact of structures such as the executive-legislative nexus and intergovernmentalism on regulatory regimes. The analysis concludes that Canadian political institutions have a significant effect on the structure and mandate of the CRTC, and that institutional analysis of regulatory agencies is a legitimate and viable research pursuit.

The essay begins by examining institutionalist frameworks. It builds a foundation for understanding the effects that institutions have on policy development. The impact of both Westminster Parliamentary Government and federalism will be detailed to give greater clarity to the institutional theories elaborated on prior. The history, development, and theoretical framework for regulation will be briefly provided, and then the structure, mandate, and behaviour of the CRTC is studied. The CRTC’s interaction with Globalive in 2009 is presented as a case study.

The Globalive case analyzes how Westminster Parliamentary Government and federalism influence the CRTC as a regulatory agency. The case study helps to sustain the hypothesis that Canadian political institutions have a clear and independent effect on the structure and mandate of the CRTC. The case study will also demonstrate the viability of institutional analysis of regulatory agencies to understand their behaviour, mandate, and power. The conclusions drawn will be presented as potential avenues for further research.
Methodology and Evidence

Institutional analysis is an established approach to understanding policies and policy outcomes, but has seldom been used to examine major regulatory agencies. As such, this thesis will look to identify both the relationship between Canadian institutions and the CRTC and the legitimacy of institutional analysis on regulatory bodies. Further, it will use evidence of an institutional impact on the CRTC to dispel theories that regulatory agencies are *sui generis* policy instruments, standard across countries regardless of the institutional structures they exist within.

These expectations are tested by comparing the theoretical frameworks for institutionalism and the specific effects of the Canadian institutions of Westminster Parliamentary Government and federalism on the CRTC. Evidence is presented in a detailed analysis of the CRTC’s structure, power, and mandate with emphasis on the *Broadcasting* and *Telecommunications Acts*. It will identify the key aspects of the CRTC that do, or do not, reflect the theoretical expectations. This analysis will be strengthened by a case study of the CRTC’s action toward the entrance of Globalive into the Canadian telecommunications market.

The main conclusion is that the structure, mandate, and behaviour of the CRTC are significantly influenced by Canadian political institutions, primarily Westminster Parliamentary Government but also Canadian federalism to a lesser extent. Further, the methodology and evidence will suggest that institutional analyses of regulatory agencies are legitimate and viable research methods.
Institutional Theoretical Framework

Institutional theories focus on institutions as “formal or informal procedures, routines, norms, and conventions embedded in the organizational structure of the polity or political economy,” associated with “organizations and their rules or conventions promulgated by formal organization” (Hall & Taylor, 1996, p. 938). Institutional structures can promote or restrict policy directions as well as influence the behaviour and power relations of actors working within political systems. Policy outcomes are influenced by such factors as ideology, culture, economics, or politics. But such factors also lack “substantive meaning if abstracted from the institutional context in which humans define them” (Hall & Taylor, 1996, p. 938). Institutional analysis demonstrates how institutions such as divisions of power or electoral processes can influence political behaviour, policy development, and the role of government agencies and actors, allowing cross-jurisdictional policy differences to be explained through structural and constitutional differences.

The development of policy regimes is influenced by state structures, which set “the stage for the development of particular decision-making institutions” (Steinmo, 1989, p. 503). Variations in public policy development arise due to the effects of institutional structures, such as the influence and policy preference of competing political actors, the existence of asymmetrical power and information amongst actors, and structural limitations within jurisdictions. While institutional theories clearly establish limits, institutions are understood as the “critical variables for understanding how and why different democratic governments tend to choose different public policies” (Steinmo, 1989, p. 504).

To understand institutional effects one requires detailed comparative analysis of a policy area between jurisdictions, focusing on the potential impact that political institutions
as interdependent variables can have on policy outcomes. For example, comparing tax policies in the United States and the United Kingdom, Sven Steinmo identifies a strong relationship between the resultant policies and political institutions in each jurisdiction, suggesting that these institutions interdependently influence the policy outcomes.

Westminster Parliamentary Government promotes a centralized system wherein ‘party governance’ dominates, often allowing the winning party of a particular election to have exclusive control over government and policy direction with few veto points. Party discipline within this system allows parties “to act on their electoral platforms no matter how ill-conceived or antagonistic to the opposition’s interests” (Steinmo, 1989, p. 527). This creates environments where sweeping policy changes sometimes occur quickly and with scant regard for the views of opponents. In looking at British tax policy, the effects of institutional structures are evident in two major ways. First, tax policy is disjointed between elections when new parties win and make quick changes. Second, policy outcomes and directions are more closely tied to the wishes of politicians than experts, advisors, or bureaucrats. Because each election cycle can bring a significant shift in policy direction, government officials follow the wishes of the current party rather than their own discretion.

In the United States’ more pluralist system, by contrast, tensions between political institutions and bodies, such as between the House of Representatives and Senate as well as between the legislative and executive branches, produce gridlock and veto points. For tax policy in the United States there is a history of “heavy use of particularistic tax expenditures” (Steinmo, 1989, pp. 511-512), special amendments by politicians to appease special interests groups, that is the result of the fragmentation of political authority and the increased existence of veto points compared to other jurisdictions. Further, the fragmented authority
within the United States’ political institutions has led to several instances in which presidents have attempted to promote tax reforms only to be defeated by Congress, even when both the legislative and executive branches were held by the same party.

The presence of particular institutions within a jurisdiction can produce relatively stable and predictable results. Institutional features, such as federal or unitary structures, single member plurality or proportional representation electoral systems, fragmented or concentrated political power, have a direct impact on policy development. An institutional analysis of governance and policy development, whether of an individual jurisdiction or a comparison between jurisdictions, yields valuable results.
Canadian Institutions: Westminster Parliamentary Government and Federalism

Canadian institutions, notably Westminster Parliamentary Government and federalism, often produce complex, sometimes contradictory effects. Canadian public policy is shaped by fused executive and legislative power produced by Westminster Parliamentary Government, a centralizing force that allows quicker and more definitive policy development. Simultaneously, Canadian public policy is influenced by federal intergovernmental relations, which increasingly necessitates collaboration and slows policy development. Together, these two institutional factors influence, and often define, policy development and politics in Canada.

Canadian political institutions are derived from the British system of responsible government, wherein the executive and legislative branches of government are fused. Westminster Parliamentary Government ensures that the executive branch is led by the head of government, the prime minister, insofar as he or she is able to maintain the confidence of the elected representatives comprising the legislative branch. The prime minister and the cabinet are responsible to, but in reality often come to dominate, the legislative branch from which it is elected. Westminster Parliamentary Government is also defined by the presence of a parliamentary opposition, able to hold the governing party, and by extension the executive, accountable. A vocal opposition, alongside the requirement of the executive to maintain confidence of the legislative branch, serve as a check on the executive. Adherence to cabinet collective responsibility, wherein the executive represents itself as a unified front within the execution of executive authority, further ensures that sides are clearly defined. The executive controls most administrative and policy processes, such as parliamentary proceedings related to introducing legislation, the appointment and management of senior
public servants and judges, and access to information and central agencies that the parliamentary opposition lacks.

Combined with a first-past-the-post electoral system, Westminster Parliamentary Government allows for ‘party governance,’ where the executive comes to dominate the legislative. Elections allow a single party to win a majority of seats in the House of Commons even with a minority of votes, granting monopoly over the functions of both legislative and executive branches through the ability to maintain confidence of the House of Commons with the support of party members. This party governance system reduces the need for cooperation or collaboration, transmitting authority and control to the prime minister and his or her closest advisors.

The institutional environment of the party and electoral systems, as well as the institutions of power, discourages compromise while promoting the creation of policy mandates with greater depth, scope, and vigour. This approach to policy development creates a desire to avoid incremental policy development in exchange for rapid, wholesale change, alongside a fear of ‘U-Turns,’ wherein opposition will fundamentally alter recent changes in sweeping decisions after coming to power. Fused systems and the “electoral structure on which party government is based generally insure[s] that one party will have exclusive control over government,” and with it a greater potential for a unified, coherent policy direction (Steinmo, 1989, p. 527). This exclusive control over legislative and executive power extends into administrative power as well, as represented in Canadian ministerial responsibility.

Institutions control and influence the public service, forging a closer working relationship between the House of Commons, the cabinet, and the public service. Ministerial
responsibility ensures that each department, ministry, or agency has usually only one cabinet minister they report and are responsible to; this centralization streamlines the process, while simultaneously, transfers further power and authority to the cabinet over public servants. Westminster Parliamentary Government gives the prime minister significant freedom of appointment, including senior public servants and judges, often without parliamentary approval.

Centralized systems such as Canada’s grant additional power and recognition to bureaucracies and agencies, and are thus more supportive, than fragmented systems that lack consensus between government and bureaucracies. In fragmented systems the “formal institutions of government cannot concentrate power and thus define political ends” leaving bureaucracy “with the task of building support for its own mission from the bottom up rather than via a principal-agent contract with political branches” (Hill & Meier, 2007, p. 54). This relationship suggests Canadian structures will have fewer pathways of responsibility, less reporting and documentation to multiple bodies, and inevitably, stronger ties between government and bureaucracy. As such, “on balance, the effect of executive dominance has made the administration an ally rather than an adversary of government” (Smith, The Invisible Crown: The First Principle of Canadian Government, 1995, p. 93).

Federalism is also a significant institutional factor in policy development across countries. In many situations, federal institutions impact the “policy preferences, strategies, and influence of social actors” (Pierson, 1995, p. 450) that exist within the political and policy development environment. Federalism also creates new actors that unitary systems lack, and these constituent actors, such as state or provincial governments, influence the possibilities available in policy development. Finally, federal institutions generate
“predictable policymaking dilemmas associated with shared decision-making,” (Pierson, 1995, p. 449) such as increased likelihood of lower common denominator policies, blame avoidance policies, incorporation of institutional protections for constituent actors or regions, searches for escape mechanisms within policy development, and reduced capacity for quick or unilateral policy decision. Federalism thus has the potential for various effects on policy development, depending on the context and institutional environment within which it exists.

Under Canadian federalism the mantra of special treatment for provincial particularisms is a constant (Cairns, 1977). While jurisdictional differences appear clearly defined due to constitutional structures, Simeon argues that “in few policy areas… except perhaps defence, the post office, or garbage collection… does one government act alone” (Cairns, 1977, p. 721). Collaborative federalism and intergovernmental cooperation, increasingly interprovincial in character and occasionally working without the federal government in specific fields, further complicates this structure (Cameron & Simeon, 2002). Canada is now a strongly decentralized federation, with increasing adherence to asymmetrical federalism (Russell, 2010). Canadian federalism leads to greater efforts at asserting power and jurisdiction, both by the federal government and by provinces, alongside frequent attempts to negotiate compromises.

Explanations for institutional and constitutional origins of federal states are primarily divided into two categories: those that seek to protect cultural diversity and those that seek to permit rapid territorial expansion and large geographic area (Smith, Canada: A Double Federation, 2010). Canada fits clearly into both categories, as its institutional structures seek to develop a double federation “based on peoples and territory,” representing a respect for the
administrative difficulty of a large, diverse territory alongside both religious and ethno-linguistic diversity (Smith, Canada: A Double Federation, 2010).

“Double federalism,” in Smith’s sense of the term, results in an executive-dominated federal government intrusion into provincial jurisdiction, as well as the development of institutions to create a pan-Canadian identity. Periods of shifting centralization and decentralization, alongside the longstanding concern over American cultural and political intrusion, are further causes of this emphasis on pan-Canadian institutions and central government dominance to manage the double federation. With the development of collaborative federalism since the 1960s, the management of this double federation has also been represented through a process of negotiated agreements and collaborative efforts between provinces and the federal government, increasingly developing institutional structures capable of respecting and responding to regional concerns.

Canadian institutions are premised on the “basic inconsistency in the constitutional design of parliamentary federations.” (Sharman, 1990, p. 205) Combining a centralizing Westminster Parliamentary Government with the decentralizing, cooperation-inducing nature of modern Canadian federalism has had a clear impact. The legacy of this inconsistent constitutional design is the modern Canadian policy and political landscape found in collaborative, executive-dominated federalism alongside a centralized policy development environment. The role and behaviour of political and administrative actors is defined by this environment.
The Rise of Regulation and Sectoral Regulatory Regimes

Modern mixed economies regulate economic and social life, combining government regulation and intervention with markets and a considerable private sector. The rise of regulation in the past four decades follows the “loss of confidence in traditional mechanisms of public ownership in many fields of public service delivery in OECD countries” (Scott, 2008, p. 1). A new era of regulatory governance was to a degree intended to replace government ownership with oversight. The role of government became to police private operators, rather than provide public services; this was possible through the creation of government agencies and bodies with the sole purpose of inspecting, and often directing, private operations. Such regulation is illustrated by the trend since the 1980s towards an increase in network governance, leading states to “become rather more preoccupied with the regulation part of governance and less with providing” services directly to citizens (Braithwaite, 2008, p. 1). The era of neoliberal privatization that occurred internationally in the 1980s, especially among Anglo-Western states, caused a reorientation of regulatory regimes.

Prior to extensive privatization, regulatory agencies were able to exert their presence by managing sectors independently and by requiring monopoly providers in field such as telecommunications and transportation to adopt new priorities or measures. Such regulatory regimes were predicated on the dominance and privileged position of state providers of service delivery (Barney, 2005). Increasingly, regulatory polices became a method of policing behaviour, wherein “agencies replaced the non-crime duty of traditional policing” forces that had existed, ensuring that the process of industrial and health inspection, for example, were regulated and observed by government agents (Braithwaite, 2008, p. 4). The
combination of the need for larger policing-style agencies to inspect geographically diverse and technologically complex industries along with managing monopoly service providers led to the creation of modernized regulatory institutions. Privatization policies “were accompanied by processes of public management reform within bureaucracies… [serving to liberalize] some aspects of central public management, while at the same time accompanied by the creation of new layers of regulation over public sector activities, frequently in new or remodeled freestanding agencies” (Scott, 2008, p. 1). Canadian regulatory institutions such as the CRTC created a foundation for new institutions after they were created in the middle of the 20th century.

The study of contemporary regulation “grew with the realization that neoliberal politics had not produced privatization and deregulation, but privatization and regulatory growth” (Braithwaite, 2008, p. 2). Privatization and new regulatory institutions were the “prescription for reinventing government to steer rather than row” (Braithwaite, 2008, p. 3). The end of many state-owned or state-sponsored monopolies in most OECD jurisdictions via privatization required a process of regulatory evolution through new methods of oversight and competition promotion. While some regulatory theories suggest that the development of modern regulatory agencies is uniform across jurisdictions, comparative analysis suggests this process was not universally applied. While Westminster Parliamentary Governments such as Canada and the United Kingdom delegated regulatory authority to newly created bodies while retaining a significant level of power for ministerial departments, regulators in other jurisdictions, notably the United States, lacked central oversight within their method of control (Scott, 2008, p. 2).
New methods of regulation involved models that included hierarchical and competitive strategies: regulatory agencies would assert independent authority over regulated firms while simultaneously creating market scenarios in which “standards emerge through the rivalry of actors jockeying for position in markets” (Scott, 2008, p. 5). While regulatory policies and regimes are heterogeneous internationally, research typologies have been developed to suggest generalized patterns. Regulatory policy and institutional research together have produced a “framework in which modern regulation is cast as an interplay” among several different regime-types, of which sectoral regimes are most frequent for economic regulatory agencies (Doern, Hill, Prince, & Schultz, 1999, p. 4).

While the various regulatory regimes, including horizontal and international regimes, are “understood to frequently overlap and collide, they are understood as largely distinct based on their relationships to the specific domains they cover” (Doern, Hill, Prince, & Schultz, 1999, p. 4). Sectoral regimes relate to the regulatory frameworks responsible for managing specific industrial sectors, usually transportation, energy, and telecommunications. Such regulation is needed because these fields are frequently dominated by a few large firms. Governments use sectoral regulatory regimes in order to produce regulation to serve as a “substitute for competition, which normal markets would otherwise supply” (Doern, Hill, Prince, & Schultz, 1999, p. 5). The agencies produced by government serve to either influence development of competition or ensure the effects of competition were it to exist.

Globalized economies and technological advancements promote convergence and amalgamation in many industries, resulting in overlaps between and within sectors (Laffont & Tirole, 2000). The increasing rate of horizontal and vertical integration in sectoral economies has led to decreased market diversity, as well as “heretofore vertical sectors
[becoming] much less vertical and resemble instead an odd array of tilting or leaning regulatory towers of Pisa" (Doern, Hill, Prince, & Schultz, 1999, p. 14). The increasing size, scope, and concentration of firms within industries, and the increased difficulty in entering markets due to technological advancements, are major factors in determining the trajectory of contemporary sectoral regulatory development (Laffont & Tirole, 2000).

While the “traditional paradigm for utility regulation rests on the regulation of a well-defined set of services offered by a well-identified operator [or small group of operators] in a well-circumscribed geographical area,” changes in the globalized economy for many industries, such as the “recent evolution in telecommunications, has shattered each of these foundations” (Laffont & Tirole, 2000, pp. 271-273). The combined influence in telecommunications of technological innovation, industry convergence, the proliferation of operators, and globalization trends has led to a considerable decrease in regulatory capacity for traditional organization structures (Laffont & Tirole, 2000). As a result, established methods of regulation are frequently becoming inadequate or misdirected, leading to demands for reform within an increasingly complex regulatory framework.
CRTC: Mandate and Structure

Ottawa created the Canadian Radio-Television and Telecommunications Commission (CRTC) in 1968 during the international rise of new regulatory regimes. The CRTC mandate is derived from two pieces of enabling legislation: the Broadcasting Act (1968) and the Telecommunications Act (1976). The Broadcasting Act specified that the CRTC would “regulate and supervise all aspects of the Canadian broadcasting system” in a “flexible manner,” designed to account for the diverse cultural, regional, and linguistic character of the Canadian state. The Broadcasting Act had seven primary features, requiring that the regulation and policy developed for, and by, the CRTC:

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<td>1.</td>
<td>Is readily adaptable to the different characteristics of English and French language broadcasting;</td>
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<tr>
<td>2.</td>
<td>Takes into account regional needs and concerns;</td>
</tr>
<tr>
<td>3.</td>
<td>Is readily adaptable to scientific and technological change;</td>
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<td>4.</td>
<td>Facilitates the provision of broadcasting to Canadians;</td>
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<tr>
<td>5.</td>
<td>Facilitates the provision of Canadian programs to Canada;</td>
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<tr>
<td>6.</td>
<td>Does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians;</td>
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<tr>
<td>7.</td>
<td>Is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.</td>
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This mandate produces a regulatory framework specifically designed to be led by the executive branch of the federal government and to account for systemic diversity in the Canadian state. The Telecommunications Act, finalizing the mandate and structure of the CRTC, expanded the role of the regulatory body to include “the maintenance of Canada’s identity and sovereignty.” In so doing, it outlined nine further roles for the CRTC:
1. To facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich, and strengthen the social and economic fabric of Canada and its regions;

2. To render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

3. To enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

4. To promote the ownership and control of Canadian carriers by Canadians;

5. To promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

6. To foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

7. To stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

8. To respond to the economic and social requirements of users of telecommunications services; and

9. To contribute to the protection of the privacy of persons.

The duality of the CRTC mandate impacts its regulatory power. The CRTC is officially an independent regulatory body with the capacity to regulate according to its mandate and to pursue clear policy directions. It can directly affect the broadcasting and telecommunications markets, including determining which corporations receive licenses, levying fines against companies that violate or ignore the Telecommunications and Broadcasting Acts, and restricting operators’ business models. One commonly used power of the CRTC, holding public hearings, serves the dual purpose of both investigating particular issues, such as corporate mergers or potential regulatory policy changes, as well as involving the public. The CRTC’s power to determine which firms enter markets, how they operate, and how they are held accountable gives it considerable capacity to regulate and steer Canadian broadcasting and telecommunications industries. Punishment can be severe, evidenced by the revoking of Genex Communications’ radio licence for CHOI-FM Québec in 2004 following the station’s history of racist and sexually explicit commentary on-air, which contradicted broadcasting regulations regarding abusive and offensive language (CHOI-FM Non-renewal of Licence, 2004). Many technical areas, such as frequency and
spectrum application and separation, are beyond the power of the CRTC; these powers are reserved to Industry Canada, allowing the CRTC to focus on more distinctly regulatory functions instead of technical matters that often preoccupy regulators in other jurisdictions. The powers of the CRTC enable the agency to fulfill the commissioners’ required responsibilities:

<table>
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<th>1. Establishing rules, policies and guidelines for licences</th>
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<td>2. Participating in public hearings and consultations</td>
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<td>3. Developing regulations and participation in issuing CRTC decisions</td>
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<tr>
<td>4. Consulting with members of the broadcasting and telecommunications industries, the public and other interested parties</td>
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<tr>
<td>5. Meeting with licensees, industry organizations or other interested parties</td>
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<tr>
<td>6. Considering directions to the CRTC from the Governor-in-Council</td>
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The emphasis on communication with private firms and the public through hearings, consultations, and meetings justifies the CRTC organization. Further, the CRTC is required to consider the directions given from the cabinet via the governor-in-council, but is does have the power to decide its own polices in most instances. The power of commissioners, individually held but collectively expressed, demonstrate that the CRTC’s powers are impacted by the commission’s structure.

The CRTC is managed by up to 13 commissioners, three of whom lead as chairpersons, appointed by the prime minister for five year terms. These commissioners can be appointed for any number of consecutive terms, without parliamentary approval, at the discretion of the cabinet. Commissioners are designated roles based on both regional representation and either broadcasting or telecommunications functions. While the CRTC is led by the chairperson and the vice-chairpersons for both telecommunications and broadcasting, the structure of the CRTC supports up to 10 regional commissioners, each with their individual jurisdictions. Currently, regional commissioners each hold positions to
represent: Ontario; Quebec; Manitoba and Saskatchewan; Atlantic Canada and Nunavut; British Columbia and the Yukon; and Alberta and the Northwest Territories respectively.

The CRTC is currently led by the chairperson J.P. Blais, who also serves as the Chief Executive Officer. Below the Chairperson are two Vice-chairpersons, one for Telecommunications, currently Peter Menzies, and one for broadcasting, currently Tom Pentefountas. The CRTC’s current leadership demonstrates the norm in appointments. Blais is a public servant who worked as Assistant Deputy Minister of Cultural Affairs at the Department of Canadian Heritage, Menzies was a journalist and worked as Editor of the Calgary Herald, and Pentefountas is a lawyer and former radio show host. This combination of public servants and communications professionals is a common trend in appointments to the CRTC: most come from prior government employment, journalism, or from within the broadcasting or telecommunications industries themselves. The job description for these positions, offering Vice-chairpersons an annual salary between $190,400 and $224,000 in the last open position, requires candidates to have “a degree or job experience in a related field of study to the CRTC, as well as senior-level decision-making experience, familiarity with the regulator's framework and knowledge of the broadcasting industry” (Galloway, 2011). Limited requirements give considerable discretion to the cabinet during the appointment process.

The CRTC mandate creates two ministerial pathways between the regulatory agency and the cabinet: broadcasting through the Minister of Heritage and telecommunications through the Minister of Industry. The CRTC is required to submit reports, annual assessments, and performance reviews to both ministries on a recurring basis. The CRTC is given a large mandate to produce regulation to protect the cultural aspects and technological
structure of Canadian broadcasting and telecommunications; this relative freedom is possible because the cabinet has control and oversight over the CRTC in many areas, such as appointments, budgeting, funding, and extent of the CRTC’s independence.

While the appointment structure is technically non-partisan, based on credentials rather than party affiliation, the process has been criticized as less open and non-partisan than the institutional rules suggest, allegedly consisting of a “complex and opaque process that mixes political patronage, bureaucratic politics and financial interests… [wherein] the ‘public interest’ is generally not a priority consideration” (Fraser). While appointments can face criticism, both in the media and in Parliament, they do not face successful opposition: once cabinet has decided on an appointment it is followed through on. The 2011 appointment of current Vice-Chairperson Pentefountas received criticisms over the close relationship between Pentefountas and Prime Minister Stephen Harper’s former Communications Director Dimitri Soudas, especially from New Democratic Party Member of Parliament Charlie Angus. Angus claimed that prior to the appointment, which was not made public until finalized, insiders had informed him the vetting process for Pentefountas had not been followed properly, and that Pentefountas would “get the job even though he was not on the shortlist of eight candidates,” three of which were existing regional commissioners (Galloway, 2011). An analysis of appointments of commissioners between 1968 and 2004 indicates that for commissioners whose political party affiliation or contributions were known, it matched with the governing party responsible for the appointment in 87% of cases, suggesting that the vague hiring criteria, the opaque appointment process, and the centralization of decision-making in the executive makes appointments susceptible to political influence and patronage (Friendly, 2004, pp. 15, 26). The power of appointment,
which “allows the government to establish the “culture” of the agency” (Barker, 2008, p. 116), gives cabinet the capacity to hold the CRTC accountable despite the absence of direct control methods.

The CRTC budget, approximately $60 million in 2014, is funded primarily through revenue derived from the regulated broadcasting and telecommunications industries, such as proceeds from telecommunications spectrum auctions or regulatory fees placed on corporations. Although the bulk of the CRTC’s funding is derived from regulated firms, the budgeting and funding is overseen, influenced, and approved by the Ministers of Heritage and Industry, giving cabinet the capacity to suggest priorities to the CRTC. Policy statements and directives from cabinet are rarely binding, and usually entail cabinet directing the CRTC to act in accordance with government priorities without specific statements regarding a particular decision. (Barker, 2008) As much as the CRTC is required to consider directions from the governor-in-council, commissioners are given the contextual independence to assert their regulatory authority in accordance with the Broadcasting and Telecommunications Acts.

Balancing the CRTC’s accountability to ministers and agency autonomy in decision-making is difficult. To manage this issue, cabinet maintains control over key policies and guidelines of the CRTC, while it is “kept at arm’s length from their day-to-day operations” (Barker, 2008, p. 115). The federal executive lacks the legal capacity to overturn decisions related to some activity of the CRTC; however, the CRTC’s independence is incomplete (Lasalle, 2012). For instance, Section 12 (1) of the Telecommunications Act states that “within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council’s own motion, by order, vary or rescind the decision or refer it
back to the Commission for reconsideration of all or a portion of it.” For the Governor in Council to vary or decide an outcome for the CRTC, rather than to only refer back, it should fall under the technical and certification of Telecommunications Apparatus or the qualification of licensing, as listed under the Powers of the Governor in Council in Section 69 (4), or be based on a specific portion of the objectives of the Telecommunications Act. Further, the Minister of Industry has no ability to directly affect decisions of the CRTC; this is reserved to the Governor in Council and requires cabinet approval.

An example of how the cabinet cannot directly override all CRTC decisions is the CRTC’s initial decision to prevent Bell Media’s purchase of Astral Media in 2012, which the CRTC claimed beyond cabinet control. While the Broadcasting Act stipulates that the cabinet can intervene as the final say in the issuance of licenses, including returning decisions to the CRTC for revision, the merger of media corporations did not constitute an issuance of licenses and thus fell purely in the CRTC’s domain, outside of the cabinet or the Governor in Council’s capacity. So long as the CRTC maintained and followed its mandate set out in the Broadcasting and Telecommunications Acts the federal government could not intervene. The CRTC eventually approved Bell’s acquisition of Astral with several strict conditions. Although the outcome of the Bell-Astral merger appears to represent CRTC independence from cabinet, the stipulations of approval reflected suggestions of then-Industry Minister Tony Clement, suggesting cabinet influence over CRTC behaviour extends into areas where the CRTC is technically independent (Geist, How to Address Canadian media Convergence if Bell-Astral is Approved, 2012).

An example of cabinet control is the overturning of CRTC rulings regarding foreign ownership criteria, under which then-Industry Minister Tony Clement approved the entrance
of Globalive into the Canadian telecommunications industry in 2009. Cabinet argued that the CRTC had misunderstood the status of Globalive, the parent company of current telecommunications carrier Wind Mobile, arguing it met “Canadian ownership and control requirements under the Telecommunications Act,” a fact the CRTC disagreed on (Geist, Government Overturns CRTC Giving Globalive the Go-Ahead, 2009). The ensuing order-in-council required the CRTC to reconstruct their understanding of foreign investment in order to match cabinet priorities.

This contextual independence, seen in both examples, is a common feature of CRTC structure. The federal government, through the cabinet, has a few methods for intervening in CRTC activity, such as varying agency decisions, directing CRTC priorities, or returning decisions for rewriting. In most situations, however, the CRTC has the independent capacity to disregard or object to cabinet involvement; the relationships between the two bodies is intended to be one where the cabinet oversees and suggests, but does not dictate or coerce, CRTC behaviour and positions. Parliament does reserve the right to revise or repeal the Broadcasting or Telecommunications Acts; taking the Canadian party governance structure into account, this represents cabinet’s capacity to amend the Acts in Parliament if it feels the powers, roles, or priorities of the CRTC are incorrect but it lacks the direct ability to intervene in specific matters.

The institutional nature of Canadian federalism and the enhanced importance of regionalism within the ‘double federation’ perspective is a key reason for structuring CRTC commissioners in regional terms, pursuing pan-national infrastructure standardization, and centralization efforts. To say that the CRTC is shaped by Canada as a federal state is not to suggest that the CRTC is itself strictly a federal institution, sharing authority and function
between the federal and provincial governments. Instead, the CRTC is a product of federalism insofar as it reflects an attempt by the Canadian government to manage the effects of federalism on the Canadian state in broadcasting and telecommunications. The CRTC is thus an institutional effort to centralize the potentially regional issue of telecommunications and broadcasting services entirely under cabinet authority, while managing the duality of Canadian federalism in the CRTC mandate.

Federalism’s impact on CRTC mandate is clear in the focus on standardization of services for Canadians, the protection of cultural and regional differences, and the promotion of distinctly Canadian broadcasting and telecommunications sectors. It prioritizes managing the cultural diversity of the Canadian federation, both the ethno-linguistic duality of English and French as well as the resulting regional dimensions. It further dictates the terms of broadcasting and telecommunications infrastructure development, highlighting the need to ensure that the provision of reliable and affordable service are available to citizens across the country regardless of location, taking into account “regional needs and concerns,” a feature not present in similar policy documents from other jurisdictions internationally (Barney, 2005). The emphasis on facilitating the “provision of Canadian programs to Canada” and promoting the “ownership and control of Canadian carriers by Canadians” represents the classic Canadian concern over interference by foreign markets and states, principally the United States. Further, the CRTC mandate focuses on regionally-standardized infrastructure development in telecommunications as a priority, rather than a national and urban-focused policy that would create superior infrastructure in cities but at the cost of rural expansion and equal capacity between regions.
The CRTC’s structure allows chairs to represent provincial or regional interests, but do so as representatives of the federal government, thereby centralizing the telecommunications and broadcasting interests of each region within the federal agency. Although this has sometimes led to conflicts between regional commissioners and the Chairperson of the CRTC, it helps to restrict the capacity for competitive state building and policy-making by provincial governments, creating greater centralization within the Canadian federal structure.

This dominance of federal authority has been challenged in many instances, with provincial governments enacting their own telecommunications and consumer rights policies when CRTC decisions were considered inadequate. When Manitoba and Quebec introduced telecommunications consumer protection legislation after perceived CRTC inaction, however, CRTC reactively produced nearly identical legislation in 2014. CRTC willingness to pursue policy directions previously introduced by provincial governments reflects the CRTC’s role as a central regulatory body that benefits from provincial efforts.

The effects of Canadian institutions on the CRTC are clearly evident. Westminster Parliamentary Government gives cabinet considerable control and influence over appointments and budgeting without requiring parliamentary approval, leading to a contextual CRTC independence. The CRTC is also seen as a product of Canadian federalism, even if it does not reflect the traditional structure of a federal institution by including shared authority and decision-making. This is demonstrated by the assertion federal authority, the limiting of provincial competition, and the promotion of standardized national infrastructure and services.
Case Study – Globalive

The issue of foreign ownership in Canadian telecommunications industries reveals the impact of constitutional forces. In Canada the influence of institutions is seen in the response to Globalive’s attempt to enter the wireless market as a fourth national carrier. The case demonstrates the relationship between the CRTC and the cabinet within the context of foreign ownership considerations, the significance of large financial decisions, and the pursuit of new entrants into the oligopolistic Canadian telecommunications industry.

In 2008 Globalive Wireless Management Corporation successfully bid on advanced wireless services (AWS) spectrum licenses for a total cost of almost $450 million. The spectrum licences were made available when the federal government, under Industry Canada Minister Jim Prentice, specifically set aside spectrum for new entrants. These licenses were capable of covering a total population of over 23 million Canadians, qualifying Globalive as a potential national carrier (Spectrum Management and Telecommunications, 2008). Despite the cabinet’s expressed desire of increasing competition in telecommunications through new entrants, the CRTC opposed the entrance of Globalive into the Canadian market, arguing it failed to qualify as a Canadian-owned common carrier under the Telecommunications Act.

Globalive Communications Corporation is a Canadian communications company founded in 1998. Initially focused on private business communication services, Globalive sought expansion into the Canadian consumer market as early as 2006, following the launch of their brand Yak Communications, responsible for residential communication services. When details of the 2008 wireless spectrum auction were announced, alongside the direct allotment of spectrum for the promotion of new entrants, Globalive founded Wind Mobile.
Using the same branding and technological base as other Wind mobile operators internationally, notably in Italy and Greece, the new Canadian Wind Mobile was Globalive’s attempt to become a new national common carrier, intent on rivalling Rogers, Bell, and Telus. However, Globalive’s goal of being more than a minor player in Canadian telecommunications required considerable funds for both the spectrum auction and the development of GSM, HSPA, and HSPA+ telecommunication infrastructure.

In order to afford the high cost of entrance, Globalive sought investment from the Egyptian firm Orascom Telecom Holding, now known as Global Telecom Holding. The company, primarily operating in the Middle East and Africa, operated at the time primarily out of Cairo. This foreign investment by an Egyptian firm was problematic because while Globalive’s structure was specifically designed to comply with the Telecommunications Act, it was “owned by AAL Telecom Holdings Incorporated ("AAL"), controlled by Canadian entrepreneur Anthony Lacavera (34.25%); Orascom Telecom Holding S.A.E., controlled by Weather Investments S.p.A., a holding company controlled by Egyptian billionaire Naguib Sawiris (65.08%); and Mojo Investments Corp., controlled by Michael O'Connor (0.67%).” (Davies Ward Phillips & Vineberg LLP, 2009) As such, the company intending to be the next major Canadian telecommunications provider was owned by a holding coming that was 65% owned by a single foreign investor.

Subsection 16 (1) of the Telecommunications Act states that carriers are eligible to operate only if they are Canadian-owned and controlled under the laws of Canada or a specific province. Section 16 (3) designates Canadian-owned and controlled to be:

(a) not less than eighty per cent of the members of the board of directors of the corporation are individual Canadians;
(b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than eighty per cent of the corporation's voting shares issued and outstanding; and

(c) the corporation is not otherwise controlled by persons that are not Canadians.

The CRTC argued it was its mandate and jurisdiction to conduct “an inquiry under the ownership and control regime as to whether a Canadian carrier is Canadian-owned and controlled, and therefore eligible to operate as a telecommunications common carrier, [which] involves a determination of both de jure control (legal control) and de facto control (control in fact)” (Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime, 2009). To ensure Canadian legal control, the CRTC required that Globalive reorganize its corporate holdings, as well as eliminate or lessen the relationship with Orascom, to ensure that at least 66.67% of the issued and outstanding vote shares are owned and controlled by Canadians.

In dealing with ‘control in fact’ CRTC referred to the 2009 decision by the National Transportation Agency, which argued that in particular contexts minority shareholders may hold ‘control in fact’ due to their capacity to influence, coerce, or exert a veto power over corporate decisions, making legal control misleading. As such the CRTC decided that Globalive’s proposal would be evaluated based on corporate governance, shareholder rights, commercial arrangements between Globalive and non-Canadians, and economic participation of Globalive and non-Canadians. CRTC decided that Orascom Telecom had “an avenue for influence over Globalive” beyond its specific financial holdings, and that “while disparate points of influence [by Orascom] may not individually result in control, when combined they can translate into the ability to control in fact.” That Orascom, among other points of influence, held 2/3 of Globalive’s equity, and was the primary source of technical expertise
for Globalive, constituted for the CRTC control in fact. In the CRTC’s opinion Globalive did not meet the requirements of the *Telecommunications Act* and was therefore ineligible to exist as a national common carrier.

The CRTC sought to increase competition in the marketplace as much as possible; however, the protection of a Canadian market, concern over Globalive’s potential to invest strategically in urban centres rather than nationally, and a strict adherence to the stipulations of the *Telecommunications Act* led the CRTC to deny the application. Seeing its goal of a new entrant being denied, cabinet intervened and overturned the CRTC decision two months later through an order-in-council. Cabinet argued that the mandate of the CRTC first and foremost was “rendering reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada, promoting the ownership and control of Canadian carriers by Canadians and enhancing the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications” (P.C. Order-in-council, 2009). Cabinet was clear that quality of service and competition were the priority, and that Canadian-dominated firms were the ideal option but not the only possible option.

Cabinet suggested that the CRTC’s decision would have been in favour of approving Globalive had the corporation’s debt financing been owned by a Canadian entity. The order-in-council argued that the CRTC’s decision regarding ‘control in fact’ was invalid insofar as the efforts by Globalive to “ensure access to foreign capital, technology, and experience” were the proper behaviour of a new entrant and that this matched the Canadian telecommunications policy objectives of the federal government. Further, cabinet disagreed that Orascom’s methods of influence over Globalive constituted ‘control in fact’, and that
since the CRTC had failed to prove conclusively that Globalive was non-Canadian controlled it thus proved Globalive was Canadian controlled.

After Cabinet’s reversal of the CRTC decision on Globalive, a competing telecommunications provider, Public Mobile, sought a judicial review of the order-in-council. Public Mobile, one of several smaller Canadian telecommunications providers, had previously been expected to potentially develop into a major competitor; however, a lack of capital prevented expansion, limiting the firm to primarily major urban centres such as Toronto and Montreal. Considering the context of the appeal, a smaller company lacking capital seeing a new entrant gaining access to previously disallowed sources of funding, the court challenge was a test of the status quo, the outcome of which could potentially mean significant changes to smaller firms such as Public Mobile.

Public Mobile was successful in this initial appeal, but when Globalive appealed further the case went to the Federal Court of Appeals, at which point the order-in-council was reinstated, ensuring that Globalive and Wind Mobile were able to continue their effort to become a new national carrier (Public Mobile v. Globalive Wireless Management Corp., et al., 2012). The Supreme Court of Canada later refused to hear further appeals relating to the federal capacity to overturn decisions of the CRTC, regarding Wind Mobile or similar situations in the future. This refusal ensured that the Federal Court of Appeals decision would be the final word; the Supreme Court’s decision also coincided with Ottawa’s enactment of Bill C-38, which amended the Telecommunications Act to grant smaller carriers some exceptions regarding Canadian control criteria (Government of Canada, 2012).

The CRTC-cabinet interactions over Globalive’s venture represents a conflict within a recent and relevant shift in cabinet efforts, and by extension efforts of the CRTC, to disrupt
an oligopolistic telecommunications industry whose structure poses considerable difficulties for regulation. It demonstrated both the CRTC’s acceptance of the federal government’s prioritization of competition and the cabinet’s willingness and ability to intervene and overrule the CRTC. This case had three major results. First, it allowed non-Canadian firms opportunity to enter into the Canadian telecommunications market. Second, it signalled that the CRTC’s independence was contextual, and that the cabinet was able and willing to exert its position of authority and central dominance. Third, it demonstrated that the CRTC adopted cabinet priorities, promoting competition and infrastructure development, even amidst opposition to cabinet decisions on how to promote those priorities.
Discussion

The Globalive case study demonstrates the effects of federalism and Westminster Parliamentary Government on the CRTC’s behaviour and actions. The conflict suggests that Westminster Parliamentary Government significantly impact the real and perceived power, role, behaviour, and independence of the CRTC vis-à-vis the cabinet. However, the Globalive conflict demonstrates the influence of Canadian federalism as present but of lesser significance, identifying the CRTC as a product of federalism created to manage regionalism and diversity, rather than serve as a traditional federal institution with shared authority and decision-making.

Three impacts of Westminster Parliamentary Government stand out. First, the decision to overrule the CRTC was made solely by cabinet, lacking parliamentary approval or explanation. Second, the effects of Canada’s system of party governance prevented partisan divisions within decision-making, granting the Conservative Party both exclusive access to information on the decision as well as a divided opposition following the decision. Third, cabinet overruled the CRTC through an order-in-council, a definitive legal instrument that essentially usurped the authority of the CRTC.

The impact of federalism is less significant than Westminster Parliamentary Government, although the indirect impacts of federalism are still noteworthy. First, the order-in-council to vary the CRTC decision required the responsible federal minister to notify and consult with provincial counterparts. In the Globalive case this requirement was not met, an issue brought up by the judge responsible for Federal Court Challenge in Public Mobile Inc. v. Canada. Second, Ottawa’s decision to overrule the CRTC was explained as a compromise...
between Canadian-ownership and Canadian regional development and competition, reflecting the underlying influences of federalism on policy priorities. What the Globalive case study fails to address is the importance of the CRTC as a centralized product of federalism rather than an outright institution of federalism. That the order-in-council overruled the CRTC, yet failed to adequately consult the provincial representatives as is required in the *Telecommunications Act*, and did so without penalty, shows how even those few aspects of the CRTC that exist to represent the provinces are susceptible to centralized dominance.

This case demonstrates the significance of Westminster Parliamentary Government on the CRTC as a regulatory agency, especially the contextual independence of the CRTC and cabinet dominance. The CRTC as a federal agency led by commissioners appointed by the federal government tasked with representing the provinces, without direct involvement or influence by provincial governments, is structured to manage Canadian federal effects rather than exist as a part of the federal intergovernmental relationship. Although both institutional factors are present in the case, Westminster Parliamentary Government is evidently far more significant than federalism in its capacity to affect the real and perceived power, role, behaviour, and independence of the CRTC vis-à-vis the cabinet.
Conclusion

Despite the proliferation of institutional analyses in research there has been no considerable effort to identify the effects of institutions on regulatory agencies, making this essay a worthy contribution into a necessary field of research. As the role and process of regulation continues to shift and gain new significance, further research into the comparative effects of institutions on regulatory agencies will warrant greater focus.

This essay has confirmed that institutional analyses of regulatory agencies is a legitimate and viable research pursuit; however, it is specifically focused on one regulatory agency in one jurisdiction. To adequately identify the effects of institutions on regulation research needs to be done on both the effects of institutions on several regulatory agencies across policy areas within a jurisdiction as well as the effects of institutions on regulatory agencies within the same policy area between jurisdictions. Only after a general framework and taxonomy of institutions has been created and connected to regulation can research be produced looking into how institutional changes in a particular jurisdiction will result in changes in the regulatory regimes of that jurisdiction.
Bibliography


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