



January 11, 2019

Filed Electronically

The Broadcasting and Telecommunications Legislative Review Panel
c/o Innovation, Science and Economic Development Canada
235 Queen Street, 1st Floor
Ottawa, Ontario K1A 0H5

Re: WGC Submission to The Broadcasting and Telecommunications Legislative Review Panel in the matter of the Review of the Canadian Communications Legislative Framework

1. The Writers Guild of Canada (WGC) is the national association representing more than 2,200 professional screenwriters working in English-language film, television, radio, and digital media production in Canada.
2. The WGC is pleased to provide these comments to The Broadcasting and Telecommunications Legislative Review Panel (the Panel) regarding the Review of the Canadian Communications Legislative Framework (the Review), pursuant to “Responding to the New Environment: A Call for Comments” dated September 24, 2018. We would like to take this opportunity to thank the Panel for its important work in undertaking this important Review of the *Broadcasting Act*, the *Telecommunications Act*, and related legislation.
3. The WGC’s comments relate primarily to English-language Canadian television production and distribution. The French-language Canadian market operates under different conditions and may have different requirements than the English-language market. Further, our members work primarily in the genres of dramatic television series (including comedy), children’s television and animation, feature films, movies of the week, and documentaries. These genres—serial drama and comedy in particular—are among the most popular television genres, and are highly culturally relevant (and economically important) as a result. As such, our comments relate primarily to this type of content, and with respect to *domestic* Canadian production, as opposed to foreign service production.¹

¹ Foreign service production is film and television production for which Canadians provide technical “production services”, and may provide some creative services in “craft” areas, but which are creatively driven by non-Canadians from outside of Canada. Commonly, such productions are shot in Canada, using Canadian crews and service companies, and which may have Canadians in roles such as production design, visual effects, and/or post-production, but which are creatively driven from Hollywood, having been written and developed there. They are Hollywood productions that are (partly) made in Canada.

The Scope and Spirit of the Review

4. This Review is part of a process that has been ongoing for the past two and a half years. On September 13, 2016, former Minister of Canadian Heritage, Mélanie Joly, launched a consultation on Canadian Content in a Digital World.² This consultation followed a pre-consultation questionnaire that was completed by close to 10,000 Canadians, meetings between Minister Joly and creators over the course of that summer, and advice from a multidisciplinary Expert Advisory Group announced in June of that year. The WGC provided its written comments to the Canadian Content in a Digital World consultation on November 25, 2016.³ The result of this consultation was “Creative Canada: A Vision for Canada’s Creative Industries in the Digital Age” (Creative Canada), announced on September 28, 2017.⁴ At the same time, the Government announced it was using its power under section 15 of the *Broadcasting Act* to ask the Canadian Radio-television and Telecommunications Commission (CRTC) to report to the Government on future models for the distribution of Canadian content and the extent to which these models will ensure a vibrant domestic market capable of supporting the continued creation, production and distribution of Canadian programming. The CRTC, in turn, launched its own consultation on October 12, 2017, which it carried out in two phases.⁵ The WGC commented in both the first⁶ and second⁷ phases of this consultation. Ultimately, the CRTC released its report, entitled “Harnessing Change: The Future of Programming Distribution in Canada” (Harnessing Change), on May 31, 2018.⁸ On June 5, 2018, the federal Government launched the Review of Telecommunications and Broadcasting Acts, and announced the work of the Panel.
5. The WGC understands that, given the results of, and comments on, this process to date,⁹ the discussion has now moved beyond *whether* we should review and amend the *Broadcasting Act*, *Telecommunications Act*, and other related legislation, in order to, among other things, support the production and distribution of Canadian audiovisual content, but rather *how* we should do so. In the Creative Canada Policy Framework,¹⁰ the Government said:

² “Consultations Launched on Canadian Content in a Digital World,” *Government of Canada*, September 13, 2016 <https://www.canada.ca/en/canadian-heritage/news/2016/09/consultations-launched-canadian-content-digital-world.html>.

³ WGC submission to Canadian Content in a Digital World Consultations, November 25, 2016 <https://www.wgc.ca/sites/default/files/2019-01/WGCSCanCon.pdf>.

⁴ “Minister Joly Announces Creative Canada: A Vision for Canada’s Creative Industries in the Digital Age,” *Government of Canada*, September 28, 2017 https://www.canada.ca/en/canadian-heritage/news/2017/09/minister_joly_announcescreativecanadaavisionforcanadascreativein.html.

⁵ Broadcasting Notice of Consultation CRTC 2017-359: *Call for comments on the Governor in Council’s request for a report on future programming distribution models* <https://crtc.gc.ca/eng/archive/2017/2017-359.htm>.

⁶ WGC submission to Broadcasting Notice CRTC 2017-359, December 1, 2017 <https://www.wgc.ca/sites/default/files/2019-01/WGCSBNC17.pdf>.

⁷ WGC submission to Broadcasting Notice CRTC 2017-359—Phase 2 Comments, February 13, 2018 <https://www.wgc.ca/sites/default/files/2019-01/WGCSFuture.pdf>.

⁸ *Harnessing Change: The Future of Programming Distribution in Canada*, CRTC, May 31, 2018 <https://crtc.gc.ca/eng/publications/s15/>.

⁹ “Responding to the New Environment: A Call for Comments,” *Government of Canada*, September 24, 2018 <https://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html>

¹⁰ “Creative Canada Policy Framework”, *Government of Canada*, September 28, 2017 <https://www.canada.ca/content/dam/pch/documents/campaigns/creative-canada/CCCadreFramework-EN.pdf>.

We know that the economies of the future will rely on creativity and innovation to create jobs and foster growth. To be competitive in the world, we must invest now to create the conditions for success, to develop and keep our talent in both French and English here at home, and to make sure we have a robust domestic market for content on which our international success will depend.¹¹

6. The Government further stated:

Creative Canada affirms the core responsibilities of the Government to protect and promote Canadian culture and identity in a digital environment. It renews our commitment to the values that must underpin our approach: our commitment to linguistic duality, cultural diversity and a renewed relationship with Indigenous Peoples. As we move forward to implement Creative Canada, we will do so in a manner that is consistent with these values.¹²

7. Harnessing Change stressed that, “New and innovative approaches are required to support content made by Canadians and ensure they can seize the many opportunities made possible by the digital era.”¹³ And the Terms of Reference¹⁴ stated that this Review is “intended to examine the existing legislative framework and tools in the context of the digital age and what changes may be needed to support the Government of Canada” in meeting objectives which include content creation in the digital age, cultural diversity, and how to strengthen the future of Canadian media and content creation.
8. As such, the WGC understands that it is not necessary to discuss in detail whether or why review and amendment of the relevant legislation is needed to support these objectives, but rather how to do so. That said, the WGC wishes to contextualize its proposals, and as such will briefly summarize its views on the necessity and rationales for such amendments.
9. The WGC also understands that the Panel is seeking comments that don’t simply respond to the challenges of today, but contemplate what the communications environment might be like in 20 years or more. We understand that the Panel also hopes to see a variety of options or proposals, rather than a single prescriptive approach, and would like to understand the principles upon which they might be based. Moreover, while the Panel will ultimately make recommendations with respect to legislation, and such legislation may focus on broad policy objectives and/or intended outcomes, the Panel is nevertheless interested in understanding how those objectives or outcomes might ultimately express themselves in more specific regulation, whether or not such regulation would be present in the legislation itself. The WGC’s comments are therefore provided with these considerations.

¹¹ Ibid., pg. 5.

¹² Ibid., pg. 6.

¹³ “New approaches are needed to maximize opportunities of the digital era, says CRTC,” *Government of Canada*, May 31, 2018 <https://www.canada.ca/en/radio-television-telecommunications/news/2018/05/new-approaches-are-needed-to-maximize-opportunities-of-the-digital-era-says-crtc.html>.

¹⁴ Terms of reference, Broadcasting and Telecommunications Legislative Review, <https://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>.

Why the Review is Necessary

10. The WGC made detailed comments in response to the 2016 Canadian Content in a Digital World consultation¹⁵ and, as perhaps the most comprehensive statement of our views in this process, we would like to briefly summarize our main points, with reference primarily to those comments.
11. English-Canada is linguistically, geographically, and culturally proximate to the United States, which makes American content more directly competitive with our domestic content than in virtually any other country.¹⁶ The English-Canadian population—and hence the English-Canadian market—is a fraction of the size of the U.S. population, at 23-28 million people compared to 325 million, respectively, which in turn is a key determinant in recovering the high costs of things like TV drama.¹⁷ The value of the U.S. TV market, as measured by revenues, is 2.5 times greater still, and the U.S. is home to the largest and most successful English-language content industry in the world.¹⁸ The cost of producing high-quality, professional content is incredibly high, and is getting higher.¹⁹ These factors combine to make the production of such content extremely risky, since nobody knows for sure what will be successful and in every country, the U.S. included, most TV shows fail.²⁰ This has historically meant that there is an economic disincentive for English-Canadian broadcasters to commission higher-cost Canadian television programming, such as drama, even when that programming is popular with Canadians.²¹ And while Canada’s proximity to, and shared language with, the U.S. challenges our domestic production sector, it also makes it easier for Canadian talent to leave Canada for Hollywood, and they often do.²² Complicating all of this is, to one degree or another, a Canadian inferiority complex or “cultural cringe” factor, which Canadian creators work to overcome both in domestic audiences as well as the entrenched assumptions and biases of Canadian content commissioners,²³ which, in turn, contributes to a culture of risk-aversion amongst Canadian broadcasters.²⁴
12. Collectively, these challenges—which neither the Internet nor digital technologies themselves resolve but, on the contrary, tend to exacerbate²⁵—have historically been met with various government policies, often referred to as the “cultural policy toolkit”. The cultural policy toolkit includes direct government support through measures such as tax credits, funding for the Canada Media Fund (CMF), and the Parliamentary appropriation for the Canadian Broadcasting Corporation (CBC). Crucially, the toolkit also includes the regulation of private broadcasters, pursuant to the *Broadcasting Act*, to support the production and distribution of Canadian programming. This component of the toolkit supports over \$2 billion in financing to English-Canadian domestic production annually, with

¹⁵ WGC submission to Canadian Content in a Digital World Consultations, November 25, 2016
<https://www.wgc.ca/sites/default/files/2019-01/WGCSCanCon.pdf>.

¹⁶ *Ibid.*, paras. 9 and 16.

¹⁷ *Ibid.*, para. 10.

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*, para. 12.

²⁰ *Ibid.*, para. 13.

²¹ *Ibid.*, para. 14.

²² *Ibid.*, para. 15.

²³ *Ibid.*, para. 17-19.

²⁴ *Ibid.*, para. 20.

²⁵ *Ibid.*, paras. 22-25.

approximately \$500 million of that being critically reliant upon broadcast regulation.²⁶ This is what is effectively supported by the *Broadcasting Act* today, and as viewing migrates from traditional, regulated broadcasting platforms to Internet-based, currently unregulated platforms, this is what is fundamentally at risk.

13. It is worth putting Canada's level of public support for domestic production in international context. In 2016 the WGC compared the amount of government support for English-Canadian²⁷ production with that provided to domestic production in the United Kingdom, Denmark, and the United States, both in absolute dollar amounts and per-capita terms.²⁸ We calculated that the English-Canadian sector received \$1.78 billion in direct government support and regulated contributions from broadcasting distribution undertakings (BDUs) combined. This compared with \$7.3 billion in comparable support from the U.K., \$945.7 million from Denmark, and \$3.28 billion from the U.S. In dollar terms, the U.K. provided four times more in comparable public support than English-Canada, and the "free market-based" U.S. spent nearly double, mostly in the form of state-level tax credits. In per-capita terms, Denmark, with a population of only 5.6 million, provided support of \$169 per person, compared with \$71 per person for English-Canada, thereby more than doubling our supports.²⁹ The WGC is grateful for the public support our sector receives in Canada, but the reality is clear: other countries are investing significantly more in their domestic sectors than we are.
14. All of this matters because of the incredibly important economic and cultural contributions the domestic television production sector makes to Canada. The volume of domestic television production (measured as the total of all budgets) reached \$2.99 billion,³⁰ and the domestic industry generated 61,200 direct and indirect full-time equivalent (FTE) jobs in 2016-2017.³¹ These numbers represent sought-after, creative, knowledge-based jobs, creating intellectual property in a 21st-century economy, and which have knock-on effects elsewhere.³² The social benefits of culture are also well understood. "A strong cultural sector contributes to the vitality of our communities. By sharing our stories with one another and engaging in dialogue, we build an inclusive and open society where citizens can freely express themselves."³³ "A Canada that does not make space for its own storytellers and programs is a country that reflects issues or attitudes that are not in step with the people."³⁴
15. The WGC believes that the CRTC confirmed many of these same observations in its Harnessing Change report, as it documented the disruption that threatens the effectiveness of regulation as a cultural

²⁶ Ibid., paras. 42-47, 51-56. Note that the discrepancy described at footnote 82 of the WGC's 2016 submission appears to have been ultimately resolved in favour of the higher number.

²⁷ We separated English and French Canada because they are separate linguistic/cultural markets that generally entail separate and independent creation of distinct programming for two distinct audiences. You cannot effectively serve both markets with identical programming, and funding comparisons must reflect this fact.

²⁸ Ibid., paras. 32-50, Appendices A-C.

²⁹ All figures in Canadian dollars.

³⁰ Profile 2017, pg. 15, <https://cmpa.ca/profile/> Exhibit 1-2

³¹ Profile 2017, pg. 23, <https://cmpa.ca/profile/> Exhibit 2-1

³² Also see: Nordicity. *The Economic Contribution of the Film and Television Sector in Canada*. July 2013 <http://www.nordicity.com/media/2013724d9fjbufnd.pdf>.

³³ Canadian Heritage. *Canadian Content in a Digital World: Focusing the Conversation*, September 2016 <http://www.canadiancontentconsultations.ca/Consultation-Paper>, pg. 10.

³⁴ McGrath, Denis. "COMMENTARY: When your Moral Compass doesn't point True North." *Cartt* July 13, 2016 <https://cartt.ca/article/commentary-when-your-moral-compass-doesnt-point-true-north>.

policy tool. Harnessing Change points out that while traditional television remains an important component of the media ecosystem,³⁵ Canadians are largely shifting their viewing habits to online digital platforms,³⁶ which in turn is driving the consumption of broadband Internet.³⁷ The Internet decouples content production and content distribution, which has benefitted the Internet access business, but largely at the expense of the content business.³⁸ Advertising revenue is flowing more to companies investing in platforms and data—which tend to be foreign companies—and less to media companies investing in content.³⁹ As subscription video becomes increasingly more important,⁴⁰ the pure-play online competitors best positioned to take advantage of this trend—again, largely foreign—harness global reach that legacy services cannot replicate domestically or even through international partnerships.⁴¹ Meanwhile, the economics of long-form video production still favour large markets over smaller ones like Canada, even in the digital era.⁴² Foreign content still has value to Canadian broadcasters, but there are signs it is weakening in the English-language market,⁴³ which has the consequence, among other things, of weakening the revenues of those broadcasters, upon which crucial regulatory supports of Canadian content, such as “Canadian programming expenditure” (CPE) rules, are based. Indeed, this change alone fundamentally threatens the basic model of regulatory support for Canadian content in private broadcasting. Yet this comes as federal spending on culture and broadcasting, as a share of the economy, falls to half what it was a generation ago.⁴⁴ Meanwhile, the CRTC recognizes that public funding is an important component of Canada's media economy,⁴⁵ and that public policy is necessary to sustain the current level of domestic production, because the market alone will not.⁴⁶ Online providers may indeed be contributing to the audio and video market, but in ways that are unconventional and difficult to verify.⁴⁷ Importantly, online video services are demonstrating strong growth but are not yet profitable, with Netflix, for example, funding nearly all of its content production through debt.⁴⁸ This in turn raises significant questions about future business practices, including consumer cost, of these services. Meanwhile, BDUs are characterized as “mature”, with revenues, and their corresponding contributions to the CMF, facing stagnation or decline,⁴⁹ while conventional TV is especially challenged due to declining audiences and lower advertising revenues.⁵⁰

³⁵ Harnessing Change, Market Insight 12.

³⁶ Harnessing Change, Market Insight 1.

³⁷ Harnessing Change, Market Insight 3.

³⁸ Harnessing Change, Market Insight 7.

³⁹ Harnessing Change, Market Insight 8.

⁴⁰ Harnessing Change, Market Insight 9.

⁴¹ Harnessing Change, Market Insight 13.

⁴² Harnessing Change, Market Insight 18.

⁴³ Harnessing Change, Market Insight 19.

⁴⁴ Harnessing Change, Figure 31.

⁴⁵ Harnessing Change, Market Insight 11.

⁴⁶ Harnessing Change, Market Insight 20.

⁴⁷ Harnessing Change, Market Insight 23.

⁴⁸ Harnessing Change, Online Video: Financial.

⁴⁹ Harnessing Change, Cable, Satellite and Fibre TV (BDU) and Discretionary Programming.

⁵⁰ Harnessing Change, Conventional Television.

16. As a result of all this, Harnessing Change identifies opportunities and risks, the latter of which include loss of Canadian content,⁵¹ declining supports for Canadian video content,⁵² and the disappearance of a distinct Canadian rights market.⁵³ Importantly, the CRTC does *not* recommend the status quo in the face of these changes, nor does it recommend deregulation of the sector. Rather, Harnessing Change supports the development of “new adaptable and innovative approaches that engage new players,” which include a restructured funding strategy that contemplates contributions of Internet service providers (ISPs) and binding contribution requirements from online video services, both foreign and domestic.⁵⁴ CRTC Chairperson Ian Scott said:

Today’s reality is that more than just traditional players benefit from the system. New actors draw significant revenues and should also contribute to the system. We are not suggesting they make identical contributions to traditional players, but they should certainly participate in an equitable way. After all, there are social and cultural responsibilities that come with operating in Canada.⁵⁵

17. The WGC agrees.

International Developments

18. As demonstrated above, Canada is not alone in employing a cultural policy toolkit to support its domestic content production and distribution sector. Canada is also not alone in facing the disruption of that toolkit due to digital technologies and the Internet. On the contrary, a number of jurisdictions are moving faster than Canada to update their cultural policies, and in ways similar to what the WGC proposes.
19. In October 2018, the European Parliament approved a revised Audiovisual Media Services Directive (AVMSD) to include both traditional broadcasters and online video-on-demand (VOD) services (like Netflix) and video-sharing platforms (like YouTube).⁵⁶ Under the AVMSD, obligations will include the requirement that video-on-demand services need to ensure at least 30% share of European content in their catalogues and should give a good visibility (prominence) to European content in their offers. Further, Member States will be able to impose financial contributions (direct investments or levies payable to a fund) upon media service providers, including those established in a different Member State but that are targeting their national audiences. In France and Germany this already amounts to 2% of annual revenues derived from their respective markets.⁵⁷

⁵¹ Harnessing Change, Risk 1.

⁵² Harnessing Change, Risk 2.

⁵³ Harnessing Change, Risk 5.

⁵⁴ Harnessing Change, Conclusions and Potential Options.

⁵⁵ Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications, November 1, 2018 <https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html>.

⁵⁶ “Questions and Answers”, Digital Single Market: updated audiovisual rules [updated on 02/10/2018], *European Commission*, June 7, 2018 http://europa.eu/rapid/press-release_MEMO-18-4093_en.htm.

⁵⁷ “Overview of Netflix (film) taxes in Europe and the Americas,” *Cullen International*, May 31, 2017 <https://www.cullen-international.com/news/2017/05/Overview-of-Netflix-film--taxes-in-Europe-and-the-Americas.html>.

20. And Europe is not alone. Brazil collects a tax from Netflix-type services to fund the national production of audiovisual content.⁵⁸ Meanwhile, in the U.S., state and local governments seek to impose taxes on online streaming services, and in Australia, celebrities like actress Cate Blanchett and filmmaker Peter Weir appeal to their own governments to extend national TV quotas to online players.⁵⁹ In the U.K., the head of the BBC predicts a £500 million shortfall to the public broadcaster due to the growth of online video by 2026.⁶⁰

Principles and Proposals for Legislative Amendments

21. The following are the WGC's comments on principles and proposals for legislative amendments to the statutes under review by the Panel. The WGC has generally chosen not to recommend extensive, specific legislative language in these respects, but instead to speak primarily to broader principles, objectives, and desired outcomes, which we hope will better inform the Panel's considerations and ultimate recommendations.

Retain current structure of broad policy direction and powers in the Act(s), regulation-making by the CRTC

22. Currently, the *Broadcasting Act* and the *Telecommunications Act* set out the broad policy objectives of the legislation,⁶¹ and then assign the task of implementing those objectives to a regulatory body, which is the CRTC. For example, in broadcasting, the *Broadcasting Act* states that, among other things, "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming".⁶² The CRTC, in turn, has created the concept of "Canadian programming expenditures" (CPE) and applied a minimum CPE spending requirement to large English-language broadcasting groups of 30% of gross broadcasting revenues.⁶³ In this way, a broad policy objective has been translated into a specific regulatory requirement as determined, defined, and enforced by the CRTC.

23. The WGC believes that this general approach should continue. While there is room for debate on precisely how this is done,⁶⁴ we believe it remains appropriate for legislation to set policy objectives which the CRTC in turn applies at a greater level of specificity. There are several reasons for this. One, the legislative process generally takes much longer to complete than a regulatory process—i.e. a matter of years for the former compared to often less than a year for the latter. Two, the CRTC is an

⁵⁸ Ibid.

⁵⁹ Fiona Williams, "Cate Blanchett, Peter Weir back appeal to protect Australian screen industry," *Screen Daily*, March 27, 2018 <https://www.screendaily.com/news/cate-blanchett-peter-weir-back-appeal-to-protect-australian-screen-industry/5127826.article>.

⁶⁰ Tony Hall, Roscoe Lecture, November 2, 2017 <https://www.bbc.co.uk/mediacentre/speeches/2017/tony-hall-roscoe>.

⁶¹ E.g. *Broadcasting Act*, s. 3(1), "Broadcasting Policy for Canada"; *Telecommunications Act*, s. 7, "Canadian Telecommunications Policy".

⁶² S. 3(1)(e)

⁶³ E.g. Broadcasting Decision CRTC 2017-148, *Renewal of licences for the television services of large English-language ownership groups – Introductory decision*.

⁶⁴ E.g. Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications, November 1, 2018 <https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html>.

expert body⁶⁵ that should have greater and more detailed knowledge and expertise on its subject matter than the legislature can be expected to have. Three, the traditional rationale of separating the regulation of broadcasting/content from the potential for political interference remains valid. This remains appropriate both with respect to the potential for influence of content for the purposes of political gain, but also for the benefit of the stability of the Canadian content sector. One of the challenges faced by the CBC over past decades was the tendency for its funding to become a political issue every one or two election cycles, with its budget often being cut to help meet short-term financial/political goals. A number of the rest of the supports for the sector have thankfully been spared that budgetary seesaw, and it would benefit the sector for that to continue.

24. The WGC's other comments in this paper presume that this "separation of powers" between the legislature and the CRTC would continue under future communications legislation.

Fundamental objectives remain relevant and appropriate

25. Subject to our further comments that follow, the WGC believes that the objectives of the current *Broadcasting Act* generally remain relevant and appropriate, both now and into the foreseeable future. Section 3(1) of the *Broadcasting Act* lays out a set of social, cultural, and economic objectives in the "Broadcasting Policy for Canada". These objectives include the maintenance and enhancement of national identity and cultural sovereignty;⁶⁶ the recognition of the bilingual⁶⁷ and multicultural⁶⁸ nature of Canadian society; the importance of Canadian expression that reflects Canadian attitudes, opinions, ideas, values, and artistic creativity;⁶⁹ the value of the economic fabric of Canada and the employment opportunities arising out of the broadcasting system;⁷⁰ and the essential need for displaying Canadian talent and Canadian points of view,⁷¹ while making maximum use of Canadian creative and other resources in the creation and presentation of programming.⁷²
26. Objectives such as these remain as pertinent as ever. There is nothing about digital technologies or the Internet that eliminates or renders irrelevant our Canadian sovereignty, our national identity (or identities), the importance to our economy of the jobs created by the sector, or the simple fact that we are a culture and a society that deserves a place for our own voices just as much as any other. If anything, the tendency for digital technologies to erode boundaries and disrupt systems makes it more important, not less, that Canadians nurture and maintain everything that is best about us, from our liberal-democratic traditions to our openness and inclusiveness to our unique place(s) in the world.
27. As such, the WGC's comments that follow have as their ultimate goal the refinement of these essential objectives and their application to the new environment engendered by digital technologies and the Internet, with an eye to embracing technological change while ensuring that it inures to the benefit of Canada and Canadians.

⁶⁵ E.g. *Canadian Broadcasting Corporation v. Metromedia Cmr Montreal Inc.*, 1999 CanLII 8947 (FCA).

⁶⁶ S. 3(1)(b)

⁶⁷ S. 3(1)(c)

⁶⁸ S. 3(1)(d)(iii)

⁶⁹ S. 3(1)(d)(ii)

⁷⁰ S. 3(1)(d)(i) and s. 3(1)(d)(iii)

⁷¹ S. 3(1)(d)(ii)

⁷² S. 3(1)(f)

The spirit and intent of the Broadcasting Act has not been adequately implemented in the past

28. While the WGC believes that the broad policy objectives of the current *Broadcasting Act* remain appropriate, we must stress that this does not mean that they have been optimally implemented in the past. On the contrary, as historically administered by the CRTC, the WGC holds the view that implementation has not lived up to the spirit and intent of the *Broadcasting Act*.
29. For example, in 1999 the CRTC released a new TV policy in which the Commission took the misguided step of reducing emphasis on broadcaster *expenditure* requirements on Canadian programming and instead switched focus to Canadian content *exhibition* obligations. This, combined with other policy changes, resulted in the underinvestment in Canadian programming, which was then shunted to the margins of broadcasters' programming schedules. The CRTC reversed course in 2010, refocusing on Canadian programming expenditures, but it set minimum levels of these expenditures on what broadcasters had been (under-) spending under the flawed 1999 policy framework. This, combined with the impacts of the post-2008 global recession, meant that expenditure obligations, set as a percentage of broadcasting revenues, were low. The CRTC clearly hoped that revenue growth would boost spending, but this ultimately did not materialize. The result was that large Canadian broadcasting groups had single-digit percentage spending obligations towards key genres like drama and documentary programming.⁷³ Would U.S. networks, the BBC, or other international broadcasters consider their business models and/or mandates fulfilled by spending 5%-9% of their revenues on drama programming? Does Netflix limit spending on content to 5% of revenues? Does any comparable organization other than private Canadian broadcasters?
30. As such, while the objectives of the current *Broadcasting Act* generally remain appropriate, the WGC recommends that, as they pertain to the support of Canadian programming in particular, they be reconceptualized and redrafted to strengthen their importance and emphasis, as a clear signal to the CRTC that the status quo has not been sufficient. As an example, section 3(1)(e) of the *Broadcasting Act* could be amended as follows:
- (e) each element of the Canadian broadcasting system shall contribute in an appropriate and significant manner to the creation and presentation of Canadian programming;
31. Similarly, section 3(1)(s) of the *Broadcasting Act* currently states:
- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
- (i) contribute significantly to the creation and presentation of Canadian programming, and
- (ii) be responsive to the evolving demands of the public; and
32. The phrase "to an extent consistent with the financial and other resources available to them" weakens the language of the subsection. While the WGC understands that private undertakings are subject to financial or other limitations, we believe the new legislation can and should prioritize the importance of contributing to Canadian programming in a better way than is currently done. "Contribute significantly" should be sufficient to convey the legislative intention, with consideration for the

⁷³ For more detail, see the WGC's comments in Broadcasting Notice of Consultation CRTC 2017-429 <https://www.wgc.ca/sites/default/files/2019-01/WGCS429.pdf>, paras. 10-17.

resources of the undertakings either being implied—because obviously nobody can contribute resources that they don't have—or, if necessary, stated as a component of all broadcasting objectives rather than a special consideration for just one of them.

Digital and the Internet must clearly be in the tent

33. In the WGC's view, **the single most important thing** the Panel could do would be to recommend to government a proposal for legislation that will **clearly and comprehensively bring Internet-based broadcasting players, both Canadian and foreign, under the ambit of Canadian content regulation, in an effective and enforceable way, so as to ensure that they contribute to the production and distribution of Canadian content.** This applies to both online broadcasting platforms such as “over the top” (OTT) players like Netflix, Hulu, and Crave, as well as to content distribution “pipes”, such as ISPs and wireless service providers (WSPs). It is absolutely fundamental to the survival of our sector that the integrity of our system be maintained in the digital age, so that we can continue to produce ever better, ever more relevant Canadian television, for ourselves and for the world.
34. It is eminently arguable that online video platforms are already covered by the existing *Broadcasting Act*. The Act is, and was expressly designed to be, “technologically neutral”,⁷⁴ and the CRTC determined in 1999 that “sounds and visual images” transmitted over the Internet constituted “broadcasting” under the Act when it issued its New Media Exemption Order,⁷⁵ now commonly called the Digital Media Exemption Order (DMEO).⁷⁶ Indeed, there is no need for the CRTC to exempt such activities from substantive regulation if they do not fall under the ambit of the Act to begin with.
35. Much has changed since 1999. In exempting “broadcasting” over the Internet then, the Commission said that it was, “satisfied that compliance with Part II of the Act, and any applicable regulations made thereunder, by persons carrying on new media broadcasting undertakings will not contribute in a material manner to the implementation of the policy objectives set out in section 3(1) of the Act.”⁷⁷ The CRTC reiterated that statement in 2009,⁷⁸ and has chosen not to revisit the issue since then. But while this position may have been true in 1999, and at least defensible in 2009, it is simply untenable today. For the reasons described earlier in these submissions, so-called “digital media” must not only be within the ambit of new broadcasting legislation, but it must be done clearly and explicitly, so that the CRTC, which will presumably be administering that legislation, will have a clear mandate to regulate where, up to now, they have been unwilling to.
36. We set out in more detail below how Canadian content regulation applied to the Internet or other digital platforms might look. For now, suffice it to say that, in the WGC's view, bringing these platforms under the ambit of the legislation does *not* need to mean simply copy-pasting existing, traditional broadcasting regulation onto the Internet. For example, it is clearly understood that exhibition requirements, which oblige linear broadcasters to dedicate a portion of their schedules to Canadian

⁷⁴ E.g. s. 2 definition of “program”.

⁷⁵ Public Notice CRTC 1999-84, <https://crtc.gc.ca/eng/archive/1999/PB99-84.HTM>, paras. 33-52.

⁷⁶ Broadcasting Order CRTC 2012-409, *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* <https://crtc.gc.ca/eng/archive/2012/2012-409.htm>.

⁷⁷ Public Notice CRTC 1999-84, <https://crtc.gc.ca/eng/archive/1999/PB99-84.HTM>, para 50.

⁷⁸ Broadcasting Order CRTC 2009-660, *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings* <https://crtc.gc.ca/eng/archive/2009/2009-660.htm>, Appendix.

programming, cannot and should not apply to nonlinear services which make up the bulk of current OTT offerings. Similarly, an ISP/WSP contribution needn't be set at the flat 5% currently applicable to BDUs. And the requirement that traditional Canadian broadcasters be Canadian owned-and-controlled is likely impractical for global, Internet-based services. The present issue is not unthinkingly applying existing broadcasting regulation to online players, but is a key threshold issue. Is digital "in" or "out" of legislation designed to safeguard and support Canadian expression online? The answer, in our opinion, is clear—it must be in.

37. To this end, the WGC recommends that new legislation maintain the technological neutrality present in the existing *Broadcasting Act*. But it must also be clear in the new legislation that "broadcasting"—or whatever terminology is chosen—is more than simply a 20th-Century platform but, indeed, constitutes the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public, including over the Internet or analogous network(s).⁷⁹ And, as discussed in greater detail below, the CRTC must have clear and explicit authority to implement a contribution regime to Canadian content from Canadian ISPs and WSPs, particularly in light of the 2012 Supreme Court of Canada decision which found that the CRTC currently lacks jurisdiction to impost such a regime.⁸⁰
38. Finally on this point, it is important to highlight what the Panel itself has commented on publicly, which is that new legislation is intended to do more than respond to the challenges of today, but to remain relevant for decades into the future. This should be kept in mind in the context of data showing that the volume of content produced in Canada is currently high, and that global online platforms like Netflix may be part of the reason why. Firstly, it should be emphasized that the bulk of that recent growth has been from foreign service production in Canada, which is not creatively driven from Canada by Canadians, and therefore does not contribute to the socio-cultural objectives of the *Broadcasting Act*. Secondly, and more importantly, the objectives of the *Broadcasting Act* are a long-term project in building and sustaining the social, cultural, and economic fabric of Canada, and they cannot be assumed away based on a few years of data. The simple fact is that we do not know exactly what is driving the current production boom in Canada, but to the extent that it is driven by OTT services like Netflix, then it is only sustainable to the extent that Netflix or others decide to sustain it. As noted above, Netflix is funding nearly all of its content production through debt. Its business model is clearly predicated on global expansion and growing market share. This phase of its development will not last forever, and it remains to be seen what its business priorities will be once the OTT marketplace becomes saturated and it must show actual profits.
39. Simply put, Canada cannot and should not outsource its cultural policy by assuming that the contributions by a few fast-growing multinational corporations will continue into the foreseeable future. The WGC welcomes the investments that Netflix and others are making in Canada, and we praise them for their current contributions. We simply believe that it is not Netflix's job to set and sustain Canadian cultural policy outcomes. It is the Canadian government's job to do so, and the government ensures this is done through legislation and regulation. If Netflix or other services contributing to Canadian content production continue to do so, then regulation simply reflects what they would have done anyway, and is therefore no burden. Regulation must exist, however, in the event that the corporate interests of OTT provides diverge from what is in the interests of Canadians.

⁷⁹ *Broadcasting Act*, definition of "programming undertaking", s. 2.

⁸⁰ *Reference re Broadcasting Act*, 2012 SCC 4.

40. Further to this, the WGC recommends that **the power to implement the regulatory tools discussed later in this submission be expressly provided to the CRTC in the new legislation.** This is perhaps the best way to ensure that the CRTC has the necessary jurisdiction and ambit to regulate in the public interest in the digital space. As such, we support the comments of the CRTC to the Panel that:

New legislation should grant the CRTC explicit statutory authority as well as flexible tools to regulate services, both domestic and international, including online service providers, who offer audio or video services in Canada and benefit from the creative, economic and social advantages of operating in this market.⁸¹

Canadian creators at the core

41. The **second most important thing** the Panel could do—and this is a very close second to the above—would be to recommend to government a proposal for legislation that will **place Canadian creators at the core, as an essential element, of Canadian content production.** In particular, **Canadian content must have a Canadian *authorial voice*.**
42. The current *Broadcasting Act* recognizes a variety of roles within the broadcasting system. These include “broadcasting undertakings” which are regulated under the Act, but also the “Canadian independent production sector”,⁸² and “Canadian creative and other resources”.⁸³ This reflects the fact that broadcasting undertakings like broadcasters and BDUs disseminate programming, but particularly in genres such as drama they do not actually *create* that programming. Canadian independent producers make important financial and distribution arrangements that make the production of programming possible. But creators—individual creative artists—make the essential creative decisions, with screenwriters sitting at the very centre of that process.
43. Crucial to the health and vitality of the domestic television sector as a whole is the place that Canadian creators and artists have in that sector. This goes to the very definition of domestic Canadian production. In the WGC's view, it is far from sufficient to claim that a production is Canadian simply because it was shot within our borders, or its copyright is owned by a Canadian production company, or its (Canadian) distribution or broadcast rights are held by a Canadian distribution company or broadcaster. Canadian creative work is fundamentally made by Canadian *creators*. We would not say that a painting is Canadian simply because it was commissioned by a Canadian art collector, or exhibited in a Canadian-owned gallery, if the painter themselves was not Canadian; we would not say that a book is Canadian simply because it was published by a Canadian publisher or sold in a Canadian-owned bookstore, if the author was not Canadian. In virtually every creative medium there are a number of important roles that help get a work from an idea—or before there was an idea—to a final product in the hands (or on the screens, or onto the digital devices) of consumers. Yet in no creative medium is the artist somehow secondary, or frankly even on par, with those other roles when it comes to defining the identity of the work. We say that the frescoes of the Sistine Chapel ceiling are the work of Michelangelo, and the fact that the frescoes were commissioned by Pope Julius II or paid for by the Catholic Church makes them no less Michelangelo's. This is true of virtually all works of art, and the fact that television production is more collaborative than painting or other forms does not change

⁸¹ CRTC written public submission to the Legislative Review Panel, January 10, 2019
<https://crtc.gc.ca/eng/publications/reports/rp190110.htm>.

⁸² S. 3(1)(i)(v)

⁸³ S. 3(1)(f)

that fact. Television shows bear the stamp of their creators—of an authorial voice or voices and of individual artistry. In serial dramatic television in particular, that voice is the screenwriter:

Television is a writer's medium. Always has been. ...Great dramatic television is serialized; the stories are ongoing, often from season to season, weaving a vast, multiple-hour tale. It is the novel to film's short story.

And in television, the actual telling of the story is everything—the narrative flow of that story and the character development within that story solidify greatness, if present.⁸⁴

44. At the centre of the writing process is the showrunner. A showrunner is the chief custodian of the creative vision of a television series whose primary responsibility is to communicate the creative vision of that series—often from the pilot episode through to the finale. The showrunner concept emerged in the U.S. in the 1980s, where it has become closely associated with the current “Golden Age” of television, and it has since expanded internationally, including to Canada. Showrunners are writer-producers who control and guide the creative vision of the show.⁸⁵ Showrunners are fundamentally both writers and producers, and they creatively control dramatic television production. There are now a significant number of talented, experienced Canadian showrunners. The industry trade magazine, *Playback*, recently profiled Canadian showrunners like Mark Ellis and Stephanie Morgenstern (*Flashpoint*, *X-Company*), Bruce Smith (*19-2*), David Hoselton (*Houdini and Doyle*), and Daegan Fryklind (*Bitten*), in which they discuss in detail their craft, the rise of the showrunner position, and their growing international success.⁸⁶
45. Strangely, however, this essential component of television production is not treated as essential by either the *Broadcasting Act* or the larger Canadian cultural policy framework. Certification of a Canadian production in Canada generally follows the eligibility requirements of the Canadian Film or Video Production Tax Credit (CPTC),⁸⁷ which is administered by the Canadian Audio-Visual Certification Office (CAVCO). Creative personnel, including screenwriters, are subject to a 10-point system, usually referred to as the “CAVCO scale”, under which the presence of a Canadian screenwriter or director earn two points each. The CPTC Guidelines state, “To be recognized as a Canadian film or video production, a live action production must...be allotted a total of at least six points,” according to the CAVCO scale. “In addition, a production must obtain two of the four points allotted for the director and the screenwriter positions (one of the two positions must be filled by a Canadian).”⁸⁸ While this does require that *either* the director or screenwriter to be Canadian, this by itself does not ensure a Canadian authorial voice, because in series television in particular that voice resides with the showrunner. With the greatest respect to our director colleagues, in television it is the showrunner who creatively controls the production. As such, a system in which only directors in

⁸⁴ Goodman, Tim, “Critic's Notebook: The Rise of the TV Auteur? No Thanks.” *The Hollywood Reporter*, October 10, 2018 <https://www.hollywoodreporter.com/bastard-machine/critics-notebook-rise-tv-auteur-no-thanks-1150887>.

⁸⁵ E.g. Collins, Andrew. “Showrunners – TV's lords and creators.” *The Guardian*, September 16, 2016 <https://www.theguardian.com/media/2013/sep/16/showrunners-tv-writers-creative-power>.

⁸⁶ Dowling, Amber. “Showrunners talk TV.” *Playback*, March 2, 2016 <http://playbackonline.ca/2016/03/02/behind-the-scenes-showrunners-talk-tv/>.

⁸⁷ Canadian Film or Video Production Tax Credit <https://www.canada.ca/en/canadian-heritage/services/funding/cavco-tax-credits/canadian-film-video-production.html>.

⁸⁸“CPTC Program Guidelines.” *Canadian Audio-Visual Certification Office*, April 2, 2012 http://canada.pch.gc.ca/DAMAssetPub/DAM-PCH2-Arts-FilmVideo/STAGING/texte-text/cptcGuide_1455637343203_eng.pdf, s. 4.02.

television need be Canadian would be one without a meaningful Canadian authorial voice. While many Canadian productions are written by Canadian screenwriters, and led by Canadian showrunners, the WGC believes this is likely due to the eligibility requirements of the CMF, which has become a *de facto* essential piece of financing for Canadian drama, and which requires a full 10 CAVCO points to receive funding, with very few, limited exceptions. The CMF may or not may continue to play this role in the future, and indeed some major online video platforms have indicated a willingness—and a capacity—to forgo CMF financing.

46. The result has been a massive drain of Canadian creative talent out of the country, as opportunities for a creative livelihood abound in Hollywood while they are stagnating here. From the WGC’s perspective, this has reached a crisis level. Currently, the WGC’s largest membership region is Toronto, but its second-largest region, running not far behind, is Los Angeles. That is worth emphasizing. The WGC is a guild of Canadian screenwriters, yet more of our members are working out of an American city than out of Montreal, Vancouver, or anywhere else in this country other than Toronto. This represents a generational loss of Canadian screenwriters, most of whom we are likely never to get back.
47. As such, the WGC submits that the essential role of Canadian creators, and Canadian screenwriters in particular, must be emphasized in the new legislation. The current Act states, at section 3(1)(f):

each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

48. The WGC believes this language should be strengthened. This can be done by ensuring that Canadian creators are mentioned in a separate subsection of the new legislation, which deals exclusively with them (and not “mixed” with other elements/objectives), and that the new Act(s) specifically refer to a “**Canadian authorial voice**” which is central to the meaning of Canadian content/programming. An “authorial voice” need not necessarily refer to any particular job or title, but instead to the principle that Canadian content is fundamentally made by creators who primarily contribute to its original artistic/creative form. In reality, however, this role is invariably going to be held by a showrunner(s) and/or screenwriter(s).
49. While the language of new legislation may ultimately remain focused on high-level values and objectives, and may not ultimately deal with CAVCO points or other certification requirements, the WGC believes that strengthening the language regarding creators as recommended above will send a message to the CRTC, as the regulator that will presumably administer the new legislation, and others, that Canadian creators, screenwriters in particular, must be a core and essential element in the Canadian system.

From single-system to ecosystem(s)

50. One key area that the Panel will likely need to address is the notion of a “single system” of broadcasting. Section 3(2) of the *Broadcasting Act* states:

It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority. [Emphasis added.]

51. Section 3(1)(a) of the *Broadcasting Act* also states that:

the Canadian broadcasting system shall be effectively owned and controlled by Canadians;⁸⁹

52. The WGC understands that if foreign OTT services are to be considered part of the “Canadian broadcasting system”, then under existing legislation they must either become Canadian owned-and-controlled or face being excluded from that system and, presumably, from Canada. The WGC understands that neither of these outcomes are practical or even necessarily desirable. At the same time, the Terms of Reference of the Review states, “it should be made clear that the Government is not interested in a proposal that reduces Canadian ownership of broadcasting.”⁹⁰

53. As such, the WGC would support legislation that created, or gave the CRTC jurisdiction to create, distinctions between “traditional” and “non-traditional” broadcasting undertakings, with different rules and obligations applicable to each. While the goal of a single, “universal” approach may seem necessary at first, we believe that it is not and should not be the end goal in and of itself. As Professor Eli Noam said, “While regulatory harmonization is a positive value one should not make a fetish of it.”⁹¹ As Noam explains, some inconsistency is unavoidable, and some may in fact be desirable.

No need to privilege “Broadcasting” or “Telecommunications” objectives

54. Some commentators on these issues who prefer the objectives of the *Telecommunications Act*, such as access and affordability,⁹² express worry that any application of the objectives of the *Broadcasting Act* will somehow overwhelm or smother telecom objectives. Certainly, to date the opposite has been the case, with Internet broadcasting being effectively exempt from broadcasting regulation.

55. The WGC believes that neither set of objectives need be mutually exclusive, and indeed *both* are essential components of a vibrant and healthy Canada. Canadians can clearly benefit from the opportunities for innovation and open expression that the Internet provides, at the same time as they benefit from the ability to see their own stories and points of view presented to them. As such, the WGC sees no inherent conflict between the two, and argues that one set of objectives need not be privileged over the other. As with many things the best approach is balance.

⁸⁹ See also Direction to the CRTC (Ineligibility of Non-Canadians), SOR/97-192 <https://laws-lois.justice.gc.ca/eng/regulations/SOR-97-192/page-1.html>.

⁹⁰ Section 2.

⁹¹ Noam, Eli M., “TV or Not TV: Three Screens, One Regulation?”, July 11, 2018 <https://crtc.gc.ca/eng/media/noam2008.htm>.

⁹² See s. 7.

Effective new enforcement tools are needed

56. An effective 21st-century regulatory regime must have effective 21st-century enforcement mechanisms. CRTC Chairperson Ian Scott said:

The *Broadcasting Act*, as it's currently written, does not allow the CRTC to impose administrative monetary penalties when broadcasters do not respect their obligations. We can revoke a broadcaster's licence for non-compliance, or require them to appear before us. However, these processes take time and cost taxpayers money.

Administrative monetary penalties would be an easy-to-implement tool that could address non-compliance more quickly and efficiently. Given our experience in enforcing the telemarketing rules over the past decade, we can confidently state that such penalties are a real deterrent to non-compliance when used with other enforcement methods.⁹³

57. The WGC agrees, and supports the provision of administrative monetary penalties to the CRTC with respect to broadcasting in new legislation. We also support the creation of a General Condition of Service Power for the *Broadcasting Act*, as the CRTC has proposed.⁹⁴ Enforcement tools must also be capable of extending to online video platforms or similar entities outside of Canada. The WGC expects that in a global marketplace, international players will continue to play a significant—if not a dominant—role in Canada, and so enforcement of Canada's cultural policies must extend globally, and not just within our borders.

58. Further, to the extent that the CRTC relies less upon licensing of broadcasting entities while still using it as an enforcement tool for at least some of those entities, section 9(1)(c) of the *Broadcasting Act*, or its successor clause, should be amended so as to no longer prevent the Commission from amending any condition of a licence within five years from the issuance or renewal of the licence. Given the expansion of enforcement tools other than licensing, and/or the increased pace of change in the sector, and subject to principles of procedural fairness, the CRTC should be able to amend conditions of licence on its own motion at any time, so as to regulate in furtherance of its objectives.

Enshrine—and define—net neutrality

59. The WGC supports net neutrality, and we would also support net neutrality being enshrined in new communications legislation.

60. It will be important, however, to define the concept of net neutrality appropriately. Such a definition could be expressed along the following lines:

Network neutrality is the principle that, to the extent feasible, Internet access providers ("ISPs") should provide access to all content and applications without blocking or

⁹³ Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications, November 1, 2018 <https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html>.

⁹⁴ CRTC written public submission to the Legislative Review Panel, January 10, 2019 <https://crtc.gc.ca/eng/publications/reports/rp190110.htm>.

discriminating as to source, destination, application, content, or device. More than that, however, network neutrality in some ways crystallizes the ethos of the Internet and its promise of permissionless innovation.⁹⁵

61. What is worth highlighting here is that net neutrality is concerned primarily, if not exclusively, with interference with data *by ISPs*, and presumably as it pertains to their own, primarily commercial or competitive, interests. This interpretation is further supported by the statements of those who see net neutrality as an extension of common carriage principles, such as those expressed in section 27(2) (unjust discrimination) and section 36 (a Canadian carrier shall not control the content of telecommunications) in the current *Telecommunications Act*,⁹⁶ both of which refer to the acts of carriers themselves.
62. Net neutrality should not be confused with a prohibition on the efforts of governments to pursue legitimate public policy objectives on the Internet, including those that affect particular types of content. Criminal provisions, for example, already make certain types of communications illegal, such as those with respect to hate speech, child pornography, or fraud, regardless of whether they occur on the Internet or not. Copyright laws make certain activities illegal when they infringe copyright. These are legitimate exercises of government policy for the betterment of the public. Some commentators, however, have sought to expand the definition of net neutrality to encompass *any* interference by any entity, pursuant to lawful government action or not. This is simply not what net neutrality was intended to encompass.
63. As such, the WGC would support enshrining or otherwise advancing net neutrality principles in new communications legislation. But it must be carefully defined so that it encompasses true net neutrality, which is undue interference *by ISPs*, so as not to limit legitimate policy-making by the government and/or the CRTC.

Access to data

64. OTT services collect and manage a great deal of subscriber and usage data with respect to their programming and viewing patterns, among other things. This data may be essential to intelligent regulation by the CRTC. Currently, traditional broadcasters must provide certain data to the CRTC, much of which is aggregated and made public for the benefit of Canadians. As part of bringing online video services under the communications legislation, the CRTC should have explicit authority to access and collect this data, subject to reasonable confidentiality and privacy principles. In 2014, the CRTC sought exactly this kind of data from Netflix, which refused to provide it.⁹⁷ It is crucial for future regulation that a similar situation not be repeated.

⁹⁵ Abramson, Bram. *Net Neutrality in Canada*. Law Society of Upper Canada. 18th Biennial National Conference New Developments in Communications Law and Policy. May 6, 2016. pg. 7-2.

⁹⁶ E.g. Winseck, Dwayne. "Modular media: A radical communication and cultural policy for Canada." *Canadian Centre for Policy Alternatives*, July 1, 2016. <https://www.policyalternatives.ca/publications/monitor/modular-media>

⁹⁷ "Netflix refuses CRTC demand to hand over subscriber data", *CBC News*, September 23, 2014 <https://www.cbc.ca/news/business/netflix-refuses-crtc-demand-to-hand-over-subscriber-data-1.2774921>.

Affordability

65. The WGC is sensitive to the cost of communications services to Canadians. By any measure, phone, TV, and Internet is more expensive in Canada than in many other places. The WGC is not seeking policies or regulation that would put any of these services out of reach for average or lower-income Canadians.
66. The fact is, however, that affordability issues which exist now cannot be ascribed to Canadian cultural policies applicable to the Internet because there are currently none. It is inescapable, then, to conclude that the cause(s) of affordability challenges for communications services in Canada are not related to cultural policy, and therefore won't be solved with respect to cultural policy. Problems of access and affordability will not be solved on the backs of Canadian creators and at the expense of Canadians' access to their own culture and entertainment. Seeking a contribution from OTT services should not increase costs to Canadians because this spending on programming is their core business, and is what they and their supporters claim they will do anyway.
67. Likewise, seeking a cultural contribution from ISPs that will undoubtedly be a fraction of what consumers already pay in value-added sales tax is also not an affordability issue. Companies with healthy profit margins are free to absorb the cost themselves in pursuit of being good corporate citizens. But if they nevertheless choose to pass on the costs to consumers, this is still not a barrier to access. For one thing, low-cost, low-bandwidth plans and/or those in underserved rural and remote areas could be exempted from the contribution. That being said, for consumers with standalone Internet packages, the impact would be minor. CRTC Chairperson Ian Scott has noted that the average Internet bill is \$46 per month. "“If you're asking me: 'Is 46 cents worth it per month in order to support the future of viable Canadian programming?' The answer is yes," Scott said.⁹⁸
68. The WGC agrees. We must stop acting as if Canadians, who live in one of the most prosperous countries on earth, cannot manage to have both a robust cultural policy and accessible communications services. These goals are not, and need not, be mutually exclusive.

What a 21st century regulatory regime might look like in practice

69. As noted above, the WGC presumes that any new communications legislation will focus on broad policy objectives, while leaving the details of its implementation to the CRTC, as regulator. As such, in this section we will discuss how the high-level proposals that the WGC is making with respect to the legislation itself could be implemented by the regulator. The WGC does not expect such aspects to be incorporated into proposed legislation, but the legislation should allow for and encourage regulatory outcomes such as these.
70. As indicated above, the single biggest challenge with respect to Canadian content is financing the production of it, given Canada's small market, proximity to the United States, the high costs of production, and the high risk of failure for any given show. In the current broadcasting system, the

⁹⁸ Jackson, Emily, "It's not a tax': CRTC chair defends proposal for internet providers to contribute to Canadian content", *Financial Post*, November 1, 2018 <https://business.financialpost.com/telecom/its-not-a-tax-crtc-chair-defends-proposal-for-internet-providers-to-contribute-to-canadian-content>.

two most important regulatory tools used to meet this challenge are CPE⁹⁹ spending requirements by private, English-language broadcasters,¹⁰⁰ and BDU contributions to the CMF and other independent production funds.¹⁰¹ The former requires the content *platform* to contribute to the creation of Canadian programming, while the latter requires the *distribution pipe* to do so. Given the different nature and role of these two elements of the broadcasting system, the contribution mechanism used is slightly different. Broadcasters are generally in the business of investing in content production for (exclusive broadcast on) their own channel(s), so CPE requirements simply oblige them to do so for Canadian content, in addition to whatever foreign content they may wish to acquire. BDUs, on the other hand, traditionally do not invest in content production, but instead provide the conduit for the distribution of broadcast channels, while benefiting from the attractiveness and variety of the content they carry. So, BDUs are not obliged to spend on program production directly, like broadcasters are, but instead contribute to one or more production funds, the CMF chief among them, which in turn make investments in Canadian programming.

71. These two regulatory tools—production spending and contributions to a production fund—are appropriate to apply to entities operating on or with respect to the Internet. OTT services, as new content platforms, could be subject to CPE requirements, while ISPs, as new content distribution pipes, could be subject to contributions to the CMF or other funds.
72. The details of a CPE model for OTT services would be best left to the CRTC, but the general contours can be described here. CPE currently operates as a percentage of gross broadcasting revenue, which is a concept that is transferable to revenues earned by OTT services from the Canadian market. CPE for large, English-language broadcast groups is currently 30% of their revenues, which was based on their historical spending levels on Canadian programming. Such a level provides a *prima facie* starting point for application to OTTs operating in Canada, while taking into account the fact that such amounts currently include news and some sports programming for traditional broadcasters while OTTs typically do not produce such programming now. This could change, however, and the CRTC would be well positioned to review these requirements on a regular basis, much like how it currently reviews broadcast licences about every 5-7 years. And in the seemingly unlikely event that an OTT service operating in Canada had no interest in commissioning Canadian programming for its service, an OTT might be able to elect to instead make a contribution to the CMF or other production fund.
73. As noted above, an essential component of this model would be ensuring that OTT investments are on truly Canadian programming, rather than actual and/or *de facto* service production that is not creatively driven by Canadians. As already mentioned, the current level of 10-point Canadian production is largely attributable to the involvement of the CMF, but deep-pocketed global OTTs may be able to forego CMF funding in exchange for the “freedom” to engage non-Canadians in key creative roles, most importantly the screenwriter/showrunner roles. A CPE-like regime for global Internet or

⁹⁹ And a crucial subset of CPE requirements, which is spending requirements on “programs of national interest” or “PNI”, which is comprised of drama (including children’s programming), long-form documentary, and certain awards shows. See Broadcasting Regulatory Policy CRTC 2010-167, *A group-based approach to the licensing of private television services* <https://crtc.gc.ca/eng/archive/2010/2010-167.htm> paras. 71-73.

¹⁰⁰ E.g. Broadcasting Regulatory Policy CRTC 2010-167, *A group-based approach to the licensing of private television services* <https://crtc.gc.ca/eng/archive/2010/2010-167.htm>.

¹⁰¹ Broadcasting Distribution Regulations (SOR/97-555), <https://laws-lois.justice.gc.ca/eng/regulations/SOR-97-555/> s. 34 and s. 52. Public Notice CRTC 1994-10, *The Production Fund* <https://crtc.gc.ca/eng/archive/1994/PB94-10.HTM>.

digital players may need to be more strongly pivoted towards Canadian creators than the current system, in part because not all the elements of the current system, like the CMF, may play the same role in the future.

74. One concern about OTT regulation has been the potential of dealing with a plethora of smaller players, and the difficulty of ensuring that all of them are treated appropriately. The WGC believes that this could be effectively dealt with by simply targeting those OTTs that actually have a meaningful impact on the Canadian market. For example, in its Convergence Review for the Australian government in 2012,¹⁰² the Australian Convergence Review Committee set a number of thresholds for organizations that would be subject to national content regulation, including having control over the professional content they deliver, having a large number of Australian users of that content, and having a high level of revenue derived from supplying that professional content to Australians, which were initially recommended to be around \$50 million a year. Many existing regulations exclude smaller entities from regulation as a matter of course. There is no reason why Canadian content regulation could not do the same.
75. Another concern sometimes cited is that of reciprocity—that traditional Canadian broadcasters currently receive benefits from the regulated system at the same time that they have obligations, while foreign OTTs obtain no such benefits. This is easily remedied by providing such players with benefits in exchange from their contributions, like access to tax credits and/or the CMF. Indeed, this has already started to happen with respect to the federal tax credit,¹⁰³ and could be expanded in other ways. It is, of course, possible that some will continue to argue that the value of the obligations do not match the benefits perfectly. In the WGC's view, this has long been argued by traditional and non-traditional media players alike, and we simply submit that, as is often the case, the perfect is the enemy of the good. Lack of perfect alignment—or of universal agreement on what that would constitute—should not preclude us from acting at all.
76. Finally, there has often been discussion of the value of regulation providing incentives (carrots) versus obligations (sticks) to produce and distribute Canadian programming. Some may argue that incentives are preferable, or even that obligations should play no role whatsoever, such that the entirety of audiovisual cultural policy should be effected by government funding and/or the CBC. While the WGC supports incentives such as tax credits and access to funding, a fundamental issue here is that foreign OTTs do not otherwise operate in Canada and pay little or nothing in the form of corporate or similar taxes. They take revenues from the Canadian market but do not contribute much of anything back to the Canadian tax base. Policy tools that allow this to happen, while instead transferring the bulk of the financing of Canadian programming to individual Canadian taxpayers, would not result in a well-balanced system. Contribution obligations ensure that these companies themselves contribute to the market they operate in. Furthermore, as noted above, OTT's access to global capital and revenues makes financial incentives less effective for these players, who may simply find that they are not worth the company's efforts. As such, regulation alleviates all of these concerns, by offering incentives but also seeking obligations in return.

¹⁰² Department of Broadband, Communications and the Digital Economy. *Convergence Review: Final Report, May 2012* http://www.abc.net.au/mediawatch/transcripts/1339_convergence.pdf.

¹⁰³ CAVCO Public Notice 2017-01, Platforms that can be used to meet the "shown in Canada" requirement of the Canadian Film or Video Production Tax Credit program <https://www.canada.ca/en/canadian-heritage/services/funding/cavco-tax-credits/notices-bulletins/public-notice-2017-01.html>. Note that the WGC supported this policy move by CAVCO.

77. We also note that the CRTC made a comparable proposal in *Harnessing Change*, in which it proposed “binding service agreements” to OTT players. The WGC believes that there is merit to this proposal, provided that it fulfills one key requirement in particular, namely, that it is not effectively “voluntary”. The term “agreement” cannot imply that OTT services may unilaterally opt out. Such an option would effectively make any “regulation” it is based on toothless and thus useless. The WGC sees merit in moving, conceptually, from a “licensing” regime to a regulatory regime that uses different tools to ensure compliance and fairness. However, such a regime must ultimately be based on enforcing Canada’s cultural sovereignty, rather than merely seeking agreement from multinational corporations that may or may not see such agreement as being in their own corporate interests.
78. The other key regulatory tool would be financial contributions from ISPs and WSPs to a fund to support the production of Canadian content, similar to the BDU model that currently partially funds the CMF. This tool would have several important advantages. For one, ISPs and WSPs are Canadian companies that operate on Canadian soil, and are therefore unambiguously subject to Canadian laws, along with the consequences of the enforcement of those laws. They therefore cannot evade regulation in the manner that foreign-based OTTs might seek to. The WGC would strongly support this model, as well as the CMF as the recipient of these funds.
79. The rationale for such a contribution is consistent with that of the current contributions made by BDUs. The value of the service that ISPs and WSPs offer is significantly tied to the content that subscribers access by subscribing to them, a large part of which includes audiovisual content. As the CRTC has recognized, the true driving force behind the rise of broadband Internet in Canada is, “demand for real-time entertainment, and particularly video, which accounts for two-thirds of the capacity of fixed networks and one-third of the capacity of mobile networks.”¹⁰⁴ While clearly not *all* Internet traffic is video, the fact that such a great deal is cannot and should not be ignored, particularly when it is the clear “driver” of broadband expansion. As such, the traditional legal distinctions between BDUs and ISPs have eroded, as convergence has resulted in overlapping functionality, and this must be reflected in the legal/regulatory regime.
80. It is no surprise then that a form of ISP contribution is and has been proposed by others in the recent past, including the CRTC in *Harnessing Change*,¹⁰⁵ as well as by renowned communications expert Eli Noam, Professor of Finance and Economics at Columbia University, in his 2008 report, “TV or Not TV: Three Screens, One Regulation?”.¹⁰⁶ This approach was also modelled by Nordicity in a 2008 report co-commissioned by the WGC entitled “ISP/WSP New Media Broadcasting Content Contribution – Estimation of Market Tolerance and Valuation”,¹⁰⁷ which ultimately proposed a 2-3% contribution based on gross revenues for ISPs and 0.06% for WSPs.¹⁰⁸ The WGC is aware of a study prepared by PricewaterhouseCoopers, LLP, for the Canadian Media Producers Association (CMPA), entitled “Modelling a new broadcasting distribution system financial contribution framework for Canadian audiovisual content”, to be provided to the Panel, which presents a similar, updated analysis, and

¹⁰⁴ *Harnessing Change*, Market Insight 3.

¹⁰⁵ *Harnessing Change*, Conclusions and Potential Options: Restructured funding strategy.

¹⁰⁶ Eli M. Noam, “TV or Not TV: Three Screens, One Regulation?”, July 11, 2018

<https://crtc.gc.ca/eng/media/noam2008.htm>.

¹⁰⁷ *ISP/WSP New Media Broadcasting Content Contribution – Estimation of Market Tolerance and Valuation*, Nordicity, December 5, 2018 <https://www.wgc.ca/sites/default/files/2019-01/WGCISP.pdf>.

¹⁰⁸ *Ibid.*, Page 7.

which contemplates even lower ISP and WSP contributions as a percentage of revenues. Both of these reports point to potential methodologies, as well as the relatively low percentages, and low-to-no associated negative impacts on the consumer, that they would represent.

81. As already indicated, the WGC is sensitive to concerns about access and affordability for Canadian consumers, so it is worth emphasizing not only the low range of percentages noted above, but also the ways in which such a contribution can be designed to mitigate concerns. Professor Noam, in recommending this tool said:

It is relatively easy to administer since the number of such companies is small. But if it is passed on to users in a flat charge form, it would be regressive and reduce connectivity for low-income users. To avoid this, the charges would have to be usage-based, which would require some usage metering by the ISPs. This could change the present “all-you-can-eat” model of web use.¹⁰⁹

82. The CRTC suggested “migrating” the contribution from BDUs to ISPs/WSPs, so that as ISP/WSP contributions were increased BDU contributions would be reduced, for little-to-no net increase for consumers.¹¹⁰ This approach would also be worth considering, provided that such a reduction is in fact passed on to consumers by the BDUs, and not retained for the benefit of BDU profit margins.¹¹¹ We have already mentioned the ability to exempt low-bandwidth subscriptions and/or subscribers in rural, remote, or otherwise underserved areas. Revenues earned from the business sector, not typically used to consume media content, could also be excluded. Like with virtually all forms of regulation, these tools can be tailored to mitigate or eliminate negative impacts.
83. Importantly, the CRTC has already explored the possibility of applying such a contribution to ISPs/WSPs under existing legislation, and the result was that the Supreme Court of Canada determined in 2012 that such power did not exist under the current Acts.¹¹² As such, new legislation must be amended to address that court decision, so as to provide the CRTC with the necessary authority. Specifically, we propose that the explicit power to implement such a levy be granted the CRTC in the new communications legislation.

The Canadian Broadcasting Corporation

84. The Terms of Reference for the Panel includes a review of the mandate of the CBC. However, in the WGC’s view, questions about the mandate of the CBC do not represent an actual or potential crisis point that the impact of the Internet and digital technologies on private traditional broadcasting does. In the WGC’s view, the primary challenge of the CBC has long been, and remains, that it is seriously

¹⁰⁹ Noam, Eli M., “TV or Not TV: Three Screens, One Regulation?”, July 11, 2018 <https://crtc.gc.ca/eng/media/noam2008.htm>.

¹¹⁰ Harnessing Change, Conclusions and Potential Options: Restructured funding strategy.

¹¹¹ BDUs will almost certainly contribute less to the production of Canadian programming over time as their revenues decline, since their contribution is based on a percentage of revenue. Further reducing the percentage itself would therefore result in a “double whammy” reduction in BDU contributions to Canadian programming. This is only justifiable in the WGC’s view if these contributions are not only sufficiently made up on the ISP/WSP side, but the reduction actually results in savings to consumers on their BDU bills.

¹¹² *Reference re Broadcasting Act*, 2012 SCC 4.

underfunded.¹¹³ As we understand it, funding for the CBC is not within the ambit of the Panel. As such, we do not have substantial comments in this respect.

85. That said, our comments above with respect to “authorial voice” apply to the CBC as much as they do to private broadcasting and content creation. As such, the WGC recommends the concept be incorporated into the CBC’s mandate as well.

Conclusion

86. The issues described in our submissions are quickly approaching a crisis stage, if they have not already. We hope that the Panel will consider them with the sense of urgency that we believe is appropriate.

87. The WGC is pleased to have had the opportunity to provide our comments. We would again like to thank the Panel for its work in this matter, and look forward to providing additional comments in future phases, if applicable.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Maureen Parker', with a stylized, cursive script.

Maureen Parker
Executive Director

c.c.: Council, WGC

¹¹³ E.g. “Analysis of Government Support for Public Broadcasting”, *Nordicity*, April 11, 2016, <http://www.cbc.radio-canada.ca/files/cbcrc/documents/latest-studies/nordicity-public-broadcaster-comparison-2016.pdf> Fig. 2.

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