

The Policy Battle over Information and Digital Policy Regulation: A Canadian Perspective

*Michael Geist**

Many countries find their information and digital policies still dominated by traditional stakeholders, particularly the content industry, major telecom companies, and marketing groups, yet Canada has experienced a notable shift in perspective with a strong and influential public interest voice. This shift toward public interest and participation in the development of Canadian information and digital policies has led to legislation, regulation, and policy outcomes that once seemed highly unlikely. This Article seeks to better understand the changing role of the public in Canadian information and digital policymaking by framing the developments as an ongoing policy development process featuring a series of closely linked changes and responses. The emergence of public participation on information and digital policy issues 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 and focus it on consumer perspectives, minimal interest from government and regulators; and initial dismissal giving way to hostility from incumbent stakeholders. The Article identifies some of the reasons behind the shift, including the growing importance of information and digital policies, the impact of digital advocacy tools, and the shifting policy pyramid in which users have now largely leapfrogged corporate interests as

* Canada Research Chair in Internet and E-commerce Law, University of Ottawa, Faculty of Law. My thanks to Ariel Katz and Lisa Austin for their invitation to participate in an exceptional workshop on the *Constitution of Information* regulation, to the *Theoretical Inquiries in Law* editors for the terrific editorial effort, to the participants at that workshop for their helpful comments and to the Social Sciences and Humanities Research Council of Canada and the Canada Research Chair Program for their financial assistance. Any errors or omissions are the sole responsibility of the author.

policy influencers. While the shift does not mean the public interest wins on every issue, it does suggest an important change in influence with long-term ramifications for the development of information and digital policy in Canada that others may seek to emulate.

INTRODUCTION

Within one year of the 2006 election that brought the Conservatives to power in Canada, information and digital policy issues began to command center stage for both policymakers and regulators. Led by then-Industry Minister Maxime Bernier, the government issued a policy direction to the Canadian Radio-Television and Telecommunications Commission (CRTC) to adopt a hands-off regulatory approach for telecommunications even as consumer prices for Internet and wireless services were increasing.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 CRTC introduced an exemption from regulation for mobile television broadcasting services.²

Government departments were similarly engaged on information and digital policy. Public Safety Canada conducted a semi-secret consultation on Internet surveillance where mandatory disclosure of subscriber information was assumed.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 (PIPEDA).⁴ Intellectual property issues were also a major government preoccupation, with Canada's decision to participate in the Anti-Counterfeiting Trade Agreement negotiations in the fall of 2007⁵ and

1 Press Release, Indus. Can., Canada's New Government Issues Policy Direction to CRTC That Calls for Greater Reliance on Market Forces (Dec. 18, 2006), <http://www.marketwired.com/press-release/canadas-new-government-issues-policy-direction-crtc-that-calls-greater-reliance-on-market-627752.htm>.

2 *Exemption Order for Mobile Television Broadcasting Undertakings*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N (Feb. 7, 2007), <http://www.crtc.gc.ca/archive/2007/pb2007-13.htm>.

3 Michael Geist, *Public Safety Canada Quietly Launches Lawful Access Consultation*, MICHAEL GEIST BLOG (Sept. 11, 2007), <http://www.michaelgeist.ca/content/view/2228/1>.

4 Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

5 *See Anti-Counterfeiting Trade Agreement (ACTA): History of Negotiations and Relevant Documents*, GLOBAL AFFAIRS CAN. (last modified Sept. 11, 2013),

the drafting of a copyright bill that was scheduled for tabling in December 2007 without public consultation and contained virtually no user-oriented provisions.⁶

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

Fast forward to nearly a decade 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 policymaking 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, transformative broadcast regulation focused on consumer choice, and regulatory consideration of additional 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.⁷ 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.⁸

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/acta-hist-acrc.aspx?lang=eng>.

- 6 Bill C-61, An Act to Amend the Copyright Act, 2nd Sess., 39th Parl. (2008).
- 7 Bill C-50, An Act to Amend the Criminal Code (Interception of Private Communications and Related Warrants and Orders), 3rd Sess., 40th Parl. (2010), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4740653&Language=E&Mode=1>; Jameson Berkow, *Police ‘Scrambling’ to Justify Lawful Access Laws*, NAT’L POST (Jan. 18, 2012), <http://www.nationalpost.com/m/news/blog.html?b=business.financialpost.com/2012/01/18/police-scrambling-to-justify-lawful-access-laws>.
- 8 *Canada’s Anti-Spam Legislation*, GOV’T OF CANADA, <http://fightspam.gc.ca/eic/site/030.nsf/eng/home> (last modified Jan. 15, 2015); Gov’t of Canada, Innovation, Science, and Economic Development Canada, *Opening Canada’s Doors to Foreign Investment in Telecommunications: Options for Reform* (Consultation Paper, 2010), <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf09920.html>; *Acta*:

While many other countries find their information and digital policies still dominated by traditional stakeholders, particularly by the content industry, major telecom companies, and marketing groups, Canada has experienced a notable shift in perspective. Government concerns remain at the very top of the policy pyramid, ensuring that surveillance rules and free trade talks proceed apace, seemingly without regard for wider public opinion. Yet when the information or digital policy issue pits corporate stakeholders against the public or consumer concerns, the public or consumers frequently prevail.

This shift toward public interest and participation in the development of Canadian information and digital policies ranks as one of the most remarkable policy transformations of the Conservative government, which held office from 2006 until the fall of 2015. Many have been quick to dismiss the public voice on information and digital policy issues, deriding Canadians that speak out as seeking a free ride, or being uninformed or ignorant of the complexity of the issues.⁹ The same groups often simply ignore those views altogether, as if the public submissions were just noise with no discernable impact. However, the Canadian experience of the past decade demonstrates a clear shift in approach, with legislation, regulation, and policy outcomes that once seemed highly unlikely.

This Article seeks to better understand the changing role of the public in Canadian information and digital policymaking by framing the developments as an ongoing policy development process featuring a series of closely linked changes and responses. Part I highlights the development of Canadian information and digital policy before the emergence of social media and the widespread use of the Internet for advocacy purposes. It notes that there was little to distinguish Canadian information and digital policy development, which largely mirrored approaches found elsewhere.

Part II examines the emergence of public participation on information and 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 and focus it on consumer perspectives; minimal interest from government and regulators; and initial dismissal giving way to hostility from incumbent stakeholders. This Part focuses on three key information policy fields: copyright, telecommunications, and privacy.

Controversial Anti-Piracy Agreement Rejected by EU, BBC (July 4, 2012), <http://www.bbc.com/news/technology-18704192>.

9 See, e.g., Richard Owens, *Noises Heard: Canada's Recent Online Copyright Consultation Process — Teachings and Cautions*, IP OSGOODE (Apr. 19, 2010), <http://www.iposgoode.ca/2010/04/noises-heard-canadas-recent-online-copyright-consultation-process>.

Part III notes that once the emergence of public participation became too prominent to ignore, governments, regulators and incumbent stakeholders crafted their responses. For government and regulators, this involved a form of “regulatory catch-up” as they endeavored to develop the means to better incorporate the public into the policy and regulatory world. For the incumbent stakeholders, their initial responses 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.

Part IV concludes with some observations on why the Canadian information and digital policy landscape has changed, noting the growing importance of the issue, the impact of digital advocacy tools, and the shifting policy pyramid in which users have now largely leapfrogged corporate interests as policy influencers.

I. CANADIAN INFORMATION POLICY, B.F. (BEFORE FACEBOOK)

As described further below, Canadian information and digital policy has undergone dramatic changes over the past decade, but there was little warning or reason to believe that a shift in approach was about to take place. For example, copyright reform in Canada was long dominated by the largest lobby groups, particularly the entertainment industry, which had successfully navigated the Canadian copyright policy framework to achieve successes that eluded the user community, represented for most of the 1980s and 1990s by education and library associations.

The enactment of a new private copying levy worth millions to the recording industry in 1996 highlights how policy was typically developed. The inclusion of a new levy was the culmination of lobbying efforts dating back almost fifteen years. It started with a 1982 government study that noted the emergence of home recording equipment and the recording industry concerns that home taping would result in declining revenues for the industry and royalties for the artists.¹⁰ A detailed economic analysis found that the impact on the industry was actually relatively small, however, leading to the conclusion that it was premature to introduce a home taping compensation levy.¹¹

10 JIM KEON, *AUDIO AND VIDEO HOME TAPING IMPACT ON COPYRIGHT PAYMENTS* (1982).

11 Michael Geist, *Groundhog Day*, MICHAEL GEIST BLOG (June 13, 2005), <http://www.michaelgeist.ca/2005/06/groundhog-day/>.

The recording industry was undaunted, however, and increased the pressure for a levy system. A parliamentary committee signaled its agreement in 1985, finding that the proliferation of audio recording devices meant that home copying was a real threat to the traditional revenue streams of copyright owners.¹² The committee also made it clear that the levy system should be technology-neutral. It presciently noted that “future recording devices might not use blank tape, thereby making a tape royalty obsolete. The work could be stored in a computer memory with no independent material support at all.” The committee therefore declined to limit the levy to any particular technology, instead proposing that the royalty “be based upon both the material support used to store the work and on the machine used to make the reproduction.” The Canadian Recording Industry Association applauded the decision, with then-President Brian Robertson claiming that home copying was costing the industry between \$250,000,000 and \$600,000,000 per year. He stated that for every purchased record, there was one record taped at home without compensation, leading to “no growth” in the industry between 1979 and 1986.¹³

In 1994, the Department of Canadian Heritage established the Task Force on the Future of the Canadian Music Industry, co-chaired by Robertson and the Canadian Independent Record Production Association President Brian Chater.¹⁴ The Task Force concluded that delay in copyright reform “threatens to seriously penalize Canada’s music industry, to deprive Canadian performers of the proceeds from their work, of their moral and financial rights, and to place Canada in the ranks of the under-developed countries in terms of protection of intellectual property.” Based on claims that three private copies were being made for every retail sale CD, the Task Force recommended enacting private copying levies.

In 1996, the government introduced legislation to create a private copying system.¹⁵ The Canadian Recording Industry Association (CRIA) responded by celebrating fifteen years of lobbying efforts. However, Robertson lamented:

I think the lack of it over the past 10 years has literally killed dozens of (music) careers. I think this is going to make a huge difference for

12 HOUSE OF COMMONS, STANDING COMM. ON COMM’N & CULTURE, A CHARTER OF RIGHTS FOR CREATORS — REPORT OF THE SUBCOMMITTEE ON THE REVISION OF COPYRIGHT (1985).

13 Geist, *supra* note 11.

14 TASK FORCE ON THE FUTURE OF THE CAN. MUSIC INDUS., A TIME FOR ACTION (1996), http://epe.lac-bac.gc.ca/100/200/301/cdn_heritage/task_force_music-e/final-e.pdf.

15 See Bill C-60, An Act to Amend the Copyright Act and to Amend Other Acts in Consequence Thereof, 33rd Parl., 2nd Sess. (enacted 1988) (Phase one of copyright reform process) (Can.).

artists, in terms of letting them make one more album or do one more tour that will give them the ability to prolong and develop their careers.¹⁶

Having concluded two rounds of reforms in the late 1980s and 1990s that not only added private copying but also codified moral rights and statutory damages, copyright reform in Canada was typified by the limited consideration of user concerns, leading to a law that featured few significant copyright limitations or exceptions.¹⁷ Fair dealing was viewed as an exception that necessitated a narrow interpretation and most other exceptions were tailored to specific sectors or technologies with little room for expansion.

The reform process itself was confined primarily to a small group of stakeholders comprised of the entertainment associations, broadcasters, publishers, copyright collectives, educational institutions, and libraries. Few individuals had participated in past consultations and copyright garnered little national media attention. Moreover, the major Canadian political parties were largely aligned on copyright, with the Liberal government and the opposition parties jockeying for position to demonstrate their support for artists by increasing copyright protections.

The Canadian copyright experience typified information and digital policy development at the time. On telecommunications issues, the public was similarly absent from the policy process. For example, upon being named Minister of Industry in 2006, Maxime Bernier set his sights on reforming Canada's telecommunications laws. In his first twelve months, he overruled the CRTC on its plans for Internet telephony regulation and introduced a sea change in the CRTC's approach, mandating that the Commission "rely on market forces to the maximum extent feasible and to regulate telecommunications services only when necessary."¹⁸ Bernier also opposed net neutrality legislation, despite a government-commissioned report on telecom reform released in 2006 that recommended that Canada introduce legal protections to "confirm the right of Canadian consumers to access publicly available Internet applications and

16 Geist, *supra* note 11.

17 See Bill C-60; Bill C-32, An Act to Amend the Copyright Act, 35th Parl., 2nd Sess., 1997, S.C. 1997, c 24, (Phase two of copyright reform process), <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=2329471>.

18 Maxime Bernier, *A Major Reform for Local Telephone Markets*, MAXIME BERNIER (Apr. 8, 2009), <http://www.maximebernier.com/en/2009/04/a-major-reform-for-local-telephone-markets/>; *SPFC — Spectrum Policy Framework for Canada*, GOV'T OF CAN., INNOVATION, SCI. & ECON. DEV. CAN. (June 2007), <http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08776.html>.

content of their choice by means of all public telecommunications networks providing access to the Internet.”¹⁹

Based on a number of government documents²⁰ obtained under the Access to Information Act,²¹ as of early 2007, the government was clearly aware of major telecom companies’ intent on becoming gatekeepers for content with the prospect of levying additional content-based fees: “Canadian telecommunications companies, like Bell and TELUS, are increasingly determined to play a greater role in how Internet content is delivered. As the carriers of the content, they believe they should be gatekeepers of the content, with the freedom to impose fees for their role.”²²

Yet, these documents also indicated that the Canadian government was inclined to accept the Internet service providers’ position on the issue:

Many commentators note that the net neutrality debate is both broader and more complex than it is typically framed by advocates and opponents. First, the Internet has never been truly neutral or equitable with respect to data transmission. Throughout its evolution, new applications and users’ growing requirements have necessitated changes to many aspects of Internet design and operation, including the introduction of non-neutral operating procedures, such as preferential content arrangements, filtering and blocking to control network abuse, as well as ‘traffic shaping’ in order to ensure an acceptable service level for all subscribers, despite the bandwidth-demanding activities of some users.²³

In other words, by formulating “traffic shaping” in terms of “contractual arrangements” between private parties, or in terms of “technical measures”

19 TELECOMM. POL’Y REVIEW PANEL, FINAL REPORT, 2006, at 90 (2006) (Recommendation 6-5), [https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/\\$FILE/tprp-final-report-2006.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf).

20 See NET NEUTRALITY, A PUBLIC DISCUSSION ON THE FUTURE OF THE INTERNET IN CANADA 17 (Feb. 6, 2007), https://cippic.ca/sites/default/files/events/net_neutrality_transcript.pdf (“Does the Minister intend to allow telecommunications companies to determine the content that its customers can and cannot access by imposing special rates, undermining net neutrality?”).

21 Access to Information Act, R.S.C. 1985, c A-1.

22 Michael Geist, *What the Canadian Government Really Thinks About Net Neutrality*, MICHAEL GEIST BLOG (Feb. 6, 2007), <http://www.michaelgeist.ca/2007/02/canadian-net-neutrality/>.

23 *Id.* On February 19, 2007, then Industry Minister, Maxime Bernier, gave similar statements in his presentation before the Standing Committee on Industry, Science, and Technology. See House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, No. 045, at 1625 (Feb. 19, 2007).

to ensure a viable industry, the government had chosen a hands-off approach to network neutrality. The policy was to allow “market forces to continue to shape the evolution of the Internet infrastructure, investment and innovation to the greatest extent feasible.”²⁴ The discussion of net neutrality legislation, therefore, was “premature” according to the government.²⁵

Privacy reform in Canada was little better. When the Canadian government enacted PIPEDA it included an important provision mandating a parliamentary review of the law every five years. The first review occurred in 2006. The shortcomings of the law were relatively easy to identify: the need for a mandatory security breach disclosure requirement, the absence of order-making power for the Privacy Commissioner of Canada, the lack of penalties for privacy violations, and concerns with weak protections when outsourcing information to low-protection jurisdictions. The committee studying the bill released its report in 2007,²⁶ yet the issue barely moved until 2014. Moreover, the government did not conduct any subsequent review of the legislation, ensuring that even the 2014 reforms (which had still not passed the Parliamentary process as of May 2015) were outdated from the outset.

In sum, Canadian information and digital policy development through to 2006 was largely consistent with public perception of an approach dominated by entrenched interests or lobby groups, with little attention paid to the views of the broader public. While there were hints that the public was becoming increasingly interested and concerned with information and digital policy — participation rates were higher than expected on several consultations and the use of alternative media (including blogs) generated increased public awareness — there were few indications that a dramatic change in Canadian information and digital policy development was in the offing.

II. 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,

24 Geist, *supra* note 22.

25 The government seemed to justify its position by polls showing support for “telecommunication reform.” See *House of Commons Debates*, 1st Sess., 39th Parl., No.141, at 1455 (Feb. 7, 2007).

26 Office of the Privacy Comm’r of Canada, Report and Government Services Canada, Electronic Documents Act (2007), https://www.priv.gc.ca/information/ar/200607/2006_pipeda_e.pdf.

Twitter, LinkedIn, and Google Plus as a key source for online social interaction, newsgathering, 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 information and digital policy issues. The battles over copyright, telecom policy, and privacy illustrate how the public policy field in Canada has evolved in recent years.

A. Copyright

In 2007, the Canadian government was expected to introduce copyright reform legislation that had been under development for many years. Days before the bill was scheduled to be tabled, a Facebook group started by the author (Fair Copyright for Canada) galvanized opposition to the forthcoming bill. Within a week, 10,000 members joined the group, within two weeks there were 25,000 members, and within months over 90,000 Canadians had joined the Facebook group.²⁷ 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 painted 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.²⁸ The move shocked traditional stakeholders, with the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the leading actors’ union, urging Prentice “to do the right thing” by ignoring the protests of a “vocal minority.”²⁹ Several music associations also issued a press release expressing their “growing concern” with the legislative delays.³⁰

27 Blayne Haggart, *Fair Copyright for Canada: Lessons from the First Facebook Uprising*, BLAYNE HAGGARTTA ORANGESPACE (June 7, 2013), <http://blaynehaggart.wordpress.com/2013/06/07/fair-copyright-for-canada-lessons-from-the-first-facebook-uprising/>.

28 *Government Retreats on Copyright Reform*, CBC NEWS (Dec. 13, 2007), <http://www.cbc.ca/news/technology/government-retreats-on-copyright-reform-1.657296>.

29 *Id.*

30 *Government’s Delay in Introducing Copyright Reforms Concerns Canadian Music*

A U.S. State Department cable confirmed the role that users played in delaying the introduction of the bill:

From December 2007 to mid-February, senior GOC officials and well-informed private sector contacts assured the Embassy that legislative calendar concerns were delaying the copyright bill's introduction into Parliament. Our contacts downplayed the small — but increasingly vocal — public opposition to copyright reform led by University of Ottawa law professor Dr. Michael Geist. On February 25, however, Industry Minister Prentice (please protect) admitted to the Ambassador that some Cabinet members and Conservative Members of Parliament — including MPs who won their ridings by slim margins — opposed tabling the copyright bill now because it might be used against them in the next federal election. Prentice said the copyright bill had become a “political” issue. He also indicated that elevating Canada to the Special 301 Priority Watch List would make the issue more difficult and would not be received well.³¹

Not only had tools like Facebook had an immediate effect on the government's legislative agenda, but the community that developed around the group also led to a “crowdsourcing” of knowledge. Canadians shared information, posed questions, posted their letters to politicians, and started a national conversation on copyright law in Canada. The initiative was not without its detractors, however. For example, prominent Canadian intellectual property lawyer 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.”³²

The Fair Copyright for Canada uprising succeeded in delaying the bill, but it did not kill it. Bill C-61 was later introduced in June 2008, six months after first appearing on the notice paper.³³ Despite the growing interest of users in

Industry, CNW GRP. (Dec. 14, 2007), <http://www.newswire.ca/en/story/132273/government-s-delay-in-introducing-copyright-reforms-concerns-canadian-music-industry>.

- 31 *Canada: Embassy Ottawa 2008 Special 301 Recommendation*, WIKILEAKS (Oct. 31, 2005), <https://wikileaks.org/cable/2008/02/08OTTAWA311.html> (Cable No. 08OTTAWA311).
- 32 Barry Sookman, *Facebook Fair for Copyright of Canada: Replies to Professor Geist*, 1 OSGOODE HALL REV. L. & POL'Y 198 (2014), <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1014&context=ohrlp>.
- 33 Bill C-61, An Act to Amend the Copyright Act, 2nd Sess., 39th Parl. (2008), <https://openparliament.ca/bills/39-2/C-61/>.

copyright reform and the emergence of tools to make their voices heard, the bill sought to tilt Canadian law toward greater enforcement and restrictions on the use of digital content, leading Liberal industry critic Scott Brison to warn that it could result in a “police state.”³⁴ With the opposition Liberal party now also criticizing the government’s approach, copyright emerged as divisive political issue in Canada. Bill C-61 would later die when an election was held in the fall of 2008.

After two failed bills and mounting political opposition over copyright reform, the government responded in 2009 with some significant changes. Tony Clement became the Minister of Industry, providing a fresh copyright perspective and demonstrating an obvious enthusiasm for new technologies. His counterpart at Canadian Heritage, James Moore, was similarly supportive of social media and new technologies and the two ministers seemed to signal a willingness to reexamine previous legislative choices.

The first major step was a national copyright consultation in the summer of 2009 that actively engaged government ministers and thousands of Canadians.³⁵ 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.

Clement used the consultation to identify a new concern: in an era of rapidly changing technology, Clement wondered aloud how the government could ensure that a new copyright bill was built to last.³⁶ Clement’s focus on longevity appeared to be a tacit acknowledgement that Bill C-61 had not been sufficiently forward looking. Indeed, with specific references to VHS tapes, emphasis on digital rights management, and blocks on the use of network-based personal video recorders, critics argued that the bill was past its best-before date the moment it was introduced.

According to a U.S. State Department cable, the consultation concerned both the established stakeholders and the U.S. government. The cable notes:

34 Peter Nowak, *Copyright Could Result in Police State: Critics*, CBC NEWS (June 12, 2008), <http://www.cbc.ca/news/technology/copyright-law-could-result-in-police-state-critics-1.707544>.

35 *Government of Canada Launches National Consultations on Copyright Modernization*, INDUS. CAN. (July 20, 2009), <http://www.ic.gc.ca/eic/site/008.nsf/eng/04020.html>.

36 *Roundtable on Public Hearings on Copyright*, INDUS. CAN. (July 29, 2009), http://www.ic.gc.ca/eic/site/008.nsf/eng/h_04028.html.

The large scale of these consultations concerns some stakeholders. Some have told the Embassy that at best, the consultations look like a stall tactic to delay the introduction of a copyright reform bill, and at worst, cover for the Government to walk back from support for strong, WIPO-compliant copyright reform. . . . Most interested parties agree that the howls of protest from grassroots consumer groups virtually guarantee that the copyright bill will be more ‘consumer friendly’ than the last iteration.³⁷

The consultation ultimately generated over 8300 responses, an unprecedented number for a government consultation of this nature.³⁸

New legislation was ultimately tabled in the House of Commons in June 2010.³⁹ The government mobilized with a media campaign characterizing the bill as “balanced copyright.”⁴⁰ The campaign represented a reframing of the government’s prior marketing approach, which had emphasized a “made in Canada” approach. Clement and Moore actively engaged with the public, responding to dozens of comments posted on Twitter and assuring the public that they were open to potential amendments.

The claims of balance were based largely on efforts to find compromise positions on some of the most contentious copyright issues. The bill included sector-specific reforms with something for almost everyone: new rights for performers and photographers, a new exception for Canadian broadcasters, new liability for BitTorrent search services, as well as the legalization of common consumer activities such as recording television shows and transferring songs from a CD to an iPod. In fact, there was even a “YouTube” user-generated content remix exception that granted Canadians the right to create remixed work for noncommercial purposes under certain circumstances.

37 *Copyright Reform in Canada: Day 4,235*, WIKILEAKS (Oct. 31, 2005), https://www.wikileaks.org/plusd/cables/09OTTAWA583_a.html.

38 Simon Doyle, *Industry Canada Responds to Consultation Criticism, Says Process Was a ‘Tremendous Success,’* THE WIRE REPORT (Apr. 23, 2010), <http://www.thewirereport.ca/news/2010/04/23/industry-canada-responds-to-consultation-criticism-says-process-was-a-tremendous-success/20686>.

39 Bill C-32, An Act to Amend the Copyright Act, 3rd Sess., 40th Parl. (2009) (Second Reading Nov. 5, 2010), http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_1s.asp?Language=E&ls=C32&Mode=1&Parl=40&Ses=3&source=library_prb.

40 *Balanced Copyright Act Needed, MPs Agree*, CBC NEWS (last updated Nov. 25, 2010, 3:46 PM), <http://www.cbc.ca/news/balanced-copyright-act-needed-mps-agree-1.868093>.

There were a number of areas where the government worked toward a genuine compromise. These included reform to fair dealing. The government rejected both pleas for no changes as well as arguments for a flexible fair dealing that would have opened the door to courts adding their own purposes to the fair dealing categories of research, private study, news reporting, criticism, and review. Instead, it identified some specific new exceptions that assist creators (parody and satire), educators (education exception, education Internet exception), and consumers (time shifting, format shifting, backup copies).

The Internet provider liability similarly represented a compromise, as the government retained a “notice-and-notice” system that required providers to forward allegations of infringement to subscribers. The system was costly for the providers, but had proven successful in discouraging infringement. It also compromised on the statutory damages rules that create the risk of multimillion-dollar liability for cases of noncommercial infringement. The new rules reduced noncommercial liability to a range of \$100 to \$5000 for all infringements, well below the \$20,000 per infringement maximum that applies to cases of commercial infringement.

The bill took two years to wind its way through the legislative process, as a Parliamentary prorogation forced the reintroduction of the bill after months of committee hearings. The hearings themselves were generally inclusive, with opportunities afforded to virtually all stakeholders from copyright collectives to consumer groups to voice their support or concerns. After two years of review, the government ultimately left the bill largely unchanged, opting for a series of modest amendments and keeping the new copyright exceptions intact.

B. Telecom Policy

Copyright may be the best known example of public engagement in Canadian information and digital policy, but it is by no means the only one. The shift in telecom policy has been similarly dramatic, with significant changes in policy related to usage-based billing (UBB), net neutrality, wireless competition, and the broader policy objectives of Canadian telecom policy.

For example, Internet data caps — frequently referred to as UBB — 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.⁴¹ After

41 *Regulators Pull Back from Usage-Based Billing After Half-a-Million Canadians Speak Out*, OPEN MEDIA (Nov. 15, 2011), <https://openmedia.org/en/press/regulators-pull-back-usage-based-billing-after-half-million-canadians-speak-out>.

the federal government indicated that it would order the CRTC to reconsider its decision to allow large Internet service 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 sixty days so it could review it on the merits.⁴² The Commission followed up with an oral hearing in July 2011⁴³ and then-Industry Minister Clement intimated plans to address the broader policy issues as part of a national digital economy strategy.⁴⁴

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 that preferred capacity-based models. The CRTC ruled that capacity-based models were a better approach since they are more consistent with how network providers plan their networks and less susceptible to billing disputes.⁴⁵

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 responses to a policy issue in the Conservative government's history, causing many to reexamine the importance of telecom and digital policies as well as the need to incorporate consumer-oriented perspectives into the policy process.

The shift in policy was not limited to UBB. As noted above, the government and CRTC initially brushed aside concerns associated with net neutrality. Despite initial opposition, the Commission made a clear commitment to addressing the issue of net neutrality and network management in a formal

42 See Laura Payton, *Use-Based Billing Could Hurt Economy: Clement*, CBC NEWS (Mar. 1, 2011), <http://www.cbc.ca/news/politics/use-based-billing-could-hurt-economy-clement-1.988562>.

43 *Review of Billing Practices for Wholesale Residential High-Speed Access Services*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N (July 11, 2011), <http://www.crtc.gc.ca/eng/archive/2011/2011-77-1.htm>.

44 *Where Canada Now Stands on Usage-Based Billing (UBB) for Internet Services*, EPISTOLI (Mar. 27, 2011), <http://epistoli.blogspot.com/2011/03/where-canada-now-stands-on-usage-based.html>.

45 *CRTC Moving Ahead with Capacity-Based Billing on February 1*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N (Jan. 27, 2012), <http://www.crtc.gc.ca/eng/com100/2012/r120127.htm>.

proceeding in July 2009.⁴⁶ It noted that part of that hearing would seek to establish the criteria for authorizing specific traffic management measures.⁴⁷ By that time, there seemed to be an emerging consensus on the easy issues such as no content blocking and better transparency of network management practices.⁴⁸ The decision to hold a hearing devoted to Internet traffic management practices sparked a flurry of submissions and commentary, with even the Privacy Commissioner of Canada taking note of the CRTC decision, stating that “the time has come for net neutrality, both as an economic and a social policy issue, to be examined by the Canadian government . . . we look forward to being a part of that discussion.”⁴⁹

The hearings on the issue featured a significant public interest presence. For example, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) on behalf of Campaign for Democratic Media (CDM) recommended the establishment of normative guidelines and boundaries for ISP behavior, particularly for determining whether throttling practices violated the Telecommunications Act.⁵⁰ CDM viewed the problem as the encroaching on the physical and theoretical space of the “public Internet” in service of private concerns.

Having heard from all sides, the CRTC released its net neutrality decision in October 2009.⁵¹ Although the decision did not go as far as some advocates had hoped, it was a move forward on several important fronts. It signified that traffic management was no longer a free-for-all tool at the disposal of

46 See Can. Radio-Television & Telecomm’n Comm’n, Telecom Public Notice CRTC 2008-19 — Notice of Consultation and Hearing: Review of the Internet Traffic Management Practices of Internet Service Providers (2008), <http://www.crtc.gc.ca/eng/archive/2008/pt2008-19.htm>. The CRTC also launched an online consultation on net neutrality in March 2009. Topics included the impact on user experience, innovation, the role of the CRTC, network management, and ISP transparency.

47 *Id.* ¶ 9(5).

48 The CRTC required Bell to provide its wholesale customers with advanced notice of its traffic management plans. See Can. Radio-Television & Telecomm. Comm’n, Telecom Decision CRTC 2008-108 ¶ 74 (Nov. 20, 2008), <http://www.crtc.gc.ca/eng/archive/2008/dt2008-108.htm>.

49 Daphne Guerrero, *CRTC Begins Dialogue on Traffic Shaping*, OFFICE OF THE PRIVACY COMM’R OF CAN. (Nov. 21, 2008), <http://blog.priv.gc.ca/index.php/2008/11/21/crtc-begins-dialogue-on-traffic-shaping/>.

50 Telecommunications Act, S.C. 1993, c 38 (Can.).

51 Can. Radio-Television & Telecomm. Comm’n, Telecom Regulatory Policy CRTC 2009-657: Review of the Internet Traffic Management Practices of Internet Service Providers (2009), <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>.

ISPs. Most notably, the decision introduced a test that was similar to what consumer and public interest groups had recommended during the hearings; it acknowledged the problems with application-specific measures; it also introduced new disclosure requirements, new privacy safeguards, and an agreement that throttling can violate the law in certain circumstances.

The changes on UBB and net neutrality seemed to embolden the government and the CRTC to increase their emphasis on consumer concerns in telecom policy. With Jean-Pierre Blais installed as the new CRTC chair in 2012, the Commission's priorities sent a message of change in Canadian communications policy. The days of emphasizing Canadian content rules or legislative overhauls were over, replaced by a consumer-oriented focus on affordable access to both content and connectivity services.

The CRTC moved the consumer perspective to the forefront of its policymaking and priorities. For example, 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 policymaking. It also said it would monitor broadband speeds and the choice of Internet service providers available to Canadians, as well as the prices paid for telephone services.⁵²

The new priorities proved to be more than just rhetoric. In 2012, the CRTC launched an initiative to create a national, enforceable code of conduct for wireless carriers. The CRTC emphasized the importance of public participation in the creation of the code, creating several avenues to encourage public participation in the process. In fact, the decision to embark on a national, enforceable code of conduct for wireless services supported by the wireless carriers itself represented a dramatic policy shift. Consistent with the Bernier market-led telecom approach, the Canadian Wireless Telecommunications Association introduced a voluntary code of conduct in 2009 with no expectation of government regulation.⁵³ Several years later, the CRTC moved to establish its national, enforceable code instead. The new code of conduct was released in June 2013, ushering in new regulation of retail wireless services.⁵⁴ The code effectively set a two-year limit on wireless contracts, created caps on data roaming fees to address bill shock, and required that carriers offer device unlocking services.

52 *See CRTC announces priorities for 2012-2015*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N (Sept. 6, 2012), <http://www.crtc.gc.ca/eng/com100/2012/r120906.htm>.

53 *Code of Conduct*, CAN. WIRELESS TELECOMM. ASS'N, <http://www.cwta.ca/for-consumers/code-of-conduct/> (last visited May 16, 2016).

54 *Wireless Code of Conduct*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N, http://www.crtc.gc.ca/eng/info_sht/t13.htm (last modified Dec. 2, 2015).

The government also made wireless competition a key concern, with then-Industry Minister Christian Paradis promising in early 2013 “to continue to pay close attention to what is going on and to make sure that our policies reflect the fact that we want to achieve the goal of having more competition.”⁵⁵ Prior government efforts were largely acknowledged to have been insufficient as a spectrum set aside in 2008 opened the door to new entrants, but enormous barriers remained. These included the slow relaxation of foreign investment restrictions that created significant problems in accessing capital, the lack of availability of the most popular devices (such as the Apple iPhone) on new entrant networks, and the inability to offer attractive bundled packages that include wireless, television, and home broadband services. As public interest in the issue continued to grow, Industry Minister James Moore confirmed that the government remained committed to greater competition through its policy of foreign investment plus spectrum auction rules designed to facilitate new entrants.

C. Privacy

Broad-based privacy reform may have stalled in Canada, but the public voice on privacy-related matters had a significant impact. For example, the public interest came to the fore in the development of anti-spam legislation. Calls for Canadian anti-spam legislation dated back to 2005, when a national task force recommended enacting laws to target spam, spyware, and other online harms (I was a member of the task force). The government waited years to introduce anti-spam legislation, finally passing it in December 2010.⁵⁶ After a contentious legislative battle, many expected a quick introduction of the accompanying regulations that would allow the law to take effect. After business groups criticized draft regulations released in June 2011, however, the government hit the pause button, leaving the law in limbo.

Critics used the delay to spread fear about “job losses” and “regulatory red tape,” yet the reality is that the battle over the anti-spam battle boiled down largely to a single issue: whether businesses should be required to obtain

55 See Michael Geist, *Can Canada's Failed Wireless Policy Be Saved?*, MICHAEL GEIST BLOG (June 3, 2013), <http://www.michaelgeist.ca/2013/06/wireless-policy-column-post/>.

56 An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities That Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-Television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c 23 (Can.).

explicit, opt-in consumer consent before sending electronic commercial messages. The law said they should and much of the intense lobbying for new exceptions was premised on avoiding this requirement.

Given industry fears, then-Industry Minister Christian Paradis faced considerable lobbying pressure to water down the law through the regulatory process. The regulations ultimately went through two drafts and three more years of delay, yet as public pressure for a resolution mounted, then-Industry Minister James Moore announced in late 2013 the final regulations and the effective date of the legislation.⁵⁷ The announcement was no sure thing, since major business groups had called for the repeal of the legislation. Once again, the public voice trumped the effectiveness of corporate lobbying.

The policy battle over Internet surveillance capabilities has been the focal point of similar public participation. The issue 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. Multiple bills were introduced over the years,⁵⁸ but it was legislation tabled in 2012 that seemed the most likely to make it through the parliamentary process. By that time, the Conservative government had a majority in the House of Commons and had prioritized law and order policies.

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 either with the government or with the child pornographers.⁵⁹ Bill C-30⁶⁰ was introduced the following day, but within two weeks, a massive

57 News Release, Gov't of Canada, Harper Government Delivers on Commitment to Protect Canadian Consumers from Spam (Dec. 4, 2013), <http://news.gc.ca/web/article-en.do?nid=798829>.

58 See, e.g., Bill C-52, Investigating and Preventing Criminal Electronic Communications Act, 3rd Sess., 40th Parl. (2010) (first reading Nov. 1, 2011), <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=4740136>; Bill C-46, Investigative Powers for the 21st Century Act, 2nd Sess., 40th Parl., (2009) (first reading June 18, 2009), <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Mode=1&billId=3997477&Language=E>; Bill C-74, Modernization of Investigative Techniques Act, 1st Sess., 38th Parl. (2005) (first reading Nov. 15, 2005), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Bill&Doc=C-74&Language=E&Mode=1&Parl=38&Ses=1>.

59 Allison Cross, *Online Surveillance Bill Critics Are Siding with 'Child Pornographers,'* NAT'L POST (Feb. 14, 2012), <http://news.nationalpost.com/2012/02/14/online-surveillance-bill-critics-are-siding-with-child-pornographers-vic-toews>.

60 Bill C-30, An Act to Enact the Investigating and Preventing Criminal Electronic Communications Act and to Amend the Criminal Code and Other Acts, 1st Sess.,

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 use of social media evolved from the Facebook protests of 2007 to the Twitter-based #tellviceeverything campaign that provided a perfect illustration of how the Internet can fuel awareness and action at remarkable speed.⁶¹ Through thousands of tweets, Canadians used humor to send a strong message that the government had 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.⁶²

There are undoubtedly many factors that led to the early successful fight against the bill. Toews's 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.

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.⁶³

The emphasis on responding to public concern highlights the effectiveness of the public campaign and the recognition of the need to incorporate broader

41st Parl. (2012) (first reading Feb. 14, 2012), <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C30&Parl=41&Ses=1>.

61 Laura Payton, *'Tell Vic Everything' Tweets Protest Online Surveillance*, CBC NEWS (Feb. 16, 2012), <http://www.cbc.ca/news/politics/tell-vic-everything-tweets-protest-online-surveillance-1.1187721>.

62 Steve Anderson, *Stop Online Spying hits 100k: Canadians Are an Inspiration*, OPEN MEDIA (Feb. 17, 2012), <https://openmedia.org/en/stop-online-spying-hits-100k-canadians-are-inspiration>.

63 See Laura Payton, *Government Killing Online Surveillance Bill*, CBC NEWS (Feb. 11, 2013), <http://www.cbc.ca/m/touch/news/story/1.1336384>.

perspectives into legislative and policy development. While the government ultimately introduced lawful access legislation that became law in 2015, many of the most invasive provisions were removed.

III. RESPONDING TO THE EMERGING PUBLIC VOICE

Public participation in government policy is frequently assumed since the structure of policymaking — 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.⁶⁴

Even where there is no statutory requirement, enhanced public consultation has gradually emerged as a critical component of policy development. As noted above, 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.⁶⁵ In April 2012, Treasury Board President Tony Clement released Canada's Action Plan on Open Government.⁶⁶ 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

64 Official Languages Act, R.S.C., c 31, s 43(2) (1985).

65 News Release, Gov't of Can., Government of Canada Launches Consultations on Copyright Modernization (July 20, 2009), <http://news.gc.ca/web/article-en.do?m=/index&nid=469009>.

66 *Canada's Action Plan on Open Government 2012-2014*, GOV'T OF CAN., <http://data.gc.ca/eng/canadas-action-plan-open-government> (last modified July 3, 2015).

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 . . .⁶⁷

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.⁶⁸ 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.

Regulators have also worked to respond to growing public interest in participating in information and digital policy development. The response from regulators to greater public participation 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 favor 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.

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 CRTC 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.

While new communications strategies are important, identifying avenues for public participation represents a greater challenge. The Canadian experience

67 *Id.*

68 Wayne Wouters, *Twentieth Annual Report to the Prime Minister on the Public Service of Canada*, CLERK OF THE PRIVY COUNCIL (Apr. 28, 2014), <http://www.clerk.gc.ca/eng/feature.asp?pageId=319>.

is best illustrated by the initial hearing on the proposed 2013 merger between Bell and Astral Media, two of Canada's largest media companies. The merger failed to receive regulatory approval and was resubmitted for subsequent approval with a greater emphasis on the public interest. The CRTC reviews of merger transactions had historically focused on the "tangible benefits" package that often provides millions in funding for new Canadian television and radio productions. Critics maintained that the result was largely regulatory theater.⁶⁹ 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 rubberstamp 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 rarely addressed, as the public interest was supposedly served by trickledown benefits generated by market efficiencies or the creation of new Canadian programming.

The most important aspect of the initial CRTC Bell-Astral decision, which surprisingly rejected the proposed merger, was the unmistakable signal that the CRTC 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."⁷⁰

The change in approach is obvious when the Bell-Astral decision is compared with the Bell purchase of CTVglobemedia only two years earlier (in 2010).⁷¹ In the Bell-CTVglobemedia deal, the words "public interest" appear only four

69 News Release, Pub. Interest Advocacy Ctr., Consumer and Public Interest Groups Still Oppose Bell-Astral Merger (Apr. 8, 2013), <https://www.piac.ca/our-specialities/consumer-and-public-interest-groups-still-oppose-bell-astral-merger/>; *Merged Bce-Astral Could Manipulate Markets: Critics*, BUS. NEWS NETWORK (May 7, 2013), <http://www.bnn.ca/News/2013/5/7/BCE-to-sell-movie-networks-Rogers.aspx>.

70 Michael Geist, *Make No Mistake, This Is a New CRTC*, TORONTO STAR, Oct. 19, 2012, http://www.thestar.com/business/2012/10/19/make_no_mistake_this_is_a_new_crtc.html.

71 *Bell Buys CTV Network for \$1.3 Billion*, TORONTO STAR, Sept. 10, 2010, http://www.thestar.com/business/2010/09/10/bell_buys_ctv_network_for_13_billion.html.

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.⁷²

In the first Bell-Astral decision, the CRTC stated clearly that the tangible benefits are only part of the analysis, repeatedly emphasizing that “the applicant’s burden to prove that the transaction is in the public interest extends beyond the tangible benefits requirement.”⁷³ 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.

While the CRTC has attracted the lion’s share of attention for its efforts, other Canadian regulators have also focused on increasing public participation. For example, in anticipation of the next review process for PIPEDA, the Office of the Privacy Commissioner of Canada (OPC) launched a public consultation on online tracking, profiling, targeting, and cloud computing in January 2010.⁷⁴ 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),⁷⁵ and launching a public consultation in the fall of 2013, in which participants were invited to identify areas for future policy advocacy.⁷⁶

72 News Release, Can. Radio-Television & Telecomm. Comm’n, CRTC Approves BCE’s Purchase of CTVglobemedia (Mar. 7, 2011), <http://www.crtc.gc.ca/eng/com100/2011/r110307.htm>.

73 *Broadcasting Decision CRTC 2012-574*, CAN. RADIO-TELEVISION & TELECOMM. COMM’N (Oct. 18, 2012), <http://www.crtc.gc.ca/eng/archive/2012/2012-574.htm>.

74 *2010 Consumer Privacy Consultations*, OFFICE OF THE PRIVACY COMM’R OF CAN., http://www.priv.gc.ca/resource/consultations/index_e.asp (last modified May 6, 2011).

75 *Advocacy*, COMPETITION BUREAU OF CAN., http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03557.html (last modified Nov. 5, 2015).

76 *Competition Bureau Seeks Input from Canadians on Potential Advocacy Initiatives*,

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 information and digital policy issues is often viewed as a threat to such stakeholders, 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 a 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 reexamining 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.⁷⁷

Bell also issued a strongly worded release indicating it was shocked and appalled at the CRTC decision rejecting its proposed merger with Astral.⁷⁸

The reaction was similar when the government delayed introducing copyright reforms in 2007. As noted above, ACTRA urged Prentice "to do the right thing" by ignoring the protests of a "vocal minority."⁷⁹ Several music

COMPETITION BUREAU OF CAN. (Sept. 10, 2013), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03558.html>.

77 Mirko Bibic, *Pay for Usage*, FIN. POST (Feb. 3, 2011), <http://opinion.financialpost.com/2011/02/03/pay-for-usage/>.

78 *Bell Shocked by CRTC Rejection of Astral Transaction, Requests Cabinet Intervention*, BCE INC. (Oct. 18, 2012), <http://www.bce.ca/news-and-media/releases/show/bell-shocked-by-crtc-rejection-of-astral-transaction-requests-cabinet-intervention>.

79 *Government Retreats on Copyright Reform* CBC NEWS, (Dec. 13, 2007), <http://www.cbc.ca/news/technology/government-retreats-on-copyright-reform-1.657296>.

associations also issued a press release expressing their “growing concern” with the legislative delays.⁸⁰

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 consumer and interest 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, Toronto-based intellectual property lawyer and the former Executive Director of the University of Toronto Centre for Innovation Law and Policy Richard Owens wrote critically about the use of form letters in the public participation in the 2009 copyright consultation.⁸¹ 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,⁸² music rights holders,⁸³ and employees of a publishing company.⁸⁴ The Balanced *Copyright for Canada* website, launched by the music industry, sent hundreds of thousands of 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 2011 CRTC hearing on the Bell-CTV Globemedia merger, numerous local organizations and businesses were encouraged to provide

80 *Government's Delay in Introducing Copyright Reforms*, *supra* note 30.

81 Richard Owens, *Noises Heard: Canada's Recent Online Copyright Consultation Process — Teachings and Cautions*, IP OSGOODE (Apr. 19, 2010), <http://www.iposgoode.ca/2010/04/noises-heard-canadas-recent-online-copyright-consultation-process>.

82 *I Work in Canada's Music Industry*, INDUS. CAN. (Mar. 1, 2010), <http://www.ic.gc.ca/eic/site/008.nsf/eng/01616.html>.

83 *Letter Requesting Changes to the Copyright Act*, INDUS. CAN. (Mar. 1, 2010), <http://www.ic.gc.ca/eic/site/008.nsf/eng/01227.html>.

84 *I Am an Employee of a Publishing Company*, INDUS. CAN. (Mar. 1, 2010), <http://www.ic.gc.ca/eic/site/008.nsf/eng/01617.html>.

effusive praise for the transaction.⁸⁵ 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.⁸⁶ 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, former 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."⁸⁷ The same claims were made during the Canadian copyright reform process, with public interventions often regarded as non-expert.⁸⁸

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.⁸⁹ 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.⁹⁰

85 *CRTC Approves BCE's Purchase of CTVglobemedia*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N (Mar. 7, 2011), <http://www.crtc.gc.ca/eng/com100/2011/r110307.htm>.

86 Michael Geist, *Ringin' Up Support for the Bell-CTV Deal*, MICHAEL GEIST BLOG (Jan. 13, 2011), <http://www.michaelgeist.ca/content/view/5572/125/>.

87 *Variety on Television Must Be Preserved, Says Bell's Crull*, WIRE REPORT (Feb. 20, 2014), <http://www.thewirereport.ca/news/2014/02/20/variety-on-television-must-be-preserved-says-bell%E2%80%99s-crull/27885>.

88 Sookman, *supra* note 32.

89 *Canadians Support Local TV Matters Campaign*, CNW GRP. (Oct. 29, 2009), <http://www.newswire.ca/en/story/504567/canadians-support-local-tv-matters-campaign>.

90 Legislative Summary of Bill C-32, An Act to Amend the Copyright Act (July 20, 2010), http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C32&Mode=1&Parl=40&Ses=3&source=library_prb#a33.

Third, incumbent stakeholders often argue that public participation masks corporate interests that lie behind the public face.⁹¹ 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 Stop Online Piracy Act (SOPA)⁹² context by Harvard professor Yochai Benkler found that the private-sector participants played at most a peripheral role in the grassroots advocacy efforts.⁹³

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 directors⁹⁴ and Telus did the same with former Public Safety Minister and Treasury Board President Stockwell Day.⁹⁵ 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. The increasing presence of political leaders within the board and leadership of Canadian telecom companies holds the potential to grant those companies

91 Jeremy Moon, Andrew Crane & Dirk Matten, *Can Corporations Be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society*, BUS. ETHICS Q., July 2005, at 429, <http://dx.doi.org/10.5840/beq200515329>.

92 United States Bill HR 3261, Stop Online Piracy Act, 112th Congress, 2011 (introduced Oct. 26, 2011, considered at committee Dec. 16, 2011).

93 Yochai Benkler et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate* (Berkman Ctr. Research Publication No. 2013-16, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295953.

94 Jamie Sturgeon, *Telecom Giant BCE Adds Former Minister Prentice to Board*, FIN. POST (July 21, 2011), http://business.financialpost.com/2011/07/21/telecom-giant-bell-adds-former-minister-prentice-to-board/?__lsa=261f-7d06.

95 Lindey Pinto, *Telus Appoints Former Federal Government Minister Stockwell Day to Its Board*, OPEN MEDIA (Aug. 6, 2011), <https://openmedia.ca/blog/telus-appoints-former-federal-government-minister-stockwell-day-its-board>.

access to current government leaders and opportunities to influence policies not available to most Canadians.

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 a massive public campaign that featured extensive use of websites, Facebook, and Twitter. The same is true for copyright advocacy. In 2010, CRIA backed the creation of “Balanced Copyright for Canada,” a website that urged its supporters to tweet at Parliamentarians, respond to opinion pieces in the media, and write directly to Members of Parliament.⁹⁶

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.⁹⁷

Moore’s call for confrontation ensured two contentious years of legislative review, yet as discussed the bill was passed in 2012 with only minor modifications.⁹⁸

96 Peter Nowak, *Consumer Groups Blast Moore Over Copyright*, CBC NEWS (June 16, 2010), <http://www.cbc.ca/news/technology/consumer-groups-blast-moore-over-copyright-1.868095>.

97 *Quoted in* Michael Geist, *James Moore’s Attack on Fair Copyright*, MICHAEL GEIST BLOG (June 23, 2010), <http://www.michaelgeist.ca/content/view/5138/125>.

98 Payton, *supra* note 42.

IV. CONCLUSION: ACCOUNTING FOR THE CANADIAN INFORMATION AND DIGITAL POLICY SHIFT

Canada is certainly not the only country in which public engagement on information and digital policy issues has taken policymakers and politicians by surprise. 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.⁹⁹

In January 2012, protests over the SOPA, hailed by some as the Internet Spring, saw millions speak out against restrictive legislative proposals that posed a serious threat to an open Internet. On a single day, Wikipedia reported that 162,000,000 people viewed its blackout page during the twenty-four-hour protest period.¹⁰⁰ 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.¹⁰¹

Meanwhile in Europe, thousands took the streets throughout the spring of 2012 to protest against the Anti-Counterfeiting Trade Agreement. The European Parliament ultimately voted overwhelmingly to reject the agreement, striking a major blow to the hopes of supporters who envisioned a landmark agreement that would set a new standard for intellectual property rights enforcement.¹⁰²

More recently, the U.S. Federal Communications Commission received millions of comments on proposed net neutrality rules, sparking a significant shift in policy approach, while privacy and surveillance have taken center stage in many countries in light of revelations emanating from Edward Snowden.¹⁰³

99 Cheryl Cheung, *New Zealand Withdraws Controversial Copyright Law*, DEETH WILLIAMS WALL (Apr. 8, 2009), <http://www.dww.com/?p=1443>.

100 *Wikipedia Blackout Supports Free and Open Internet*, WIKIMEDIA FOUND. (Jan. 19, 2012), http://wikimediafoundation.org/wiki/Press_releases/Wikipedia_blackout_supports_free_and_open_internet.

101 Dan Nguyen, *SOPA Opera Update: Opposition Surges*, THE PROPUBLICA NERD BLOG (Jan. 19, 2012), <http://www.propublica.org/nerds/item/sopa-opera-update>.

102 *See generally Anti-Counterfeiting Trade Agreement*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/acta> (last visited May 18, 2016).

103 Lorenzo Franceschi-Bicchierai, *The 10 Biggest Revelations from Edward Snowden’s Leaks*, MASHABLE (June 5, 2014), <http://mashable.com/2014/06/05/edward-snowden-revelations/#nPJzXYze8iqZ>; Elise Hu, *3.7 Million Comments Later*,

Indeed, numerous countries have experienced public advocacy on information and digital policy issues. From Hungary's mass protests over a proposed Internet tax in 2014¹⁰⁴ to over a million comments on India's net neutrality rules in 2015,¹⁰⁵ information and digital policies have become increasingly mainstream issues around the world.

Yet the Canadian experience may be unique given the grassroots nature of the campaigns and the breadth of the issues involved. Moreover, unlike other protests that have focused on stopping legislation, the Canadian experience has emphasized public interest changes to the law. As a result, Canada is home to an expansive list of new copyright exceptions and the leading voice for treating limitations and exceptions within copyright as users' rights. It has the world's toughest anti-spam laws and net neutrality rules that are widely viewed as being amongst the most effective in the world. What might the Canadian experience teach? While every circumstance is different, there are some lessons that may translate more readily to other countries.

A. The Public as an Information and Digital Policy Stakeholder

The biggest shift within the Canadian information and digital policy framework was not a specific provision or law, but rather the emergence of the broader public as a recognized stakeholder within the policy process. Information 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.

While government officials would likely protest that the public has always been welcome within the policymaking process, the reality is that the system was largely stacked against individual participation. Information law issues can be highly technical, making it difficult for a non-expert to assess the implications of legislative proposals. Moreover, policy officials often work with "stakeholder lists" that do not readily account for broader public participation.

Here's Where Net Neutrality Stands, NPR (Sept. 17, 2014), <http://www.npr.org/sections/alltechconsidered/2014/09/17/349243335/3-7-million-comments-later-heres-where-net-neutrality-stands>.

104 *Hungary Internet Tax Cancelled After Mass Protests*, BBC NEWS (Oct. 31, 2014), <http://www.bbc.com/news/world-europe-29846285>.

105 Aayush Soni, *How People Power Took On Big Business in the Fight for Net Neutrality in India*, GUARDIAN, May 25, 2015, <http://www.theguardian.com/technology/2015/may/25/india-net-neutrality-people-power>.

The Canadian experience demonstrates that these barriers can be overcome. Once the public interest became evident, government officials conducted open consultations designed to maximize public participation. The use of social media, plain language explanations and backgrounders, town halls, online discussion fora, and other techniques were crucial in bringing users to the table and granting them a voice in the policymaking process.

B. The Internet as a Tool for Participation

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. The Canadian story consistently demonstrates the potential of these tools to raise awareness and influence the policymaking process. The 2007 copyright advocacy campaigns originated on Facebook at a time when government was still unsure about how to react to mass Internet-based advocacy. Years later, grassroots online petitions (UBB) and Twitter campaigns (#tellviceeverything) had a similar impact on government policy.

While the effectiveness of online tools waxes and wanes over time — there is no simple recipe for success — there is no denying the importance of Internet-based advocacy in Canada. Indeed, the significant shifts in information and digital policy in Canada over the past decade would not have occurred without the continuous feedback loop provided by Internet-based tools.

C. The Policy Pyramid

The Canadian information and digital policy story is also notable for the subtle shift in hierarchy amongst policy stakeholders. The government sits atop the policy pyramid. That position has not changed with the advent of the Internet and is reflected by those issues that have not shifted over the past decade. There have been many changes in policy over the past decade, but the public appetite for change has rarely met with success when government was the stakeholder on the opposite side.

The tension between the public and government is most obvious with respect to surveillance matters. While the United States gradually grapples with the Snowden fallout, the Canadian response has been muted at best. Canadian government officials have said little about Canadian surveillance activities, despite revelations of spying activities in Brazil, cooperation with foreign intelligence agencies,¹⁰⁶

106 Greg Weston, *Snowden Document Shows Canada Set Up Spy Posts for NSA*,

a federal court decision that criticized Canada's intelligence agencies for misleading the court,¹⁰⁷ and a domestic metadata program that remains largely shrouded in secrecy.¹⁰⁸

Canadian telecom companies such as Rogers and Telus¹⁰⁹ reluctantly followed their U.S. counterparts in issuing transparency reports in 2014,¹¹⁰ though Bell (the largest provider) remains a holdout and reports indicate that government officials expressed concern about any public reporting.¹¹¹ In fact, the Canadian government seems to have moved in the opposite direction, by adopting a lower threshold for warrants seeking metadata than is required for standard warrants in Bill C-13, the cyber-bullying and lawful access bill, that passed the House of Commons in October 2014.¹¹²

The same is true with respect to copyright. The link between trade — particularly trade agreements — and intellectual property is well-known. The annual U.S. Trade Representative Special 301 list, congressional watch-lists, as well as trade negotiations such as the Trans Pacific Partnership and the

CBC NEWS (Dec. 9, 2013), www.cbc.ca/news/politics/snowden-document-shows-canada-set-up-spy-posts-for-nsa-1.2456886.

107 David Pugliese, *Court Decision Finds CSIS Deliberately Misled Judge on Spy Warrants — Government Upset and Will Now Appeal That Ruling*, OTTAWA CITIZEN (Feb. 7, 2014), <http://ottawacitizen.com/news/national/defence-watch/court-decision-finds-csis-deliberately-misled-judge-on-spy-warrants-government-upset-and-will-now-appeal-that-ruling>.

108 Colin Freeze, *Canada's Metadata Collection Worries Critics*, THE GLOBE & MAIL (Mar. 27, 2014), <http://www.theglobeandmail.com/news/politics/canadas-metadata-collection-worries-critics/article17714407/>; Colin Freeze, *How Canada's Shadowy Metadata-Gathering Program Went Awry*, THE GLOBE AND MAIL (June 15, 2013), <http://www.theglobeandmail.com/news/national/how-canadas-shadowy-metadata-gathering-program-went-awry/article12580225/?page=all>.

109 David Patton, *Telus Issues First 'Transparency Report' on Requests for Customer Information*, TORONTO STAR, Sept. 18, 2014, http://www.thestar.com/business/2014/09/18/telus_issues_first_transparency_report_on_requests_for_customer_information.html.

110 Colin Freeze et al., *TekSavvy, Rogers Break Silence Over Government Requests for Data*, GLOBE & MAIL (June 5, 2014), <http://www.theglobeandmail.com/technology/tech-news/teksavvy-opens-books-on-government-data-requests/article18999107/>.

111 *Disclosure of 'Sensitive' Telecom Surveillance Details Worried Feds: Memo*, MACLEANS (Nov. 30, 2014), <http://www.macleans.ca/news/canada/disclosure-of-sensitive-telecom-surveillance-details-worried-feds-memo/>.

112 Bill C-13, Protecting Canadians from Online Crime Act, S.C. 2014, c 31, <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6731159&File=4>.

Canada-European Union Trade Agreement have the potential to influence domestic policy in a manner that leaves skeptics concerned that national laws are drafted in Washington or Brussels.¹¹³

It is certainly true that trade negotiations played a major role in the Canadian copyright process. In particular, the adoption of the U.S. Digital Millennium Copyright Act-style anti-circumvention rules within the 2012 legislation was unquestionably a function of U.S. pressure and the recognition that a more flexible approach would face opposition in most other ongoing trade negotiations.¹¹⁴ Some U.S.-based industry groups supported restrictive anti-circumvention rules, yet the issue became an important one for the Canadian government not because of particular industry influence, but rather due to broader concerns about Canada-U.S. relations. Canada and the U.S. maintain the world's longest common border and one of the world's largest trading relationships. Maintaining that relationship is a longstanding policy priority of all Canadian governments, ensuring that the U.S. relations issue has the possibility of superseding domestic policy considerations.

Based on the information and digital policy experience in Canada over the past decade, there is a strong argument that the broader public has now surpassed corporate stakeholders in the policy hierarchy. The Canadian government has been unafraid to challenge corporate interests on information policy issues, frequently viewing a consumer-friendly approach as a political winner. Moreover, changes to Canadian campaign financing rules, which severely limit the ability of corporations to provide political donations, may have a direct impact on corporate influence. In fact, Canadian political parties are now more dependent on independent, smaller donations than on corporate support.

113 Kathleen Lau, *Blacklist Canada for Lax Piracy Laws, U.S. Lobby Group Urges*, IT WORLD CAN. (Feb. 21, 2007), <http://www.itworldcanada.com/article/blacklist-canada-for-lax-piracy-laws-u-s-lobby-group-urges/7775>; Michael Geist, *Treaty Consultation Process Snubs Public*, TORONTO STAR, Nov. 3, 2008, http://www.thestar.com/business/2008/11/03/treaty_consultation_process_snubs_public.html.

114 See Gwen Hinze & Maira Sutton, *Canada's C-11 Bill and the Hazards of Digital Locks Provisions*, EFF BLOG (Feb. 10, 2012), <https://www.eff.org/deeplinks/2012/02/canadas-c-11-bill-and-hazards-digital-locks-provisions>; *Not Caving to U.S. on Copyright Bill: Heritage Minister*, NAT'L POST (Sept. 29, 2011), <http://news.nationalpost.com/news/canada/not-caving-to-u-s-on-copyright-bill-heritage-minister>; House of Commons Debates, 41st Parl., 1st Sess., No 31 (Oct. 18, 2011), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=31&Parl=41&Ses=1&Language=E&Mode=1>.

Regardless of the reason, individuals have now seemingly surpassed corporate interests in the information and digital policy pyramid. That doesn't mean the public interest wins on every issue or that corporate stakeholders lose on theirs, but it does suggest an important shift in influence with long-term ramifications for the development of information and digital policy in Canada.

