



January 11, 2018

Submitted electronically

The Broadcasting and Telecommunications Legislative Review Panel
c/o Innovation, Science and Economic Development Canada
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Dear Panel Members:

Re: *Call for Comments on the Questions set out in the Legislative Review Panel
Terms of Reference*

Enclosed is a submission by FRIENDS of Canadian Broadcasting (FRIENDS) in response to your Panel's call for comments.

FRIENDS is an independent watchdog for Canadian content, on air and online. FRIENDS is exclusively supported by 364,000 Canadians and is not affiliated with any broadcaster or political party.

We look forward to providing additional comments in future phases of the Panel's review.

Yours sincerely,

Daniel Bernhard
Executive Director and Spokesperson

**FRIENDS of Canadian Broadcasting
Submission**

to the

Broadcasting and Telecommunications Legislative Review Panel

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Submission to the Legislative Review Panel

Introduction

FRIENDS of Canadian Broadcasting (FRIENDS) is pleased to provide this submission in response to the Broadcasting and Telecommunications Legislative Review Panel's call for comments.

FRIENDS is the citizens' advocate for Canadian journalism and storytelling, on air and online. We do not accept money from corporations, foundations, or governments, and as an entirely independent watchdog group, we are not affiliated with any broadcaster or political party. Our work is exclusively financed by individual contributions from our 364,000 supports across Canada.

We are at once fully supportive and profoundly skeptical of this review. Canada's communications legislation can surely be improved, and we welcome the opportunity to contribute to that effort.

But we must not forget that this review is necessitated by technological change that has far outpaced Canada's broadcasting and telecommunications regulations. This esteemed Panel will no doubt give careful thought to its task, but the Government's decision to deliberate comes at the expense of its responsibility to regulate. Action is needed today. This exercise ensures only delay. And a clear-eyed observer might reasonably discern that the Government's preference for thoughtful deliberation is motivated more by political considerations than by a sincere desire to protect Canada's national interests in such critically important sectors.

Industry will not stand still while this process unfolds. New legislation will not be proclaimed before 2021 – 2025 is likely more realistic. By then, the sacred objectives enshrined in Section 3 of the existing Broadcasting Act may still be facts of law, but they will no longer be facts of life. The market will long since have moved on.

We cannot expect corporations, especially foreign corporations, to prioritize Canada's cultural policy objectives above their quest for profit.

The principles set forth in Section 3 of the Broadcasting Act uphold a long tradition, which recognizes that broadcasting and telecommunications are not simply industries like any other: they are crucial institutions upholding Canada's identity and independence with major implications for Canadian culture, politics, unity, and sovereignty. Action must be taken now, lest ours becomes the first generation of the broadcasting era to abandon the principles of

economic, political, and cultural sovereignty that have underpinned every piece of broadcasting and telecommunications legislation in Canadian history.

Two key factors necessitate timely action by the Government of Canada:

- Internet broadcasting and other technological developments have had a demonstrably negative impact on Canadian media revenues, degrading the capacity of Canadian media to support Canadian content, particularly local news. And this impact is accelerating. If the prevailing trend continues, the market will be increasingly dominated by firms that originate outside of Canada's borders and that do not contribute nearly enough to Canadian society. These new entrants profit from artificially low regulatory compliance costs, giving them unwarranted competitive advantages, such as an exemption from Canadian Programming Expenditure requirements. Of course, such an exemption reduces the quantity and quality of Canadian programming available to Canadians. It will be as though Section 3 of the Broadcasting Act did not exist.
- New, predominantly foreign-owned online media companies have not filled the gaps left by the Canadian media they are displacing. In many cases, these new entrants have not only failed to fill the gap, they have widened it substantially. For example, companies like Facebook are squeezing Canadian publishers out of the advertising market without investing a cent to produce Canadian journalism. But they also disseminate disinformation on an unprecedented scale, a nefarious business that engenders serious harms, including a distorted 2016 United States Presidential election. Facebook has even been found responsible for knowingly allowing users to incite ethnic violence in Myanmar, resulting in a killing spree that left tens of thousands dead and hundreds of thousands more displaced.¹ When companies like Facebook drive Canadian journalism into financial distress or bankruptcy, they are not simply taking away the medicine that keeps our democracy alive. They are also aggravating the sickness with hefty doses of misinformation and hate.

Industry players, policy makers, and Canadian citizens increasingly agree on the need for prompt government intervention to ensure appropriate and equitable contributions from all players in the Canadian audio-visual market, and the need to address the rapid decline of local news. There is also an urgent need to reimagine and reinforce Canada's national public broadcaster, CBC/Radio-Canada to fulfil its mandate in a fundamentally transformed media ecology.

Summary of FRIENDS' Position

Our position begins from a firm belief that for the most part, the 1991 Broadcasting Act remains relevant. No major changes are necessary or warranted. In essence, our position can be boiled down to five core points:

¹ It's worth noting that the Canadian government has spent millions to provide humanitarian assistance to refugees fleeing this Facebook-fueled ethnic cleansing campaign.

1. Section 3 of the Broadcasting Act lays out clear cultural policy objectives that should not just be preserved, but enhanced, with special attention paid to the rights and representation of Canada's Indigenous peoples.
2. Section 3 is still the law of the land, and the extent to which the reality of the marketplace no longer reflects its precepts amounts to a serious failing by the Government and the CRTC to uphold their duty to implement the Act. The existing legislation gives them the power to address many of the major issues facing the broadcasting system, such as the lack of contribution by internet broadcasters. The primary problem is not outdated legislation, but rather a stunning dereliction of the duty to use the considerable powers which existing legislation clearly provides for.
3. All players in Canada's media and broadcasting system – no matter how they deliver content – should be subject to the equitable rules and responsibilities, including equitable contributions to the creation of Canadian content and equal application of the law, especially laws concerning taxation and defamation.
4. If the CRTC lacks certain powers required to ensure these equitable contributions, those powers should be identified and implemented without delay. The Act does not need to be completely rewritten. It can simply be adjusted to incorporate these new powers.
5. Even if internet publishers were held responsible for user-generated disinformation, and even if internet broadcasters were given Canadian Programming Expenditure requirements, the cultural objectives of the Act cannot be fully realized without a strong national public service broadcaster. Section 3 comprises non-economic objectives, and these are best assured in a body like CBC that is not motivated by economic or political considerations. In this age of infinite choice, where exclusionary regulation is no longer viable, Canadians need and deserve a strong public broadcaster that can counterbalance the negative effects of foreign platform companies while taking creative risks that raise the bar for all participants in the marketplace.

Accordingly, and as further discussed below, we urge the Panel to take the following measures:

1. Without delay, and before issuing a report of any kind, clearly identify the powers that the CRTC and the Government already have with respect to the crisis facing the Canadian broadcasting system, and urge them to employ these powers decisively and without further delay.
2. Should the CRTC require new powers to implement a broader-based equitable contribution framework involving all broadcasters, encourage the government to fast-track their enactment;
3. Recommend only such legislative changes as are absolutely necessary or advisable for the medium to long term success of Canada's communications system including its economic, social and cultural facets, while strengthening Section 3 of the Act; and
4. Do all of this as soon as possible, well before the dissolution of the current Parliament casts the future of this vital endeavour into limbo.

Finally, your Panel’s invitation has led us to carefully re-examine the 1991 Broadcasting Act. We note that the words “democracy” and “democratic” do not appear in the statute. This is not likely a willful omission, but rather a reflection of the zeitgeist of the early 1990s, when liberal democracy was not just ascendant but seemingly unassailable.

No informed person could say that the same is true today. In fact, “democratic backsliding” has become a commonplace subject of discussion, even in mature democracies like the United States and Canada. We therefore suggest that your Panel recommend that the link between media and democracy be embedded in the introduction to any new Broadcasting Act. We further suggest that your report mentions how media – and in particular, public service broadcasters like APTN, CBC/Radio-Canada, CPAC, Knowledge Network, Télé-Québec, TFO, TV5, and TVO – is a vital component of a healthy democracy.

Telecommunications Act Review Questions

FRIENDS’ interest in the review of the Telecommunications Act is primarily in respect of how it may impact broadcasting.

This leads us to take an interest in matters such as:

- The determination about when something should be considered broadcasting and when telecommunications;
- The level of foreign ownership in one vs. the other, and how this might impact vertically-integrated corporations; and
- When and where broadcasting and telecommunications intersect/overlap, which statute and which underlying objectives should take precedence.

We will therefore respond only to questions that deal with issues of this nature.

Overview of FRIENDS Position

Whereas the distinction between telecommunications and broadcasting was once fairly clear, that is no longer the case. Modern telecommunications networks – certainly the “last kilometre” – seamlessly and often dynamically combine broadcasting and telecommunications.² Mobile phones receive data over the internet that may be consumed as video, audio, or text. And online platforms such as Facebook blur the lines between broadcasting and telecommunications when they bundle complementary services like Facebook Messenger (telecoms), Facebook Watch (broadcasting), and the Facebook News Feed (both) together into an integrated user experience.

Online platforms have argued that their crossover businesses should be exempt from regulation. When broadcasting regulations are suggested, they point to the unsuitability of

² That is, what is devoted to telecom vs. broadcast depends on service demand.

those regulations to the telecoms aspects of the business, and vice versa. There is also a popular argument that almost any content requirement for internet-delivered services would engender negative knock-on effects, including censorship and the end of net neutrality.

This line of argument is fundamentally unproductive, and patently false. It reflects a disturbing condescension towards qualified regulators' ability to consider more than one factor at a time. And it condones a troubling slight-of-hand whereby key players in the telecoms and broadcasting sectors leverage pure or effective monopoly positions in one vertical to dominate both, then demand exemption from regulation in either.

In reality, the intermingling of broadcasting and non-broadcasting content on the internet presents only a modest definitional and practical challenge for regulators. Suggestions to the contrary are mere fearmongering, and to boot, they insult the intelligence and public-mindedness of qualified policymakers.

1. Regulators can accept the internet's 'permissionless' entry ethos without neglecting the obligation to oversee Canadian broadcasting that happens to be delivered online;
2. Concerns that excessive regulation could stifle competition and innovation can be addressed by unconditionally exempting platforms under a certain size threshold or those that have operated for less than a certain limitation period;
3. Platforms that intermingle broadcasting and non-broadcasting can have obligations tailored to that general overall mix.³

2. Competition, Innovation, and Affordability

2.1 Are legislative changes warranted to better promote competition, innovation, and affordability?

Regarding this question, the Terms of Reference state:

Given the integrated nature of many Canadian carriers and the high degree of concentration in the sector, barriers to dynamic competition need to be considered in the context of convergence. However, it should be made clear that the Government is not interested in a proposal that reduces Canadian ownership of broadcasting.

FRIENDS strongly supports this statement. No country can remain sovereign – and continue to exist – if it surrenders ownership and control over the primary means of communication among citizens to foreign interests.

³ The definition of "program", in the Broadcasting Act, "means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text". This provides the Commission with the ability to include the public aspect of services like Facebook which have a combination of audio, video and static images.

Canadian ownership of both telecommunications and broadcasting is fundamental to Canada's national identity and cultural sovereignty. While Canadian ownership rules were originally intended to keep critical physical infrastructure under domestic control, the need for such a provision is not impacted by the internet's software-driven distribution model.

Canadian ownership of broadcasting is already diminishing, as unregulated foreign internet media conglomerates have entered the Canadian market without any of the checks, balances and obligations required from Canadian broadcasters. Their entry into the Canadian marketplace does not enhance competition and choice, particularly in the French-language market. Instead, these companies have skillfully exploited lucrative regulatory advantages to establish effective monopolies or duopolies in crucial broadcast businesses like advertising and subscription video on demand (SVOD). The so-called 'network effect'⁴ that underpins the business model and competitive advantage of companies like Google, Facebook, and Netflix tends decidedly towards monopoly.

Maintaining Canadian ownership and control of both significant content and assets underlying telecommunications infrastructure is not just achievable, it is critically essential to sustaining a competitive marketplace for Canadian consumers.

In fact, without strong Canadian ownership provisions, Parliament could lose the power to regulate in future – an unequivocally negative outcome for Canadian sovereignty and democracy. Even when foreign program services, such as Google, Facebook and Netflix dominate – as has become the case – maintaining Canadian ownership of telecommunications infrastructure makes it possible to enforce Canadian laws and regulations.

In practical terms, we also believe that given the vertically integrated (VI) nature of Canada's major communications companies, relaxation of foreign ownership of telecommunications providers would inevitably and severely damage subordinate broadcasting assets, which are already under serious strain. In order to take full advantage of any such relaxation, VIs would logically seek to divest of broadcast assets, resulting in a fire sale of broadcasting properties for which there are few buyers.⁵ Mass closures and service reductions would likely result.

Thus, we oppose any measure that allows foreign-controlled entities to take greater ownership positions in Canada's telecommunications sector, or any reductions in broadcasting foreign ownership prohibitions, including by, as has been suggested, reclassifying BDUs to be subject to more relaxed telecommunications foreign ownership rules than broadcasters.

⁴ This refers to phenomenon whereby the presence of an additional user of a good or service increases the value of that good or service for all other users. The original telephone system was subject to this network effect; as new lines are connected, existing lines become more valuable since there are more people to call. Ultimately this leads to a "winner takes all" dynamic built on the circular logic that a service is valuable because everyone uses it, and that everyone uses it because it is valuable.

⁵ Today's identical foreign ownership rules for incumbent telcos and broadcasters make it easy for both types of assets to be owned by a single entity. If telecom ownership rules were relaxed or eliminated, such entities would have to limit their interests in broadcasting, logically leading to divestitures.

<https://www.theglobeandmail.com/business/commentary/article-busted-auctions-no-buyers-for-canadian-media-companies/>

3. Net Neutrality

3.1 Are current legislative provisions well-positioned to protect net neutrality principles in the future?

Yes. No changes in this regard are justified.

However, it is worth exploring this issue in greater detail, because it is commonly argued that any attempt to enforce public policy objectives in the online space constitutes a breach of net neutrality. This could not be further from the case.

The principle of net neutrality flows directly from telecommunications common carrier principles entrenched in the Telecommunications Act. In particular, Section 36 of the Act states that carriers must have prior Commission approval when they control the content or influence the meaning or purpose of telecommunications they carry.

This principle has been further articulated and encoded by the CRTC in various decisions and policies related to traffic management and other ISP practices.⁶ The CRTC has sensibly articulated that while blocking access to specific content outright requires prior CRTC approval, net neutrality does not preclude legitimate, non-discriminatory traffic management.

In other words, net neutrality is about ensuring non-discriminatory access to lawful content, and preventing ISPs from making self-interested determinations about what traffic they will or will not carry, at what speed, and on what terms. Measures to sanction illegal services or support Canadian content are not breaches of net neutrality in any respect.

In FRIENDS' view, such an approach will become even more important, as the internet evolves into an increasingly dominant distribution medium for both lawful and unlawful broadcasting.

Ultimately, if broadcasting regulation is to apply to internet-delivered broadcasting services, the Commission must retain the ability to apply broadcasting rules to such services, and to enforce those rules effectively.

In today's legislative structure, that is accomplished in two ways:

- Section 4 of the Telecommunications Act states that "[this] Act does not apply in respect of broadcasting by a broadcasting undertaking"; and
- Section 28(1) of the Telecommunications Act, which requires the Commission to pay heed to the objectives of the Broadcasting Act in determining whether any discrimination or preference in the transmission of programs is unreasonable.

These provisions should be retained in any amendments to the Telecommunications Act.

Broadcasting Act Review Questions

⁶ <https://crtc.gc.ca/eng/archive/2009/2009-657.htm#VII>, and <https://crtc.gc.ca/eng/archive/2017/2017-104.htm>

8. Broadcasting Definitions

8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?

In FRIENDS' view, the concept of broadcasting remains highly relevant, notwithstanding significant shifts in the way broadcasting is carried out. The 1991 Broadcasting Act wisely presents a technology-agnostic definition of broadcasting that has proven very durable.

Accepting, as FRIENDS does, the Commission's definition of programming and broadcasting on non-traditional media,⁷ broadcasting activity continues to thrive and grow:

- Overall television viewing has increased. Combined viewing of traditional television and OTT services has grown from 29.5 hours per week in 2012 to 31.3 hours per week in 2016.⁸
- Evidence also suggests that declines in conventional radio consumption (from 16.9 hours per week in 2012 to 14.5 hours per week in 2016) are offset by increases in online audio streaming (which 89% of regular radio listeners also used in 2016). The podcast industry is also exploding, with 20% more Canadians regularly engaging in podcasts in 2018 than in 2017.⁹

The question is not whether broadcasting remains relevant, but rather how to appropriately and efficiently ensure that all broadcasters are subject to equitable regulations and obligations, irrespective of how their signal reaches consumers.

Those casting doubt upon the validity of regulation for internet broadcasters often have a strong financial interest in remaining outside the scope of the regulation. While such doubt proliferates, debate drags on, and these broadcasters that claim not to be broadcasters tighten their stranglehold on the Canadian market. The resulting outcome subverts the cultural policy objectives of the Broadcasting Act.

In respect of the 'open' nature of this new environment, it is clear that rules restricting access to legal content are not likely to succeed, and they would likely introduce negative externalities, like the normalization of state censorship, that are clearly not conducive to the maintenance of a free and open society. Accordingly, FRIENDS opposes the extension of measures such as Canada's current eligible services lists to the internet.

⁷ Per the New Media Exemption Order. Public Notices CRTC 1999-84 & 1999-197. See Broadcasting Order CRTC 2012-409 for current version. See paragraphs 33 to 36.

⁸ CRTC Monitoring Report 2017.

⁹ Ibid, <http://mediaincanada.com/2018/07/19/podcasting-gains-momentum-with-canadians/>

Respecting the shifting nature of this new environment, technology-agnostic legislation remains the optimal choice.¹⁰

8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?

The most important success indicator for new broadcasting legislation and regulation will be the full and equitable inclusion of internet-delivered broadcasting into Canadian cultural policy, especially the obligation to support and exhibit distinctly Canadian content.

The 1999 Digital Media Exemption Order (DMEO) allows internet broadcasters to operate in Canada without contributing to the creation of Canadian content, but ironically, the DMEO laid the groundwork for a viable solution by recognizing that broadcasting-like activity on the internet is in fact broadcasting – despite the new transmission medium, despite the fact it is sometimes one-to-one, and despite the fact that broadcasting ‘receivers’ were, in this case, personal computers or mobile phones.

Yet while the DMEO affirmed jurisdiction, the Commission imposed no Canadian programming requirements on exempt broadcasters. Perhaps this made sense at that time, when the internet was primarily an alpha-numeric medium with no discernable impact on traditional broadcasting.

However, as early as 2006, the Commission recognized that such impact was foreseeable:

In the Commission’s view, given the evidence of this proceeding with respect to the speed and acceptance of technological change, it would be prudent for policy makers to assume a potential for material economic impact on broadcasting undertakings over the medium term.

Accordingly, the Commission considers that within the next three to seven years, public policy action will need to be taken if it is to have the desired effect. Corrective action taken beyond this time frame may be ineffective.¹¹

Unfortunately, the Commission did not follow its own advice. And if the present policy of willful inaction continues, the Commission's premonition may well come to pass; exempted broadcasters such as Netflix and Canal Plus will not only have bankrupted Canadian broadcasters, they will also have become too powerful to regulate, given the political

¹⁰ In this, FRIENDS supports the testimony of Professors Gregory Taylor and Marc Raboy on October 17, 2018 before the Senate Standing Committee on Transport and Communications that the Broadcasting Act is far from outdated. <https://cartt.ca/article/altering-acts-no-need-change-because-broadcasting-sector-healthy-corrected/> (paywall)

¹¹ The Future Environment Facing the Canadian Broadcasting System, December 14, 2006, pursuant to OIC P.C. 2006-519, issued June 8, 2006, paras 433-434.

repercussions governments might face should regulation increase the cost of these services, or even be perceived to do so.¹² And because the available OTT services predominantly operate in English, they have already begun to erode the choices offered to francophone Canadians as a proportion of the whole offer. and this process is likely to accelerate in the coming years.¹³

Five years later, after a fact-finding exercise regarding over-the-top (OTT) programming services, the Commission implausibly, and we contend, erroneously concluded that:

*the evidence does not demonstrate that the presence of OTT providers in Canada and greater consumption of OTT content is having a negative impact on the ability of the system to achieve the policy objectives of the Broadcasting Act or that there are structural impediments to a competitive response by licensed undertakings to the activities of OTT providers.*¹⁴

Further, the Commission's refusal to revise or even review the DMEO followed in 2015 and 2018. We are now at the point where more than 50% of Canadian households with an internet connection subscribe to Netflix¹⁵ – a service with no obligation to produce or present Canadian programs.¹⁶ Yet the Commission somehow continues to maintain that this has “no negative impact on the ability of the system” to maintain the Canadian character of broadcasting.¹⁷

Only this year, in its Section 15 Report, did the Commission finally admit what had been plainly foreseeable, even patently obvious, for a decade: that the internet is having a discernable and materially negative impact upon the Canadian broadcasting system.

In FRIENDS' opinion, therefore, the most important actions this Panel can take are to:

- Confirm that the Commission's jurisdiction applies to *all* broadcasting services, including online broadcasters, as FRIENDS and others believe it does;
- Encourage the Commission to act swiftly to impose equitable Canadian Programming Expenditure obligations on internet broadcasters comparable to those which licensed broadcasters uphold; and

¹² The absurdity of the political concern around the so-called “Netflix tax” does not detract from its political salience. Many parties have declared their opposition to the tax, though no party has actually proposed such a thing. Furthermore, Netflix has increased prices on multiple occasions since the notion of a “Netflix tax” was first raised in 2014, and yet subscriber numbers have continued to grow.

¹³ <https://www.journaldemontreal.com/2018/02/20/nous-sommes-les-parents-pauvres-de-la-television>

¹⁴ <https://crtc.gc.ca/eng/publications/reports/rp1110.htm>

¹⁵ 57% as at 1Q 2018. <https://business.financialpost.com/telecom/media/netflix-doing-booming-business-in-canada-industry-research-reports-suggest>. The percentage is understood to be higher in English- than French-Canada, with two thirds of Quebec households reported to have been Netflix subscribers in 2017.

<https://montrealgazette.com/business/local-business/netflix-deal-thrusts-company-into-quebec-political-fray>

¹⁶ The \$500 million five-year agreement with Netflix announced September 28, 2017 is to “original productions in Canada”, not Canadian content. <https://www.newswire.ca/fr/news-releases/launch-of-netflix-canada-a-recognition-of-canadas-creative-talent-and-its-strong-track-record-in-creating-films-and-television-648509133.html>

¹⁷ See, generally, the CRTC Section 15 “Harnessing Change” Report and the Reference Document that was issued during that process. <https://crtc.gc.ca/eng/publications/s15/> <https://crtc.gc.ca/eng/television/program/s15r.htm>

- Recommend that the Government fast-track the passage of any new powers the Commission may require to effectively enforce contribution obligations on ISPs, WSPs and VBDUs as part of a broader-based equitable contribution framework.

The importance of these measures cannot be overstated. If the internet broadcasters who are dominating the system are not properly brought into the broadcast regulatory framework, uniquely Canadian issues and insights, such as those that pertain to Canada's Indigenous and francophone populations, will become all but invisible in Canadian popular culture. And as a result, they will lose political salience, with very real consequences for our country. The Commission must act now, and we implore the Panel to urge it to do so at once.

9. Broadcasting Policy Objectives

9.1 How can the objectives of the Broadcasting Act be adapted to ensure that they are relevant in today's more open, global, and competitive environment?

The current objectives of the Broadcasting Act remain highly relevant. We strongly urge the Panel to recommend that Section 3 of the current Act be not just preserved but enhanced in any new legislation. In particular, the rights and choices of Indigenous peoples should be explicitly recognized, not just "when resources become available", but always. Most references to "English and French" should be expanded to include "Indigenous languages" as well.

Section 3 prescribes a balanced diet of domestic and international content. In today's open media environment, where domestic content faces vastly increased competition, we must strengthen the fundamental cultural policy objectives of the current Act.

While priorities among the objectives and the tools required to advance them may change over time, the objectives themselves are timeless. We acknowledge that there may be some value in tweaking certain objectives, but we see no basis for wholesale change.

However, we would support any change that limits the Commission's ability to *unconditionally* exempt internet broadcasters from regulation without a sensible explanation as to how such an approach furthers the Canadian programming objectives stated in Section 3. Section 3(s) clearly states that "private networks and programming undertakings should...*contribute significantly* to the creation and presentation of Canadian programming" (emphasis added). It does not distinguish between programming undertakings carried out on air and those delivered online.

While exemption orders may be an effective way to regulate foreign-owned internet broadcasters that cannot be licensed under the current Act, the Commission cannot continue to exempt these players from meaningful Canadian programming obligations, especially considering the twisted logic that is used to defend such exemptions.

At the very least, the CRTC should have a positive duty to demonstrate why unconditional exemptions support the normative values of Section 3. If an exemption is intended to resolve the fact that foreign-owned entities cannot be licensed, some type of equitable contribution should be a mandatory condition of exemption.

9.2 Should certain objectives be prioritized? If so, which ones? What should be added?

Under the current Act, the Commission has autonomy to weigh competing objectives as it deems fit. While this may occasionally result in decisions that give less than ideal weight to Canadian programming or cultural interests, it underscores the value of the Commission's independence and reaffirms its expertise as an independent administrative tribunal. Moreover, to the extent that the Government might choose to prioritize certain objectives, this can already be accomplished through the existing power of direction (Section 7).

We do, however, have one suggested addition to the objectives. Given its increasing importance, we believe that the objective of achieving an equitable contribution framework among all players in the system should be recognised in the Act through a small addition to Subsection 3(1)(e):

(e) each element of the Canadian broadcasting system shall contribute in an appropriate **and equitable** manner to the creation and presentation of Canadian programming [emphasis added]

In addition, please see our suggestion about the strengthening of Indigenous languages and programming, above.

9.3 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?

This strikes to the heart of how the Commission can achieve its objectives going forward.

In its Section 15 Report, the Commission rejects the current licensing-based approach, proffering to replace licences with "Service Agreements" individually tailored to each broadcaster's business model. The Commission justifies this by describing the current licensing approach "as a rigid system based on a set of prescribed classes of licence with standardized requirements...[resulting in] thousands of individual licensees and other undertakings [that] must each be managed and, in many cases, individually monitored and regulated."

It is difficult to understand how an expressly individualized approach will ease the managerial burden the Commission contends with. And the Commission makes no mention of the

principal barrier to licensing foreign players under the current Act: the Direction that only Canadian-owned and- controlled entities can be licensed.¹⁸

The Commission already has the power to create an equitable contribution framework. The Commission has the power to exempt certain broadcasters from licensing en masse. And it has the power to place conditions on those exemptions. Conditional exemption orders are nimbler, and they fall within the Commission's existing powers. The Commission can, therefore, immediately apply CPE conditions to broadcasters covered by the DMEQ, without new legislation. We strongly urge the Panel to call on the Commission to use this power immediately, even if only as an interim measure. The Commission must preserve the principles of the current Act while it remains the law of the land.

It is not clear to FRIENDS why Service Agreements are preferable to conditional exemption orders for these purposes. The former require a major legislative rewrite, while the latter can achieve the same objective and are already provided for in the current Act. Given that Service Agreements would give hugely powerful companies the ability to negotiate customized deals, an exemption order approach seems preferable to us. If Canada does go for Service Agreements, there should be clear rules favouring the use of a standard agreement that is modified as little as possible – only so much as is needed to accommodate certain business models for which the standard provisions are insufficient. These variances must be strictly technical, i.e. alternative methods for achieving standardized objectives that adjust to the business model in question. We further propose that any requested deviations be negotiated in public, with the opportunity for interested parties – including members of the public – to contribute. And they should be subject to regular reviews that include public consultation.

In any event, given the importance for freedom of expression and the 'innovation without permission' ethos of the internet, FRIENDS agrees that a licensing regime based on pre-approval is not appropriate for most internet-delivered media.

Except in cases where a large, well-capitalized player intends to introduce a major service all at once, equitable obligations for internet-delivered media need not commence on service launch. Instead, meaningful regulation could kick in once revenue or user base thresholds are reached. For example, Germany recently imposed content moderation obligations for social media platforms with at least 5 million users. Canada could pursue a similar approach.

10. Support for Canadian Content and Creative Industries

¹⁸ Pursuant to a 1997 Direction to the CRTC concerning the ineligibility of non-Canadians to hold a broadcast licence.

¹⁸ In section 2 on "Competition, Innovation, and Affordability"

10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production, and distribution of Canadian content?

As discussed above, FRIENDS fully endorses the Commission's recommendation to ensure appropriate and equitable contributions from all players, foreign or Canadian, conventional or digital. This approach would bring hundreds of millions of dollars into the system and ensure that companies such as Netflix financially support, present, and prominently position Canadian content that serves the public interest as defined in Section 3 of the current Act.

FRIENDS also agrees that contributions should be equitable, but not necessarily identical, as between services, and maximized. Among other things, this would allow the Commission to recognize and reflect the greater value played by Canadian (over foreign) media, in terms of employment opportunities, economic impact and support for Canadian programming.

Nevertheless, FRIENDS agrees with the Commission that certain benefits or incentives could accrue to such foreign players, including access to tax credits and advertising tax deductibility, if they make an equitable contribution within the system, in proportion to their Canadian competitors. That said, FRIENDS does not believe that access to such benefits should be a precondition that must be in place before foreign players are required to contribute. The contribution should be non-negotiable, while the degree to which foreign players may access the aforementioned benefits should be determined on a case-by-case basis.

There are two reasons for this approach.

First, there are valid policy reasons why the Commission should still prefer Canadian media. For example, CMF and local news funding should only support Canadian entities. It is desirable to create space for new Canadian entrants to innovate within the domestic market with products, services, and technological innovations that are currently unforeseeable. Any policy that encourages a monopoly or quasi-monopoly, especially a foreign monopoly, stifles domestic innovation. The consequences for Canada's cultural identity and cultural industries would be dramatic and irreparably harmful.

Second, an assessment of equity takes into account both the advantages and disadvantages that a foreign entity may have in operating in Canada. The disadvantages may include lack of access to certain benefits available to Canadian players. The advantages, on the other hand, may include the lack of need to invest in Canadian jobs and infrastructure, monopolistic or near monopolistic market position, subsidies from other countries that support content delivered in Canada, and exemption from Canadian content requirements that further exacerbate the disparate economies of scale which globally-oriented broadcasters by definition enjoy over domestically-focused broadcasters.

10.2 How can the CRTC be empowered to implement and regulate according to a modernized Broadcasting Act in order to protect, support, and promote our culture in both official languages?

In FRIENDS' view, support of Canadian culture in both official languages, and Indigenous languages, should remain the primary expectation and requirement of Canadian media as opposed to foreign players.

Contributions from foreign broadcasters should support Canadian culture, but it would be a mistake to expect that these contributions would obviate the need for a vibrant Canadian-owned media sector. At the very least, these equitable contributions would level the competitive playing field, giving Canadian companies that advance Canada's official languages policy a fair opportunity to compete on equal terms with foreign firms acting without concern for Canada's historically important bilingualism policy.

For example, contributions from foreign entertainment-based OTT players, such as Netflix and Amazon Prime, should be primarily directed to the licensing of independently produced Canadian programming. Priority should be given to original production presented by CBC or other public service broadcasters. An element of these contributions should also be directed to independent funds. The use of Canadian independent producers provides an important element in promoting diversity. Nevertheless, to the extent that such programming receives CMF funding, it should still require a first window of meaningful duration on a Canadian broadcaster, and hence support the system.

Players such as Google and Facebook should support local news, including contributions to finance public broadcasting in English, French, and Indigenous languages – especially local services wiped out by Google and Facebook's stranglehold on the Canadian advertising market. Programming provided by such platforms should also be held to the same standard as comparable Canadian companies which are legally responsible for the quality and lawfulness of content they disseminate. Additionally, democracy-eroding platforms like Facebook should be required to contribute to a democracy-enriching antidote: the CBC. CBC has the mandate and independence to discover and disseminate truthful non-fiction content. Such requirements would not replace, but rather supplement, other support measures.¹⁹

While, generally speaking, foreign players should continue to be allowed to provide content in the languages of their choice, the CRTC should have the right to impose minimum official language and Indigenous language obligations on larger foreign internet media players. Discoverability regulations would also be necessary, as would a requirement to ensure the

¹⁹ A 1% of revenue contribution from Google and Facebook would generate on the order of \$40-\$50 million per year. This is an order of magnitude less than the \$275 to \$440 million annually in incremental advertising that would accrue to Canadian media if advertising purchased on foreign internet-delivered media that act as broadcast and newspaper service were no longer deemed a deductible expense under the Canadian *Income Tax Act (ITA)*. <https://www.friends.ca/pub/15057>

availability of operating interfaces in both official languages and Indigenous languages. Platforms wishing to avoid the content creation requirements could conceivably pay an exemption fee instead, calculated as a percentage of Canadian revenues, the proceeds of which would flow to Canadian companies that advance Canadian official languages policy and promote national unity and Canadian identity. However, the discoverability and interface requirements should apply regardless.

10.3 How should legislative tools ensure the availability of Canadian content on the different types of platforms and devices that Canadians use to access content?

FRIENDS supports the notion of introducing some form of minimum exhibition or 'shelf space' requirement for OTT platforms, both foreign and Canadian.

In October 2018, the European Parliament adopted new rules for online players – a 30% European content quota for SVOD platform catalogues. We must also have strong discoverability rules, as in the EU.²⁰ FRIENDS would support a parallel requirement in Canada for Canadian content, including a proportional measure of content in French, as well as Indigenous languages.

In setting appropriate exhibition or shelf space levels, consideration should be given to:

- commitments a global OTT platform might make to global exhibition of Canadian content, in both official languages and Indigenous languages; and
- commitments an OTT platform might make to providing algorithms and interfaces that give priority to Canadian programming – in both official languages and Indigenous languages – or at least present Canadian content in due proportion to the minimum exhibition requirement.

A high shelf space requirement will not help Canadian programming if the requirement is simply filled with old library fare and/or the elimination of niche foreign fare. Thus, while it is difficult for the Commission to legislate algorithms and interfaces, it could accept detailed commitments in return for lower shelf space requirements. Any linear streaming services should have prime time Canadian content exhibition requirements, equivalent to those of conventional TV stations.

Furthermore, the Commission should be given the power to audit, without prior notice, the recommendation algorithms of digital platforms subject to these Canadian content regulations.

²⁰ The revised European Audio Visual Media Services Directive provides for "increased obligations to promote European works for on-demand services who need to have at least a 30% share of European content in their catalogue and to ensure the prominence of this content." See <https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd> Accessed 8 December 2018.

This power should be accompanied by the power to enforce penalties for noncompliance, up to and including the power to order ISPs not to carry specific noncompliant services.

11. Democracy, News and Citizenship

11.1 Are current legislative provisions sufficient to ensure the provision of trusted, accurate, and quality news and information?

Current legislative provisions are manifestly ill-equipped to ensure the provision of trusted, accurate, and quality news and information. This failure is not attributable to the Broadcasting Act.

The problem has many aspects:

1. Social media companies are in the attention business, and since posts that inspire indignation are shared far more widely than more temperate content,²¹ platforms have an overwhelming financial incentive to disseminate the most negative, sensational content they can find, including deliberately false, intentionally divisive content. Ultimately these companies care about what interests the public, not the public interest.
2. Social media companies and search engines display content which they believe will interest each of us individually. Platforms like Facebook push this content to users. Google uses a highly-suggestive autocomplete feature to push people towards certain content, while also showing different search results to different people. YouTube, a sister company to Google, does the same thing, and also uses a recommendation engine that promotes extreme content. The resulting individualization of reality relativizes truth and diminishes debate between proponents of contrary viewpoints – a vital component of a healthy democracy.
3. It's bad enough that these tech companies circulate falsehoods and extremist content with impunity. What's worse is that in doing so, they are siphoning advertising revenue away from legitimate, respectable Canadian publishers, diminishing the capacity of Canadian news sources to provide and disseminate quality news and information in support of the public interest. In other words, our existing regulatory regime does not just empower the sickness. It also suppresses the cure.

The problem is particularly acute for local news. Local news outlets are most vulnerable to revenue downturns due to their necessarily smaller potential revenue base. And it is beyond clear that digital publishers like Facebook and Google are displacing, but not replacing this

²¹ See the following study by researchers at Harvard's Shorenstein Centre on Media, Politics and Public Policy <https://shorensteincenter.org/transparency-social-media-wael-ghonim/>

vital local news coverage. The majority of Canadians who live outside the largest urban centres are most negatively affected by this phenomenon.

And when these platforms do publish news (and sell interested users to advertisers), they do not pay the creators of that content. It is unequivocally damaging, and irresponsible, to allow this parasitic business model to persist. Platforms surpassing a certain revenue or user-base threshold should be required to pay content creators for use of their content. This will provide crucial support to credible Canadian journalism outlets that play a vital role in our democracy.

11.2 Are there specific changes that should be made to legislation to ensure the continuing viability of local news?

The crisis of local news has already led to the shuttering of 224 local print publications since 2008.²² While broadcasting has not suffered such closures to date, they are coming, and the change may well arrive suddenly, with little warning and with great force. Stop-gap measures introduced by the CRTC in September 2017 in support of local TV news may have forestalled the day of reckoning, but have not prevented it.²³ Total annual contribution amounts from the CRTC's new BDU contribution regime will bring in less than the average annual reduction in local TV revenues for each of the last six years.²⁴

In its Section 15 Report, the CRTC finally acknowledged the obvious – the local TV sector is in a state of "decline". The Commission stated that "to remain viable in the future – particularly in an environment where audiences are fragmenting across platforms and subscription revenue is increasingly important to finance content – this model must find ways to monetize its programming across platforms, including new revenue sources."

FRIENDS estimates that more than half of local stations in small and medium sized markets will fade to black by 2022 in the absence of a concerted public policy action.²⁵ The effect of such a collapse will be devastating but also discriminatory, hitting Canadians living in small and medium centres particularly hard.

Radio is also not immune to revenue declines and potential news cuts and closures.²⁶

²² <http://localnewsresearchproject.ca/wp-content/uploads/2018/10/LocalNewsMapDataasofOctober12018.pdf>

²³ <http://www.crtc.gc.ca/eng/archive/2016/2016-224.htm>

²⁴ The CRTC estimated the value of its annual reallocation of BDU contributions to local news at \$85 million. Private local TV revenues in Canada have declined from a peak of \$2.144 billion in 2011 to \$1.608 billion in 2017, or an average of \$89 million a year for six years

²⁵ Based on a Nordicity/Miller report published by FRIENDS and Unifor in January 2016, before the CRTC moved to fund local TV from BDU contributions and required major corporate groups to keep TV stations open (Near Term Prospects for Local TV in Canada). FRIENDS estimates that the Commission's actions deferred closures from 2020 to 2022, when major TV group licenses are up for renewal. Evidence of the stop-gap nature of the CRTC's actions includes 2017 cuts by Bell to local newscasts. <http://mediaincanada.com/2017/03/31/bell-media-cuts-jobs-tweaks-local-sports-coverage/>

²⁶ Radio experienced four years of revenue declines from 2013 to 2017, totaling 6.5%.

Recognizing that new communications legislation will take time, the Commission has proposed two potential “interim measures” that could partially address some of the challenges facing local news. In particular, the Commission indicated that it could:

- **Examine ways to support television** news production through increased access to subscription revenue.
- **Re-examine the regulatory approach** to radio so that it contributes to the promotion and presentation of Canadian artists and music in the digital environment.

Such stop-gap measures are not sufficient. In particular, access to subscription revenues risks driving up the cost of BDU subscriptions at a time when cord-cutting is already a significant issue. Moreover, effective answers to the crisis of local news in Canada are of an urgency and quantum that go beyond what the Commission can do under the current Broadcasting Act.

In this regard, FRIENDS notes the November 21, 2018 Economic Statement, announcing the Government’s “intention to propose three new initiatives to support Canadian journalism”, including a new refundable tax credit to support news organizations:

To further support news journalism in Canada, the Government intends to introduce a new refundable tax credit for qualifying news organizations. This new measure will aim to support Canadian news organizations that produce a wide variety of news and information of interest to Canadians. The refundable credit will support labour costs associated with producing original news content and will generally be available to both non-profit and for-profit news organizations. An independent panel will be established from the news and journalism community to define eligibility for this tax credit, as well as provide advice on other measures. Once established, the effective date of the refundable tax credit will be set for January 1, 2019.

FRIENDS presumes that this credit will be available to private broadcasters, and is the only one of the three initiatives that in practice will be so.²⁷ We estimate that for local TV, the maximum benefit would be no more than \$40 million annually, or less than half of the value of the CRTC’s current “stop-gap” BDU contribution regime.²⁸ We therefore do not believe this initiative will stem the tide of anticipated local TV closures, or preserve local news in the timeframes governed by this legislative review.

²⁷ There is nothing in the Government’s announcement that suggests this tax credit will not be available to private broadcasters, but details on eligibility are still to be confirmed. The two other announced initiatives relate to online subscriptions (of utility to newspapers) and charitable tax credits for non-profit news media.

²⁸ Private broadcaster news spending is on the order of \$350 million a year (CRTC Statistical Summaries). Assuming as much as 80% of that would be towards labour, a 15% refundable labour tax credit would return just over \$40 million annually. Per note 24, supra, the estimated value of the BDU contribution regime is \$85 million annually.

A more beneficial action which the government could immediately take would be to amend the Income Tax Act (ITA) so that advertising placements that Canadians purchase from foreign internet-delivered media are no longer deemed deductible expenses. This simply extends the spirit of the current law to the internet. We have estimated that the resulting benefit of such a measure would be significantly higher – a redirection of \$275 to \$440 million annually in incremental advertising back to traditional media, as well as increased corporate taxes to federal and provincial coffers of over \$1.3 billion annually.²⁹

In the alternative, Government will need to be prepared to substantially increase the value of its tax credit, or find other means that provide the quantum of support necessary to make a material and sustainable difference.

Requiring platforms like Facebook to adhere to the same standards of quality and truthfulness as Canadian broadcasters would also reduce their unnatural, unjustified competitive advantage in the advertising market.

Imposing obligations on online services to financially support Canadian news, including ISP and platform contributions, could also form part of an appropriate local news support framework.

Finally, additional funding for CBC, particularly to provide local news, especially in markets where private broadcasters and newspapers are withdrawing (as further discussed below) should be a key component of local news support.

12. Cultural Diversity

12.1 How can the principle of cultural diversity be addressed in a modern legislative context?

Canada is one of the most ethnically-diverse countries in the world. According to a 2013 Pew Research Centre study, we are the only western country to break into the top 20 most diverse nations (out of over 180 studied countries studied).³⁰

The objectives of the Broadcasting Act speak to the importance of cultural diversity, including:

3(1)(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the

²⁹ *Close the Loophole! The Deductibility of Foreign Internet Advertising*, Peter Miller and David Keeble, February, 2018. <https://friends.ca/explore/article/close-the-loophole-the-deductibility-of-foreign-internet-advertising/>

³⁰ <http://www.pewresearch.org/fact-tank/2013/07/18/the-most-and-least-culturally-diverse-countries-in-the-world/>

linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society

(o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;

Thus, in practice, advancing the Canadian programming objectives of the Act is the best way the system can address the principle of cultural diversity.

When the Commission and the Government fail to enforce Canadian content requirements for internet broadcasters, they are undermining the rights of Canada's diverse communities in a troubling multitude of ways.

Since Canada is among the most diverse countries on Earth, a disproportionate amount of foreign content is, by definition, the product of less diverse societies where writers, producers, performers are less likely to reflect Canada's diversity.

Second, it is important that diverse content originate in Canada. A Canadian of Punjabi origin, to use but one example, is neither served by nor reflected in programs originating from the Punjabi regions of India or Pakistan. Likewise, such content is totally inaccessible to non-Punjabi Canadians, leaving them uninformed about the experience of their Canadian Punjabi colleagues, neighbours, and compatriots. Furthermore, imported Punjabi content crowds out local voices in the Punjabi community, who are broadcasting in Punjabi but also in English and French. In all cases, the failure to promote diverse *Canadian* content is effectively discriminatory, exclusionary, and detrimental to the greater goals of peaceful co-existence, inclusivity, and cross-cultural enrichment.

13. National Public Broadcaster

13.1 How should the mandate of the national public broadcaster be updated in light of the more open, global, and competitive communications environment?

The importance of the CBC's mandate, and the Corporation's success in meeting it, are valued by Canadians, with 80% believing that CBC plays an important role in strengthening Canadian culture and identity in a poll conducted for FRIENDS by Nanos Research.³¹

The current legislative mandate of the CBC/Radio-Canada gives the Corporation wide discretion to serve the Canadian public in a manner that the Board and Management believe appropriate, subject only to monetary considerations, and any constraints imposed by the CRTC.

³¹ <https://legacy.friends.ca/goodpolitics>

The mandate of CBC/Radio-Canada is set out in both the objectives of the Broadcasting Act (Section 3(1)(m)) and the objects and powers of the Corporation (Section 46(1)).

For example, Section 3(1)(m) provides that programming provided by the Corporation should, at a minimum:

- (i) be predominantly and distinctively Canadian;
- (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions;
- (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities;
- (vi) contribute to shared national consciousness and identity; and
- (viii) reflect the multicultural and multiracial nature of Canada;

Section 46(1) states that in furtherance of such objectives, and subject to conditions of licence and applicable regulation, the Corporation may, among other activities:

- (c) originate programs, secure programs from within or outside Canada by purchase, exchange or otherwise and make arrangements necessary for their transmission;
- (d) make contracts with any person, within or outside Canada, in connection with the production or presentation of programs originated or secured by the Corporation;
- (i) collect news relating to current events in any part of the world and establish and subscribe to news agencies; and
- (j) publish, distribute and preserve, whether for a consideration or otherwise, such audio-visual material, papers, periodicals and other literary matter as may seem conducive to the attainment of the objects of the Corporation;

In practice, this has, for example, allowed the Corporation to:

- pursue a “digital first” strategy over the last five years;
- emphasize and/or de-emphasize local coverage depending on the circumstances of individual markets;
- radically change programming on Radio 2 and ICI Musique, experiment with the format of The National on CBC TV, and launch sophisticated new streaming services like Tou.tv in French and, more recently, the new Gem service in English.

Indeed, recognizing that the Corporation must have a degree of independence in interpreting and fulfilling its mandate, the Commission has been relatively sparing in its regulation of the CBC, limiting itself to minimum Canadian programming expectations and other conditions proposed by the Corporation to ensure the distinctiveness of the public broadcaster.

Thus, for example, in the Corporation’s TV renewals of 2000, the Commission:

- **expected** the CBC to fulfill its commitment to a minimum of 40 hours per year of co-productions and exchanges between its English- and French-language television services and **encouraged** it to maximize this co-operation as a means of increasing cultural interchange between the two official language groups;
- **required** CBC to honour its commitments in regard to weekday supper-hour and late-night newscasts of one hour thirty minutes per day of regional/local news programming on English-language television stations in Halifax, Montreal, Toronto, Ottawa, Winnipeg, Regina, Edmonton, Calgary and Vancouver, plus lesser/regional commitments for other stations;
- **Accepted** a CBC commitment to broadcast a minimum average of 5.5 hours per week of Canadian drama in each year and encouraged “the CBC to continue to exceed this minimum and continue to give Canadian drama pride of place in its peak time schedule”³²; and
- prohibited the CBC by **condition of licence** from broadcasting in peak time the most popular non-Canadian films for a period of 10 years following their theatrical release as well as all recently released non-Canadian films.³³

More recently, in 2016 the CRTC denied licence amendments that would have extended advertising on Radio 2 and ICI Musique given the evidence that CBC had not, as promised, maintained its level of investment in radio, and hence the lack of evidence that advertising revenues had helped preserve the distinct nature and high quality of the services’ programming.

This suggests that there is very little need to update CBC’s legislated mandate. There is considerable risk that a rewrite would could constrain CBC’s broad mandate and necessary editorial flexibility.

13.2 Through what mechanisms can government enhance the independence and stability of CBC/Radio-Canada?

Ensuring the independence and stability of the CBC are the two most vital aspects of CBC governance.

FRIENDS polling found that 81% of Canadians think the CBC should remain independent from government, and 80% would increase CBC funding or maintain it at current levels.³⁴

³² In CBC’s 2013 renewals this became a Condition of Licence of 9 hours per week of PNI with sub requirements. <https://crtc.gc.ca/eng/archive/2013/2013-263.htm>, para 62.

³³ <https://crtc.gc.ca/eng/archive/2000/DB2000-1.HTM> The different wording used by the Commission has different legal effect. With a condition of license being the most binding, and an encouragement having no legal effect, but something that can prompt questions if clearly not adhered to.

³⁴ <https://legacy.friends.ca/goodpolitics>

Consistent, reliable and ample funding is the lynchpin of stability. The current government's decision to increase the parliamentary appropriation to CBC by \$150 million annually until 2021, has reversed much of the damage done by previous cuts, but still leaves the CBC with less funding than it had twenty-five years ago, accounting for inflation.³⁵

Canada continues to have one of the lowest levels of public funding for public broadcasting of comparable democratic countries.³⁶ Stable and predictable funding of CBC, at minimum adjusted to inflation, should be established for four to five-year periods.³⁷ In 2008, the House of Commons Standing Committee on Canadian Heritage recommended that CBC's parliamentary grant rise to \$40 per capita – equivalent to \$47 in 2018.

CBC's independence is governed by specific provisions in the Broadcasting Act, and includes both the principle of journalistic independence and the independence of CBC's Board and management from government influence.

Section 46(5) of the Broadcasting Act (introduced for the first time in the 1991 Act) sets out the CBC's mandate for journalistic independence:

(5) The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.

Another provision on independence is in respect of the financial provisions governing the Corporation under the Act, which at section 52(1) states:

52 (1) Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

These provisions clearly articulate CBC's journalistic independence, but they still cannot prevent incidents of self-censorship, carried out in response to explicit, implied, perceived, or even anticipated pressure from the Government of the day, which controls the purse strings.

Independence starts with non-partisan appointments.

The appointment, tenure, duties and disqualifications of directors of the CBC are set out in subsection 36(2) through section 39 of the *Broadcasting Act, 1991*.

Common to cultural agencies such as the National Film Board (NFB), Telefilm, the Canada Council for the Arts, National Museums and National Art Gallery as well as quasi-judicial bodies such as the CRTC and National Energy Board (NEB), the provisions in the *Broadcasting Act*

³⁵ <https://www.friends.ca/files/PDF/a-sustainable-cbc-minority-report-by-senator-art-eggleton-2.pdf>

³⁶ <https://www.friends.ca/files/PDF/nordicity-public-broadcaster-comparison-2016.pdf>

³⁷ The doctrine of parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation, including budgetary matters.

that govern Board appointments outline relatively broad criteria.³⁸ Other than disqualifying members for direct conflicts of interest, there is no required expertise or test for independence.

In 2017, the Government announced a new appointment process for CBC's Board of Directors "to ensure merit-based and independent appointments".³⁹ Central to the process is an Independent Advisory Committee⁴⁰ which conducts selection processes in order to recommend qualified candidates to the Minister of Canadian Heritage for these Governor-in-Council appointments. This same selection process was used for the position of CEO.⁴¹

While the new appointments process is an important step forward, to fully ensure merit-based and independent appointments, the Broadcasting Act should be amended to explicitly entrench the role of a qualified appointment committee, the qualifications of Board members, and the ability of the Board to hire and fire the President without the Government's permission.⁴²

To that end, and in particular, to avoid any possible repetition of past experience under the Harper Government, where patronage appointments dominated the CBC Board, FRIENDS recommends that the Broadcasting Act be amended to formally establish a new appointment process for the CBC Board and President, including but not limited to the following elements:

1. Director candidates should be required to possess experience in at least one of three general categories:
 - a. broadcasting, media and/or journalism;
 - b. financial or technical matters; and
 - c. cultural or creative industry experience, including music and film/TV production.

A minimum of two directors should possess each area of experience.

2. An appointments committee chosen from current or former Deputy Ministers, and Associate or Assistant Deputy Ministers of Canadian Heritage, Heads of Cultural agencies, and distinguished Canadians, such as recipients of the Order of Canada,

³⁸ A point also made by the Lincoln Committee in its report of June 2003, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, pp. 550 – 553,

<http://www.parl.gc.ca/content/hoc/Committee/372/HERI/Reports/RP1032284/herirp02/herirp02-e.pdf>

³⁹ <https://www.canada.ca/en/canadian-heritage/corporate/ministerial-council-appointments/advisory-committee-cbc-radio-canada/questions-answers.html>

⁴⁰ The Independent Advisory Committee members were named by the Minister of Canadian Heritage and selected from one or more of the following groups:

- prominent Canadians from the public and private fields, including those with experience in broadcasting;
- representatives of the cultural sector from across Canada, including Francophones from Quebec; and
- Indigenous and youth representatives.

⁴¹ <http://www.cbc.radio-canada.ca/en/media-centre/2017/12/19a/>

⁴² <https://legacy.friends.ca/pub/13997>

should be formed to vet candidates and provide the Minister with a short list of recommended qualified names. The CBC Appointments Committee should be explicitly tasked with recommending a Board comprised of a majority of non-partisan members.

3. In the event of a vacancy in the position of President, the following three-phase appointment process should be followed:
 1. Nominations would be first vetted by the CBC Appointments Committee that then provides a list of qualified candidates to both the GIC and the CBC Board;
 2. The Board provides a short list of a minimum of three eligible candidates, with recommendations to the Governor in Council;
 3. The Governor in Council selects a President from the short list, who is then appointed by the Board.
4. In furtherance of ensuring experienced directors, the conflict of interest provisions set out in section 38(1) should be amended to permit a minority of Board members to be engaged in broadcasting, production, or music, or have a pecuniary or proprietary interest therein, but to avoid any direct conflict by requiring disclosure of any such interests prior to appointment and recusal on any decisions that affect those interests.
5. Consideration should be given to providing specific requirements on partisan appointments, such as the following:
 - No more than 50% of Board members should have a partisan background.
 - For every partisan government member, there should be an equal number of members from other political parties.
6. CBC director appointments should remain 'during good behaviour' rather than 'at pleasure', and remain eligible for a five-year term, renewable at the option of the GIC.
7. Consideration should be given to reducing the size of the CBC Board of Directors from 12 to nine. Consideration should also be given as to whether section 36(5) of the Act (which allows an incumbent director to continue in office until a successor is appointed) should be rescinded.
8. The CBC Board should explicitly be made responsible for approving the goals, policies and long range plans of the CBC, as well as evaluating their implementation. The President should be made explicitly responsible for general management and supervision of staff, and to develop long-term strategies for recommendation to the Board.

9. The CBC's requirement for journalistic, creative and programming independence, set out in Section 46(5) and section 52(1) of the Broadcasting Act, and Section 68.1 of the Access to Information Act, should be made a direct obligation of directors.

13.3 How can CBC/Radio-Canada play a role as a leader among cultural and news organizations and in showcasing Canadian content, including local news?

CBC/Radio-Canada has the largest journalistic footprint in Canada, with a presence in every part of the country – some 50 locations – operating in English, French, and various Indigenous languages.

CBC Television is currently required by condition of licence to devote a minimum of 75% of the broadcast day and a minimum of 80% of prime time (7 p.m. to 11 p.m.) to the broadcast of Canadian programs.

While this is appropriately higher than private broadcasters, FRIENDS questions why CBC should air any foreign programming at all, except on exceptional occasions. In particular, we see no reason why CBC should air any foreign entertainment programming, such as US movies.

At nine hours per week, CBC Television's current commitments to PNI are now only slightly higher than those of Bell Media and Corus.⁴³ A new, higher level should be considered at the CBC's upcoming licence renewal.

Also, with additional funding, independent of political caprice, CBC could produce better, more adventurous Canadian programming that would further distinguish it from private broadcasters, to the benefit of CBC, the private broadcasters, and the Canadian public.

CBC Radio has appropriately high commitments to Canadian music, that are higher than those of private broadcasters.

CBC is a major player in news in Canada, and given the challenges facing local news, can play an even more essential, and strategic, role going forward.

CBC's current commitments to local news in Canada, by condition of licence, include the following:

- CBC English-language television provides at least 14 hours of local programming (including local news) in six metropolitan markets (Calgary, Edmonton, Montréal, Ottawa, Toronto and Vancouver)

⁴³ As at September 1, 2018, the minimum PNI levels for Bell Media and Corus were set at 7.5% and 8.5% of gross revenues, respectively. Broadcasting Decision CRTC 2018-335.

- CBC English-language television provides at least seven hours of local programming (including local news) in eight non-metropolitan markets (Regina, Winnipeg, Windsor, Fredericton, Halifax, Charlottetown, St. John's, Yellowknife)
- CBC French-language television provides at least five hours of local programming per week (including local news) in twelve markets (Vancouver, Edmonton, Regina, Winnipeg, Ottawa, Toronto, Trois-Rivières, Sherbrooke, Québec, Saguenay, Rimouski and Moncton)

CBC Television stations are also required, by condition of licence, to provide “programs originating from and reflecting all regions of Canada” and to ensure “national news and information programming shall reflect the country’s regions and official language minority communities, and promote respect and understanding between them.”

CBC Radio provides varying degrees of local programming, including local news. Other than a specific condition of licence related to CBEF Windsor, CBC Radio has no conditions of licence related to local programming.⁴⁴

CBC has also launched a number local digital services, including CBC Hamilton, launched in May, 2012⁴⁵ and “local” online breakouts in for markets such as Sudbury and Kitchener-Waterloo.⁴⁶ The amount of truly distinctive local news content on these platforms is unclear.

From this overview, one can draw the following conclusions:

- CBC is not operating in any of the smallest television markets currently served by private broadcasters, including small independents
- CBC English-language local news serves the same major metropolitan and many of the non-metropolitan markets also served by multiple private broadcasters, but also serves some non-metropolitan markets not served by private broadcasters (Fredericton, Charlottetown, Yellowknife⁴⁷)
- CBC French-language local news serves official language minority communities (OMLC) not served by French-language private broadcasters
- It is not clear how much local news CBC radio provides in the markets it serves
- CBC is not using digital platforms to materially extend local news to underserved or unserved markets
- Overall, CBC’s role in supporting local news in Canada is ill-defined and unclear

FRIENDS believes that CBC can deploy local news and programming resources more strategically. In particular, we believe that **CBC should be required to publish a strategic plan for local news that the CRTC would review during CBC’s upcoming licence renewal.**

⁴⁴ <https://crtc.gc.ca/eng/archive/2013/2013-263.htm#bm257>, Appendix 4, COL 15.

⁴⁵ <https://www.cbc.ca/news/canada/toronto/cbc-hamilton-digital-service-set-to-launch-thursday-1.1190451>

⁴⁶ <https://www.cbc.ca/news/local>

⁴⁷ Private broadcasters provide regional Atlantic coverage in Fredericton and Charlottetown. No private broadcasters serve Yellowknife.

Among the elements that plan should incorporate are the following:

- As a base, and to provide news diversity, CBC should continue to provide local news in at least the national capital and provincial capitals, including maintaining a news bureau in every province and territory
- Private-sector media have complained, and not without merit, that CBC's public funding puts them at a competitive disadvantage, and many cultural groups have complained that the Corporation has abandoned them. CBC should transform itself into an essential partner to other Canadian media. Wherever it operates, CBC should play a catalytic role in the media sector by making news content freely available for any person or media organization to use (with credit but without in-segment CBC branding), while also syndicating and amplifying other outlets' news coverage and analysis on its digital platforms (also with appropriate attribution).
- Priority for new service should go to markets where private broadcasters and/or newspapers have withdrawn
- CBC should use its multiplatform approach to reach Canadians with local news across all possible platforms, not to favour one over another
- Television, as the medium where many Canadians still get their news⁴⁸, should remain a central platform, where resources warrant.

Building on its mandate to "enlighten" Canadians, CBC/Radio-Canada should transform itself into a learning institution, collaborating with myriad educational institutions throughout the land.

In recent years, FRIENDS has noticed a growing tendency on CBC Radio One programs that are sold to some 160+ National Public Radio stations to include excessive amounts of American material, apparently in order to increase its appeal to United States audiences. The Panel might therefore consider some statutory guidance to ensure that editorial decisions offer priority to Canadian over foreign content in cases where there might otherwise be an incentive to substitute financial considerations for the imperative of "showcasing Canadian content".

Other than the foregoing comment, FRIENDS does not believe that any changes to CBC's legislative mandate are necessary to achieve these (13.3) objectives.

13.4 How can CBC/Radio-Canada promote Canadian culture and voices to the world, including on the Internet?

⁴⁸ As at 2017, 57% of Canadians said in a Reuters survey that they continue to use traditional media (TV, radio, print) as their main source of news (vs. 39% for online). <http://j-source.ca/article/traditional-media-still-most-trusted/>

FRIENDS is open to CBC playing a more global role, though Canada must remain its priority. In any event, we do not believe that legislative change is warranted in this respect, aside from the comment referencing Radio One, above. The terms of reference for the Review panel speak of Canada's cultural industries in excessively economic terms, while undervaluing their cultural importance. The emphasis on the need to increase cultural exports reflects a misguided understanding of why cultural industries are important to Canadian life.

13.5 How can CBC/Radio-Canada contribute to reconciliation with Indigenous Peoples and the telling of Indigenous stories by Indigenous Peoples?

The Truth and Reconciliation Commission made one general and three specific sub-recommendations concerning CBC/Radio-Canada's contribution to reconciliation:

84. We call upon the federal government to restore and increase funding to the CBC/Radio-Canada, to enable Canada's national public broadcaster to support reconciliation, and be properly reflective of the diverse cultures, languages, and perspectives of Aboriginal peoples, including, but not limited to:

- i. Increasing Aboriginal programming, including Aboriginal-language speakers.
- ii. Increasing equitable access for Aboriginal peoples to jobs, leadership positions, and professional development opportunities within the organization.
- iii. Continuing to provide dedicated news coverage and online public information resources on issues of concern to Aboriginal peoples and all Canadians, including the history and legacy of residential schools and the reconciliation process.

FRIENDS supports these recommendations.

In furtherance of these recommendations, CBC should publish an annual report on its contributions to reconciliation.⁴⁹ We also encourage CBC to work collaboratively with Indigenous broadcasters like APTN⁵⁰, as well as the nascent Indigenous Screen Office, to share resources, as appropriate, and to ensure that Indigenous Canadians have access to as much quality programming as possible.

Not to be underestimated, and consistent with our response to Q 12.1 above, is the important role that CBC/Radio-Canada can play in reconciliation with Indigenous Peoples in journalistic coverage that holds government and other parties to account for promises made with respect to the reconciliation process.

13.6 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official language minority communities?

⁴⁹ CBC currently files annual reports on PNI and other matters with the Commission pursuant to conditions of licence.

⁵⁰ Note recommendation 85 from the Truth and Reconciliation Commission's Calls to Action.

The CRTC has made local reflection and reflection of underrepresented groups – and OLMCs in particular – a central element of the objectives set out for community channels. And the Commission recently required licensed BDUs to establish citizen advisory committees for community channels operating in markets with a population of over one million people.⁵¹

In the CBC’s 2013 licence renewals, the Commission determined that “to maximize the number of future programming projects reflecting the English OLMCs in Quebec, it is appropriate to require [by condition of licence] the CBC to devote at least 10% of its annual programming development expenditures averaged over the licence term to English-language programming from independent production companies in Quebec”.

The CRTC also imposed a general condition of licence on both CBC English- and French-language television to ensure that their national news and information programming reflects the country’s regions and OLMCs and promotes respect and understanding between them.

As in the case of local news, CBC’s role in supporting and protecting the vitality of OLMCs should take into account, and not merely replicate, efforts already being made by other players in the broadcasting system.

In any event, given the CRTC’s policies in this area, FRIENDS believes that expectations or requirements on CBC in respect of service in OLMCs does not require statutory change, and is best left to the Corporation and the licence renewal process.

14. Governance and Effective Administration

14.1 Does the Broadcasting Act strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

The CRTC’s independence is vital to the success of the broadcasting system. It must be maintained in any new legislation.

The Broadcasting Act includes government powers of direction⁵² and the power to hold a hearing and/or require a report⁵³, as well as the right to “appeal” decisions to Cabinet.⁵⁴ It is also implicitly understood that the CRTC will pay attention to government policy.

⁵¹ <https://crtc.gc.ca/eng/archive/2016/2016-224.htm>

⁵² Sections 7, 8, 26 & 27

⁵³ Section 15

⁵⁴ Section 28.

Regarding all but the limited area of specific directions (such as on channel reservations or as a consequence of trade agreements), the CRTC retains wide latitude to interpret or even reject government views, thus ensuring its independence.

FRIENDS has no difficulty with this dynamic. So long as the Chair and Commissioners are prepared to assert their independence – as they often have – Canadians are well-served.

In fact, the worst thing that could happen is for politicians to gain direct control over broadcasting regulation – a clear threat to Canadian democracy.

14.2 What is the appropriate level of government oversight of CRTC broadcasting licensing and policy decisions?

As noted in response to Q. 14.1 we believe that the current Act generally strikes the right balance.

14.3 How can a modernized Broadcasting Act improve the functioning and efficiency of the CRTC and the regulatory framework?

We are not aware of any impediments to the CRTC improving its functioning and efficiency and, hence, that of the regulatory framework.

14.4 Are there tools that the CRTC does not have in the Broadcasting Act that it should?

By “tools” we assume this question refers to specific regulatory mechanisms or instruments used by the CRTC to exercise its powers within its legislated mandate.

We are aware of no fundamental omissions in the Commission’s Broadcasting Act toolkit. However, the following would potentially provide the Commission with greater flexibility and discretion in the use of its existing tools:

1. Amending the Commission’s exemption order power to provide more flexibility in its use (e.g. when warranted, on specific undertakings rather than just a class of undertaking);
2. Specific/broader powers of data collection. The Commission’s current specific data collection powers only apply only to licensees. Expanding these powers to specifically apply to exempt undertakings may help buttress the Commission’s resolve in seeking data from online providers like Netflix and Google;
3. AMPs or Administrative Monetary Penalties. These may be a more practical remedy for infringement than current summary conviction offences, the use of which could

be a higher priority if more and more activity is through unlicensed (exempt) entities.⁵⁵

14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content?

See Q. 10.3

⁵⁵ For the most part, licensees tend to comply with obligations, as failure to do so risks a “show cause” hearing, a shorter licence term, even licence revocation. That nature of sanction does not exist with exempt services.