Independent Broadcast Group/ Le
Groupe de diffuseurs indépendants

January 11, 2019

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

Dear Panel Chair and Panel Members:

Re: Review of the Canadian Communications Legislative Framework

1. Independent Broadcast Group/Le groupe de diffuseurs indépendants ("IBG/GDI") is an association of Canadian independent broadcasters.[1] IBG/GDI welcomes this review of Canada's communications legislative framework.

A. Introduction and Executive Summary

2. This submission will focus principally on the *Broadcasting Act* and on the theme of supporting the creation, production and discoverability of Canadian content.

3. The broadcasting policy for Canada in the *Broadcasting Act* sets out our country's ambitions for broadcasting media. These ambitions are based on the recognition that the broadcasting system provides a critical public service that is essential to Canada's national identity and cultural sovereignty.

4. One of the key objectives in the Act is set out in section 3(1)(d) which provides that Canada's broadcasting system should:

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

5. Canada's independent broadcasters reflect all of these vital ambitions for the broadcasting sector. Independent broadcasters create and distribute programming content in English and French, in Indigenous languages and in a wide range of third-languages reflecting Canada's ever-increasing diversity. Independent broadcasters offer content to all age groups as well, and often have the specific mandate to serve linguistic and ethnic minorities.

[1] The members of IBG/GDI are Aboriginal Peoples Television Network Incorporated, BBC Kids, Channel Zero Inc., Ethnic Channels Group Limited, Hollywood Suite Inc., OUTtv Network Inc., Stingray Group Inc., Super Channel (Allarco Entertainment), TV5 Québec Canada, and Zoomer Media Limited.

6. Independent broadcasters are also an important source of innovation and entrepreneurial dynamism in the communications sector. Independent broadcasters invest in Canadian programming and technology, and are actively pursuing new opportunities in international markets as a priority. Independent broadcasters are more nimble and less tied to legacy domestic infrastructure than the vertically integrated media conglomerates that now dominate the Canadian market. For this reason, independent companies are well placed to act as the catalyst for Canada's content production industry as it seeks to take advantage of global platforms.

7. Independent broadcasters are, we believe, exactly the type of content and technology companies that Canada's communications policies and legislative framework should support and help grow in the emerging digital future.

8. Our submission to the Panel is based on this objective: creating a legislative framework that recognizes the essential and vital role of independent broadcasters in Canada's communications system and ensures an ongoing and vibrant communications sector.

9. In this submission, we will first provide an economic overview of the impact of the independent production sector based on a study commissioned from Nordicity. The study is compelling. Collectively, independent broadcasters account for $2.73 billion in annual revenue, employ the equivalent of 28,610 Canadian full-time employees (FTE), directly and indirectly, and contribute $2.6 billion annually to Canada's gross domestic product.

10. There are, however, immediate concerns. Consistent with observations made by the CRTC when it introduced its Let's Talk TV regulatory framework[2], independent broadcasters are experiencing a greater economic decline than the larger broadcast groups. Contrary to the hopeful statements made when Let's Talk TV was announced that, "New players will emerge,"[3] this has not been the case. Rather, the "new players" that are now poised to dominate in Canada are the existing non-Canadian platforms like Amazon, Apple, Google and Facebook, among others. For the first time, Canadian services will be forced to negotiate with non-Canadian platforms for access to our own domestic market.

11. This raises serious policy concerns regarding the diversity of voices and representation in the broadcasting system, particularly since the Canadian system is itself characterized by very high levels of ownership concentration and cross-ownership of media and communications networks. This is not an accident. It is the result of policy decisions taken over time to create "Canadian champions" to compete directly with global companies.

12. Instead, it appears that the vitality of our own domestic market has been sapped, even when we need to stimulate new and innovative Canadian players that can take advantage

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[2] *Broadcasting Notice of Consultation CRTC 2014-190*.
[3] Speech by Chairman Blais to the Canadian Club, Ottawa, Ontario, March 12, 2015.

of global opportunities. Instead of focusing on opportunities for Canadian programming abroad, our largest domestic players are deeply engaged with their domestic mobile and other telecom businesses – seeking to maximize their share of the domestic market against their domestic competitors – and forcing down programming costs on the BDU side in the face of shrinking subscriber numbers. This does not bode well for a dynamic Canadian programming sector that would encourage new entrants.

13. Instead of continuing the strategy of favouring a few, dominant Canadian players, we believe that the communications legislative framework should prioritize a diversity of voices and diversity of ownership, especially independent ownership. For the Canadian broadcasting system to be healthy and vibrant it must include diverse ownership groups and companies of different scale and size to ensure that different voices are heard – and different economic models are pursued. For Canada to be competitive, we need a system that fosters creativity and innovation. This means a system that encourages and supports new entrants and a broad and diverse group of content companies.

14. In this submission, we will address certain of the questions set out for the Task Force in its Terms of Reference, addressing principally questions related to the *Broadcasting Act*. The following is a summary of our recommendations:

- Immediate action is required to bring online services into the Canadian broadcasting system as recognized and contributing players. The Commission should be authorized to establish terms and conditions by which these services may contribute in an appropriate manner to broadcasting policy objectives.

- Definitions in the *Broadcasting Act* determine the scope of the Commission's authority. It would be appropriate to update these definitions as part of a longer-term update of the communications legislative framework. In addition to including "online services", as discussed above, broadcasting definitions should:

    - remain technologically neutral;

    - continue to focus on programming content (i.e. audio and audio-visual content), and not the wider range of content that is available on the Internet;

    - recognize that the data that is generated in connection with programming is itself integral to that programming;

    - move towards the recognition of programming "platforms" – which are replacing BDUs – and that may perform "programming", "distribution" and "network" functions at the same time; and

    - reconsider some of the assumptions around the exclusion of the delivery of programming to "public places" in the current definition – it is not clear

why the delivery of content to most commercial establishments should be excluded from the Act.

- Broadcasting policy objectives should be updated to reflect the role of the diversity of voices and diversity of ownership, including independent ownership, in fostering innovation and creativity. Currently the Act does not explicitly recognize the diversity of voices and ownership as a clear objective. It should.

- IBG/GDI supports many of proposals made by the Commission in its *Harnessing Change* report including:

    - Bringing online services into the broadcasting system so that they may make an appropriate contribution to broadcasting policy objectives.

    - Potentially streamlining licensing procedures to lighten the administrative and regulatory burden on licensees and the Commission. Any such tools (such as open-ended licensing) should also provide for regulatory certainty for licensees.

    - Giving the Commission the explicit authority to regulate the collection and use of programming data – and explicitly recognizing in the Act the privacy rights of individuals in their own personal information.

    - Providing the Commission with additional licensing tools – such as service agreements – to enable regulation at the enterprise rather than service-specific level. However, small and medium sized enterprises should not be disadvantaged by such arrangements (i.e. by having less flexibility or more onerous terms than larger entities).

- A healthy and dynamic domestic market is essential to both the *domestic* success of Canadian expression, as well as to its potential *international* success. Ownership diversity is both a bellwether of, and a key contributor to, a healthy domestic market.

    - The regulatory policy in the *Broadcasting Act* should explicitly recognize ownership diversity, including independent ownership,

    - As the broadcasting system moves to a platform environment, many of the principles ensuring access of programming and programming services to distribution undertakings should also be applied to programming platforms.

- To ensure that the Commission has the requisite authority and tools to support a healthy domestic market the Commission's specific authorities should be expanded.

- The Commission's authority to regulate economic relationships between undertakings should be made explicit.

- The Commission's authority to use dispute resolution tools should apply to disputes between all types of undertakings.

- The Commission should be provided with the authority under the *Broadcasting Act* to make interim decisions and orders, and to review its own decisions, comparable to the powers it has under the *Telecommunications Act*.

B. Economic Contribution of the Canadian Independent Broadcasting Sector

15. In preparing for this submission, the members of IBG/GDI and a number of other independent broadcasters engaged Nordicity to prepare an analysis of the economic contribution of the Canadian independent broadcasting sector. That analysis is attached as an Appendix to this submission.

16. For the purposes of Nordicity's analysis and this submission, independent broadcasters are understood to include broadcasters other than those associated with the largest ownership groups, Bell, Shaw/Corus, Rogers and Quebecor, as well as Cogeco, which operates a significant BDU as well as video-on-demand and radio programming assets. CBC/SRC is also excluded from the definition of "independent broadcaster". The size of its parliamentary appropriation sets it apart from independent broadcasters.

17. The Nordicity study largely speaks for itself, but there are a number of key findings made in the report:

- Independent broadcasters have often been at the forefront of promoting diversity in the Canadian broadcasting system and sustaining their business models through innovation, diversification and international expansion.

- Independent broadcasters account for $2.73 billion in annual revenue, employ the equivalent of 28,610 Canadian full-time employees (FTE), directly and indirectly and contribute $2.6 billion annually to Canada's gross domestic product**.**

- Independent broadcasters are actively expanding their broadcasting and content production operations to embrace new distribution platforms and international opportunities. Independent broadcasters attracted $191.2 million in international earnings in 2017.

- As illustrated with many of the examples provided in the study, independent broadcasters are leading Canada's drive into global markets as cultural and technological entrepreneurs.

- While independent broadcasters are intensely focused on continuing to succeed, revenue from broadcasting activities in the independent sector have experienced a greater decline since 2013 (by 15%), than have revenues from broadcasting as a whole (by 5%). The independent share of the broadcasting market has declined from 12.2% in 2013 to 10.9% in 2017.

- It is notable that the radio sector remains more diverse than the television sector – with revenue from independent radio services (including pay audio and satellite services) exceeding independent revenue in the television sector. Total revenue in the independent radio sector in 2016/17 amounted to $1.09 billion.

- However, independent television services make substantial direct contributions to Canadian programming – spending $253.3 million on Canadian programming in the 2016/17 broadcast year.

- Most of this spending was on programs of national interest (PNI) or related information programming (drama, long-form documentary and other information programming) or news programming. Overall, in 2016/17, independent broadcasters spent 9.4% of their previous year's revenue on PNI, which exceeds the minimum requirements set by the CRTC for the largest broadcast groups.

- Independent television stations spent $143.5 million in 2016/17 on news and information programming, with almost half of this amount directed to news.

- Independent television stations spent $154.7 million on external (i.e. non-in house) production, with long form documentary and information programming and drama making up most of this activity. Most of this expenditure, $91.1 million, was on original (rather than acquired) productions.

- When the leverage provided by independent television services' spending on original production is accounted for, this amounts to $388.5 million of commissioned production activity. When service production and proprietary productions are also taken into account, this amounts to a total of $691.2 million in annual Canadian television production associated with independent broadcasters.

18. The Nordicity study describes a substantial independent broadcasting sector that is engaged in reflecting Canadian diversity and in pursuing innovative new approaches to broadcasting and content businesses. These companies, which vary largely in size and scope, include some of Canada's leading cultural entrepreneurs.

19. While the results of the economic analysis demonstrate convincingly the economic value and impact of the independent sector, there are notable areas of concern. In particular the more rapid decline in revenue within the independent sector between 2013 and 2017 is a serious concern as is the decline in market share. Canada simply cannot afford any

further decline in the independent sector. The share of the market held by the few largest companies is already disproportionately high.

20. We do note the difference between the relative share of the radio market represented by independent broadcasters as compared to the television market. Independents still represent a majority of radio market revenue. This difference is significant. In radio, with the exception of Stingray's pay audio service, access to the listening audience does not depend on a BDU intermediary. In television – even over-the-air television, for the most part – access to audiences does depend on a BDU intermediary. While the intermediation of BDUs in the television industry is not the sole determining factor (the cost of entry in radio is generally lower than for many television services), it is nonetheless highly relevant to the fate of the independent broadcasting sector.

Questions in Terms of Referenced related to the *Broadcasting Act*

C. Broadcasting Definitions

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

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

21. These two questions set out in the Terms of Reference request the Panel to look at the scope of the *Broadcasting Act* and at how Canada's communications framework could be adapted to more directly incorporate the Internet. The Internet directly affects Canada's content creation and distribution landscape. IBG/GDI believes strongly that it is essential for our legislative framework to expressly include the Internet, and to continue to take a technologically neutral approach to how programming content is created and distributed to Canadians. While the questions assume that there exists an "open" Internet, the truth is that the Internet is itself an evolving and consolidating environment that is subject to exactly the same concerns about "access" and "distribution" for programming and programming services that underpin the existing *Broadcasting Act*.

22. IBG/GDI believes, however, that it is critical to take a staged approach to adapt the *Broadcasting Act* to Internet distribution. Urgent action is needed, as soon as possible, to ensure that Internet distributors are clearly brought within the ambit of the *Broadcasting Act*.

23. In the longer term – as a part of this Panel's review of the entirety of Canada's communications legislative framework – it could be desirable to modify this framework more comprehensively to reflect technological advancements and emerging platform-based programming distribution models.

(i) ***Immediate Action to Include Internet Distribution in the Broadcasting Act***

24. It is time to require large, Internet-based distributors to make a direct contribution to the Canadian broadcasting system in a manner that is similar to the contributions made by Canadian broadcasters.

25. After its comprehensive review of the future distribution environment, the CRTC reached the following conclusion – which confirms the observations of made by IBG/GDI and others in that process, and in many others:

> In the future, Canadians will increasingly rely on the Internet to discover and consume music, entertainment, news and information. Already, more than two-thirds of data on fixed networks and more than one-third of mobile data is used for real-time video and audio entertainment, and this amount is steadily increasing. Although traditional television and radio will continue to evolve and play important roles, the roles will be smaller than in the past as they are gradually overtaken by online services.[4]

The Commission continued:

> It is evident that Canadians already rely on international online services that are deeply integrated into our broadcasting system and that the role of these services cannot be ignored or minimized. These are new types of services with different business models and not simply other television, radio or distribution services.

26. IBG/GDI agrees with these conclusions. We do wish to note, however, that by acknowledging that so-called "traditional" radio and television services will play a lesser role going forward, we are not indicating that independent broadcasters – or independent content companies – will necessarily play a lesser role. The objective of independent broadcasters is to continue to evolve with communications technologies and to take full advantage of the Internet and other distribution opportunities, in Canada and internationally, that it represents.

27. The overriding concern at present is that the pace of comprehensive legislative change – which realistically represents several years' work – is inadequate to respond to the existing realities of the communications market. The international services referred to in the Commission's analysis – such as Netflix, Amazon Prime and others – are *already* present in Canada and are making substantial inroads in the communications marketplace. These services have no obligation to Canadian content exhibition, funding, independent production, programming accessibility, local programming, news and information content, or any other many other areas in which Canadian broadcasters have obligations.

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[4] CRTC, *Harnessing Change*, Part 7, Conclusions and Potential Options.

28. This uneven approach is not sustainable and the impact on Canadian services is already being felt. Therefore, as an urgent priority, IBG/GDI believes that the existing *Broadcasting Act* should be amended to explicitly incorporate the Internet within the existing legislative framework. In many ways this framework is already technologically neutral. Only a few amendments would be required to ensure that Internet distribution of content is treated in a manner that is comparable to other forms of content distribution. The following amendments to the *Broadcasting Act* would be sufficient to enable the Commission to equalize the treatment Internet and other types of broadcasters:

- Amend section 2 of the Act (the definitions section) by adding the following:

  "online service" means a distribution undertaking or programming undertaking that receives and retransmits broadcasting or transmits programs by means of the Internet;

- Update the broadcasting policy set out in section 3 of the Act by adding the following new policy objective:

  "online services"

  (i) should give priority to delivering or providing access to Canadian programs;

  (ii) should, to an extent consistent with their operations in Canada, contribute to the creation and presentation of Canadian programs; and

  (iii) should, to the extent they operate as programming undertakings or distribution undertakings, fulfill the policy objectives applicable to such undertakings;

- Amend section 4 (which deals with the application of the Act) by adding new subsection (5) as follows:

  (5) For greater certainty, this Act applies to online services that offer services to the public in Canada regardless of the location of any facilities of the online service provider.

- Amend section 9(1) (licensing and other powers) by adding a new paragraph dealing specifically with online services as follows:

  9.(1) Subject to this part, the Commission may, in furtherance of its objects,

  (i) require any online service that would require a licence to operate if it were not exempted by an order made under subsection 9(4), to carry, on such terms and conditions as the Commission deems appropriate, programming and programming services specified by the Commission.

- Amend section 9 by adding a new subsection that explicitly addresses the exemption of online services to ensure that any such exemption takes into account broadcasting policy objectives for such services:

  9.(5) For greater certainty, any order made under subjection 9(4) in relation to online services shall ensure that online services contribute substantially to the implementation of the broadcasting policy set out in subsection 3(1).

- Amend section 10 (regulation-making authority) by adding express regulatory authority with respect to online services as follows:

  10.(1) The Commission may, in furtherance of its objects, make regulations

  (j.1) respecting the delivery or provision of access to Canadian programs and the contribution to the creation and presentation of Canadian programs by online services;

  (j.2) requiring persons operating online services to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify with respect to their operations or services provided in Canada;

29. The changes, as proposed, recognize that "online services" are unique in that they may function as both "programming services" and as "broadcasting distribution undertakings". Accordingly, the contribution to be made by these services, and the role they must play, should take into account the particular function of these services. Existing broadcasting policy objectives would apply to these services, as appropriate, in keeping with their functions as originators of content ("programming services"), or as the distributor of content provided by others ("distribution undertakings").

30. With these amendments, the *Broadcasting Act* would be updated immediately to incorporate the Internet expressly as a means of distribution. The Commission would be expressly empowered to regulate these undertakings if they provide services to the public in Canada, regardless of the location of their facilities. The Commission would have explicit authority require online services to offer Canadian programming and distribute Canadian programming services, as may be appropriate, as well as to provide requested information regarding their operations and services in Canada.

31. Finally, these amendments are consistent with the Commission's current regulatory approach for Internet-based undertakings, which regulates them by way of an exemption order issued under section 9(4) of the Act. There is no impediment to the Commission issuing an exemption order that would frame appropriate requirements for online services in keeping with the explicit objectives for these services set out above. This authority is made explicit in proposed section 9(1)(i) set out above.

32. These changes would enable the Commission to regulate online services in a manner that is consistent with their function, role and innovative business models.

(ii) *Longer Term Legislative Reform to Address New Distribution Models*

33. IBG/GDI believes that the definitions and related amendments set out above would help to address the existing inconsistency in regulatory approach between online and other types of broadcasters.

34. In the longer term, it is possible that more extensive definitional changes could be made to the *Broadcasting Act* to reflect new ways of offering programming to the public. There are, however, certain elements of the existing definitions that should be maintained.

Technological Neutrality

35. The 1991 *Broadcasting Act* was intended to take a technologically neutral approach to the delivery of programming. For this reason, the definition of "broadcasting" includes "any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication". "Other means of telecommunication" is itself broadly defined in section 2(2) of the Act.[5]

36. At the time of the 1991 amendments, Parliament's concerns extended primarily to capturing satellite transmissions and encrypted, cable-delivered signals (i.e. pay and specialty television services) within the Act. A similar technologically neutral approach is desirable going forward. In 1991, Internet or other forms of computer based and "networked" distribution was not recognized as a type of communication. For this reason, some aspects of the definition of "broadcasting" now appear outdated. An updated, but still technologically neutral definition of "broadcasting" would be appropriate.

37. A technologically neutral definition could, for example, examine whether the notion of "encrypted" content is still relevant, add reference to accessing content via the Internet, and consider the relevance of the reception of content by means of "broadcasting receiving apparatus". The CRTC has itself determined that this term is broad enough to capture "personal computers, or televisions equipped with web TV boxes"[6] and, similarly, captures mobile devices employing point-to-point technology[7]. However, it is not clear what type of devices the term is meant to exclude. It could be more helpful to consider whether there are particular types of public programming delivery that are *not* meant to be captured (for example, permanent programming downloading[8]), rather than focus on the means of reception.

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[5] To mean, "any wire, cable, radio, optical or other electromagnetic system, or any similar technical system".

[6] *Broadcasting Public Notice CRTC 1999-84*.

[7] *Broadcasting Regulatory Policy CRTC 2009-329*.

[8] In *Entertainment Software Association* v. *SOCAN* [2012] 2 SCR 231, a majority of the Supreme Court of Canada determined that "permanent" downloads of content (video games containing musical works)

38. When it comes to certain key question that affect the creation and delivery of diverse programming content to Canadians, there is little difference between distribution of content by the Internet and other forms of distribution. Without careful monitoring and intervention in the public interest, all forms of distribution are potentially subject to monopolization and competitive abuse.

39. Consider the following observation made by the Canadian Media Concentration Research Project ("CMCRP"):

> The sprawling expansion of the internet giants adds up to the two companies [Google and Facebook] — and others, such as Amazon, Apple and Microsoft — building what is tantamount to their own private internets that bring huge volumes of internet traffic as close to the doorsteps, desktops and devices of their users as possible. These activities have huge implications for the very character of the internet as we know it.[9]

These companies, which now dominate the Internet, are moving more directly into the broadcasting marketplace: the ownership and delivery of content directly to the public.

40. While CMCRP takes issue with whether these companies are actually the "vampire squids" of the advertising market that they have been made out to be,[10] the lesson to be taken is that the Internet is not immune from domination by a few players. The history of communications systems, from book to film to telegraph to radio to television – and now to Internet – has consistently seen technology that promised open and diverse communication eventually controlled by a few dominant players.[11]

41. There is no principled reason to exclude communication by means of the Internet from the application of key principles set out in the *Broadcasting Act*. It is subject to exactly the same potential abuses – and should be carefully managed to ensure that the Internet is able to meet its potential to fulfill the same public interest objectives.

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did not constitute a communication to the public for copyright purposes. Rather, these transactions were compared to traditional video rental or purchase activities. It is, however, a valid policy question whether electronic activities of this type *should* potentially fall within the scope of the *Broadcasting Act* – at least as they relate to "programs". Including these activities within the ambit of the Act would enable the regulation of electronic rental and purchase transactions to ensure, for example, the provision of shelf-space to Canadian programming content. There is no bright line between the provision of "on-demand" access to programming content in comparison to short-term rental of such content, for example. Including such transactions within the definition of broadcasting would enable the regulator to determine whether regulating these transactions would contribute to the policy objectives set out in the Act.

[9] CMCRP, *Media and Internet Concentration in Canada, 1984-2017*. [http://www.cmcrp.org/media-and-internet-concentration-in-canada-1984-2017/], page iv.

[10] *Ibid.*, page 73.

[11] This is the theme explored in great and convincing detail in Timothy Wu's highly influential work, *The Master Switch: The Rise and Fall of Information Empires.*

Continue to Focus on Programming, not Text

42. The current definition of broadcasting relates to the transmission of "programs". This is a central term of the *Broadcasting Act* and goes to the heart of the CRTC's jurisdiction over the regulation of electronic content. Essentially, unless the electronic content is a "program", the provisions of the *Broadcasting Act* do not apply to that content (or do so only indirectly to the extent that these types of communications are otherwise closely associated with the delivery of programming – such as the delivery of closed captioning).

43. IBG/GDI believes that it is appropriate to maintain the distinction drawn in the Act between communications that are "programming" – i.e. audio or audio-visual in nature – as opposed to those that are predominantly alphanumeric text. To include alphanumeric text within the ambit of the Act would extend the Commission's jurisdiction to all forms of electronic communication to the public, including electronic publications such as newspapers, for example.

Programming data is integral to programming

44. While maintaining the distinction between programming and alphanumeric text that is *delivered* to the public is appropriate, the same reasoning does not apply to data (i.e. "alphanumeric text" or digital information) that is *collected* from the public.

45. The collection of viewership data and other information associated with programming is now intimately related to the delivery of that programming over the Internet. Data is accessible through the set-top-box platform and it is being actively used now by vertically integrated or BDU-affiliated broadcasters in Canada. The Commission has already recognized that the appropriate use of this data by the broadcasting industry can be beneficial to the achievement of broadcasting policy objectives.[12]

46. The *Broadcasting Act* does not, however, currently recognize the role of data as it relates to the delivery and use of programming services. Arguably, the Commission's jurisdiction to regulate the collection of data is derived indirectly from its authority to regulate the distribution of programming services by distribution undertakings.[13] The collection and use of data is now intimately associated with the distribution and use of programming by viewers in the online environment. In particular, the use of algorithms to collate and present programming titles to viewers is a key feature of Internet-based platforms such as Netflix and YouTube – and virtually every other Internet platform. Viewer or user data is also used for the purposes of compensating programming creators and distributors.

47. The collection and use of data is one of the biggest issues that regulators will confront going forward. It is now the primary business model of many Internet based programming platforms. This kind of data collection and use was not part of the

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[12] *Broadcasting Regulatory Policy CRTC 2015-86*, paragraphs 154-162.

[13] Pursuant to the regulation making authority in relation to distribution undertakings under sections 10(1)(g) and (h), for example, and under its authority to make conditions of licence.

economic landscape when the current *Broadcasting Act* was created. It was not, therefore, dealt with as an express element of the creation, delivery and use of programming.

48. We need to be able to create explicit policies around the creation and use of viewer data. It is critical that broadcasters have access to key data relating to the viewing of programming and basic audience information. The use of this data will be fundamental to the development, production and marketing of programming and to revenue streams such as advertising and merchandising. Without this information, program creators face much greater risk and miss potentially valuable revenue opportunities. This will discourage *investment* in content. Yet, many platforms, such as Netflix, are loath to share basic viewing data. The story of the set-top-box audience measurement system in Canada is tortuous – even as the largest companies continue to make announcements of their ability to access and use enhanced data.[14] Asymmetrical access to data will have far reaching consequences to how content is created and distributed.

49. In this environment, the omission of data use from the concept of broadcasting is a key gap that should be addressed. The concept of broadcasting should include the collection and use of data collected in association with programming.

Move to the concept of "Platforms"

50. The current definitions in the Act refer to three specific types of undertakings: "programming undertakings" (which transmit programs), "distribution undertakings" (which receive and retransmit broadcasting to dwellings, permanent or temporary), and "networks" (where control over programming or programming schedules is exercised by another undertaking or person). Internet-based services do not easily fall within these definitions or are more likely than not to exhibit characteristics of all types.

51. It would be beneficial to consider broadcasting undertakings in a more holistic manner, rather than separating them by functional category as is currently done in the Act. Rather, "undertakings" should be recognized as potentially operating multi-faceted service *platforms* which could involve the transmission of programs selected by them (i.e. a "programming" function) as well as the transmission of programs offered by other persons (i.e. a "distribution" function).

52. The merger of the concept of the programming undertaking and the distribution undertaking would provide greater flexibility in determining the appropriate regulatory action for the particular undertaking involved. Currently, the *Broadcasting Act* does not extend objectives relating to the provision of access for programming to "programming services" themselves. Thus, for example, the Act does not contemplate that video-on-demand undertakings (which are programming undertakings) provide fair terms of access for the programming provided by other programming services. Section 3(1)(t) of the Act, which sets out the principle of fair access for programming services, relates only to the

[14] "Bell launches system for targeted TV ads", *Wire Report*, January 9, 2019.

facilities of distribution undertakings. In an online environment, this distinction will become potentially even more problematic. For example, if Bell Canada were to elect to distribute all of its own, controlled programming to the public via the Internet in its own walled garden (as a "programming service"), then the Act would not currently seem to empower the provision of access to this platform by other programming providers. This gap will become increasingly problematic going forward.

Delivery in "public places"

53. Lastly, with respect to the overall approach to broadcasting set out in the current *Broadcasting Act*, the current definition explicitly excludes the transmission of programs "made solely for performance or display in a public place". At the time this provision was enacted, it was stated that the intention was to exclude such matters as "championship fights shown in arenas"[15]. This exclusion has, however, taken on a potentially much broader scope than may have been intended. It is now the case, for example, that most commercial establishments in which the public is permitted entry could be considered a "public place". Accordingly, any service may be offered in such an establishment without regard to its character, or compliance with regulatory requirements.

54. While the distinction drawn in the existing Act may have made sense when the transmission of programming to public places was a relatively discrete and costly activity, this is no longer the case. The services that are accessed in public places such as retail establishments, restaurants and bars, and other locations are potentially exactly the same services as may be accessed by the general public in any other location via the Internet. It is not clear why an entity offering programming to the general public in Canada for home viewing, for example, should not meet the same public policy objectives when it makes that content available for viewing by the public through commercial establishments. Some activities – such as the championship fight noted above – do not raise material policy issues. Other activities, such as providing television or music services to retail outlets, could raise material policy issues if the activity had a sufficient impact on the Canadian market.

55. In IBG/GDI's view, the outright public place exclusion from the definition of broadcasting appears to be overbroad in the current environment. A more consistent approach would be to include such activities within the overall regulatory framework and then enable the regulator to exercise a "light" or "heavier" touch as may be appropriate depending on the activity.

[15] See discussion in *Canadian Broadcasting Regulatory Handbook, 14th Edition*, page 10 [ss104-6].

D. 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?

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

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

56. IBG/GDI believes that the broadcasting policy objectives for Canada set out in the *Broadcasting Act* remain highly relevant to Canada today. The provisions set out overall objectives for the broadcasting system and then enumerate specific objectives for certain types of broadcasters (e.g. programming services and distribution undertakings) and in specific areas of activity (e.g. educational programming, the provision of accessible programming and programming reflecting Indigenous cultures). There are only a few instances where the objectives do not seem to resonate in the manner in which they were originally intended (such as the reference to "alternative television programming services" in section 3(1)(r)).

57. From IBG/GDI's perspective, the most significant omissions from the existing broadcasting policy objectives are objectives relating to a diversity of ownership within the broadcasting system, and objectives relating to the more open and global environment in which programming providers now operate.

Recognize Diversity of Ownership and Independent Ownership as a Clear Objective

58. IBG/GDI believes strongly that ownership diversity plays a key role in furthering the interests of Canadians. In fact, ownership diversity is often cited by the Commission as an important factor in preserving a diversity of editorial points of view[16] and in enhancing competitiveness and innovation in the broadcasting sector.[17]

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[16] *Broadcasting Public Notice CRTC 2008-4*, in which the Commission states: "Given the trend toward greater consolidation and the consequent impact on diversity of voices, a plurality of ownership in the private element is necessary in order to maximize the diversity of voices in the Canadian broadcasting system."

[17] *Broadcasting Regulatory Policy CRTC 2015-96*. The Commission notes at several points in that policy that the wholesale regulation of relationship between programming services and distribution services is focused on ensuring a fair competitive environment that fosters diversity and innovation. Its policies with respect to small BDUs are expressly intended to encourage new entrants and competition between different owners. It makes similar comments with respect to the entry of new programming services to serve third-language markets.

59. With respect to editorial diversity, the Commission has already recognized, for example, that independent local television stations are often the only source of local news on television in the communities they serve.[18]

60. Notwithstanding the importance of ownership diversity, over time, a few large media conglomerates have come to dominate the Canadian broadcasting system. Not only are the entities large, they are also vertically integrated, controlling both the distribution networks and the content that is delivered over those networks.

61. The recent report by the CMCRP summarizes the state of the Canadian market succinctly. It states that in Canada, "two things stand out: the sky-high levels of diagonal integration and the extremely high levels of vertical integration that exist in this country." The report continues:

> . . . Canada stands alone in the developed world on account of the fact that all of the main TV services in the country, except for the CBC and Netflix, are owned by telecoms operators. In the US, by contrast, while there are also four vertically-integrated behemoths—AT&T, Comcast, Charter (Liberty) and Cox—they accounted for just a third of that country's mammoth $1,405 billion (CDN) network media economy in 2017 (adjusted to take account of AT&T's take-over of Time Warner earlier this year). In the US, like most other countries as well, most broadcast and pay TV services are not owned by telecoms operators—a fact that has extremely important implications, as this report shows.
>
> In sum, high-levels of vertical and diagonal integration are distinguishing features of the network media economy in Canada and they need to be recognized and dealt with accordingly. Indeed, the principle of "common carriage" (popularly known as "net neutrality") is built for conditions like these—albeit not contingent upon them. As this report suggests, this unique combination of conditions helps explain why internet access, mobile wireless and cable TV services prices are so expensive, data caps low, unlimited options rare and expensive, and the variety of stand-alone internet streaming TV services on offer in Canada so limited.[19]

62. IBG/GDI agrees with this analysis. In fact, it is alarming to realize that the greatest challenge to the dominance of the largest Canadian companies comes from *non-Canadian* players. The CMCRP notes, for example, that concentration levels in the total TV marketplace in Canada have started to decline over the last year "largely because of the growth of internet streaming services, especially Netflix".[20]

63. Yet, services like Netflix – while very popular with Canadians – operate largely outside of the regulated broadcasting system and do not make anywhere near the same

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[18] *Broadcasting Regulatory Policy CRTC 2016-224*, paragraphs 77-78.
[19] CMCRP, *Media and Internet Concentration in Canada, 1984-2017*. [http://www.cmcrp.org/media-and-internet-concentration-in-canada-1984-2017/], page ii.
[20] *Ibid.*

contribution in terms of employment, production of Canadian programming content and contribution to Canadian GDP as do Canadian players. Turning to non-Canadian players to re-establish a competitive and diverse environment in the Canadian marketplace can only have a long-term negative impact on the Canadian broadcasting system and on Canadian expression.

64. A critical objective that should be included in the *Broadcasting Act* going forward, therefore, is explicit recognition of the benefits of ownership diversity and a diversity of voices in Canada. IBG/GDI recommends that a new objective be added as follows:

3(1)(d) *The Canadian broadcasting system should*

. . .

(v) Foster innovation and creativity in the provision of programming through a diversity of voices and diversity of ownership, including independent ownership.

65. The concept of "independence" in this objective is meant to reflect ownership that is independent of material ownership of distribution networks. As noted by the CMCRPP, the principles of "common carriage" and "net neutrality" were meant specifically to address concerns related to the cross-ownership of networks and the content offered over those networks. In the broadcasting context, the "common carriage" principle was instead replaced by the notion of BDUs providing access to content providers.

66. Initially, when cross-ownership of cable or satellite companies and programming services was first allowed – the access commitments made by these companies were comprehensive and far-reaching. For example, when Rogers acquired Maclean Hunter in 1994, Rogers committed to distribute all licensed programming services on its cable systems "without qualification".[21] It also committed to abide by a binding arbitration dispute resolution mechanism and to ensure that programming services had priority access to the Rogers systems over non-programming services. These and similar access commitments were carried forward and codified in regulation even as more programming services were licensed and the regulatory framework became more nuanced.

67. The broad and comprehensive access commitments made by cable and satellite providers in exchange for the ownership of programming services were largely eliminated with the Commission's Let's Talk TV policy framework. Somewhat ironically, the requirements to provide access to certain key programming services was eliminated in part because a large proportion of those services with an access right (i.e. Category A services) were owned by the vertically integrated companies themselves.[22] This should be a clear indication that the level of concentration of media ownership and vertical integration has indeed become very high.

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[21] *Decision CRTC 94-923*. The commitment did not apply to third-language and minority language services, which were subject to channel capacity.
[22] *Broadcasting Regulatory Policy CRTC 2015-96*, paragraphs 113 to 119.

68. The challenges associated with obtaining access rights also lead directly to ownership consolidation among programming services. For example, independent services well remember the suggestion made at the Let's Talk TV hearing that independent programming services should "get together" – i.e. consolidate – in order to increase their bargaining power in relation to distributors.[23] This could be one response, but it is inconsistent with the approach of encouraging new entrants and does not promote wider editorial and content diversity.

69. It is also inconsistent with the idea that an economic environment benefits from the presence of a range of companies of different sizes and scale, innovating, growing and consolidating and de-consolidating on a continuous basis. Even while we have created network access choke points in the broadcasting system through industry consolidation, we have also created a broadcasting system that faces systemic risk because it depends excessively on a few, large players whose economic interests in broadcasting are actually quite small in relation to their economic interests in other businesses.[24]

70. Our system should, we believe, be moving to eliminate choke points that affect the distribution of content: they are increasingly the result of the simple exercise of market power rather than capacity or other technical limitations. Similarly, we need to be consciously aware and seek to address concerns around the excessive concentration of power by emerging platforms. On the Internet, it is often terms of service or terms of access to the platform that are the new choke point. This is an area that must be subject to scrutiny and oversight.[25]

71. Network and platform access issues will, IBG/GDI believes, dominate the competitive communications environment for years to come, including in relation to Internet-based platforms.

72. Recognizing the need within the broadcasting system of a diversity of voices and a diversity of ownership, as a clear objective, will provide clear direction in staving off potential abuses by network and platform owners.

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[23] *Broadcasting Notice of Consultation CRTC 2014-190*, Transcript, Hearing 15 September 2014, paragraphs 14023 to 14052.

[24] CMCRP, *Media and Internet Concentration in Canada, 1984-2017*. [http://www.cmcrp.org/media-and-internet-concentration-in-canada-1984-2017/], page 24.

[25] See, for example, the discussion of this issue in the European Commission's Communication *Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe* (May 25, 2016). In that Communication, the European Commission noted that the most common alleged market problems for businesses reliant upon and dealing with online platforms included the following: "(1) platforms imposing unfair terms and conditions, in particular for access to important user bases or databases; (2) platforms refusing market access or unilaterally modifying the conditions for market access, including access to essential business data; (3) the dual role that platforms play when they both facilitate market access and compete at the same time with suppliers, which can lead to platforms unfairly promoting their own services to the disadvantage of these suppliers; (4) unfair 'parity' clauses with detrimental effects for the consumer; and (5) lack of transparency — notably on platform tariffs, use of data and search results — which could result in harming suppliers' business activities."

E. Support for Canadian Content and Creative Industries

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?

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?

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?

73. The path forward to ensuring the continuing production and accessibility of Canadian programing – and ongoing innovation in content creation and distribution is deceptively simple to state:

- first, all entities that are involved in Canada's broadcasting system should make an appropriate contribution to Canadian programming – through its funding, creation or distribution – in a manner that is consistent with the functions of those entities; and

- second, Canada should focus on ensuring that it has a healthy and dynamic domestic marketplace that supports Canadian players – including new entrants, independent services, and small and medium sized companies – and ensures access to the Canadian market for these players – notwithstanding the heavily concentrated and vertically integrated ownership structure of Canada's communications industries.

(i) *Parity in regulatory contributions*

74. We have already set out above our view that urgent action is required to bring Internet-based broadcasting services expressly into the communications legislative framework. We have proposed specific legislative amendments that could be adopted within a short time frame to provide that Internet-based services should make an appropriate contribution to the achievement of Canadian broadcasting policy objectives that is in keeping with the function and role of those services.

75. IBG/GDI respectfully requests that the Panel urge the Government to move forward on these or similar amendments as an urgent priority. Bringing online services expressly into the *Broadcasting Act* is a first and much needed step to modernize the communications legislative framework. Such an initiative would immediately enable the Commission to move forward to develop comprehensive and detailed policies that will ensure that online services do make an appropriate contribution to Canadian programming – and contribute to the ongoing development and growth of Canada's broadcasting system.

76. In its *Harnessing Change* report the Commission has succinctly expressed views that echo the submissions made to it over the years by many industry players and consumers:

> [S]ervices operating in Canada, just as in any other nation, have social responsibilities to the Canadians they serve. Such services benefit from Canada and Canadians and consequently should also participate in the enrichment of our cultural, social, democratic and economic fabric.[26]

Viewed from another perspective, we should appreciate that services like Amazon Prime are about to enter a highly attractive market with online audio-visual services. Accessing this market should come with the assumption of responsibilities to support and enhance that market.

77. In IBG/GDI's respectful view, the key role for the Panel in suggesting legislative modernization should be to empower the regulator to take the steps that are required to modernize Canada's regulatory framework. The Panel itself is likely not in the position to suggest, for example, detailed regulatory requirements for online services, such as exhibition levels, funding requirements, or access for Canadian services. Rather, the focus should be on ensuring that the regulator, the CRTC, has the legislative tools it requires, and a clear mandate, to move meaningfully into this area of regulation.

78. In the longer term, IBG/GDI notes that the Commission in its *Harnessing Change* report has suggested that the regulatory tools available to the Commission be reformed in key ways to adapt to on online and more global environment. These proposed measures would include:

- Reframing the formal licensing framework under which individual services are authorized to operate in Canada and, more specifically, providing for open-ended licence terms;

- Providing the Commission with explicit authority to collect data, and regulate the collection of data, both for the CRTC's own purposes and to provide service providers with the data generated from third-party platforms; and

- Enabling the Commission to regulate at the "enterprise" level, rather than service by service, through innovative service agreements or similar measures.

79. IBG/GDI would support these measures. We agree with the Commission's observation in its report that the current regulatory tools available to the Commission do not appear to be adequate to the task at hand and result in our regulatory system falling behind technological developments. We have the following more specific observations on these proposals:

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[26] CRTC, *Harnessing Change*, Conclusions and Potential Options.

(ii) *Open-ended licensing*

80. As the Commission notes in the *Harnessing Change* report, it currently issues thousands of licences. The ongoing activity of reviewing, renewing and reissuing these licences creates a significant administrative burden for the Commission and for licensees. IBG/GDI agrees, therefore, that a more open-ended licensing regime could reduce these administrative burdens.

81. IBG/GDI's primary concern in this area, however, is that the certainty of a licence term – and the terms and conditions under which a particular service may operate – are key factors for commercial and non-commercial broadcasters. It would be far more difficult to make investments in operations, to generate financing, and undertake other business activities without a high level of certainty regarding the particular circumstances under which a licensee will operate for a reasonable period of time. Currently, licences may not be amended on the Commission's own motion during their first five years of currency.

82. Therefore, if the legislation were amended to contemplate open-ended licensing, mechanisms should also be included to provide for *minimum* time frames for non-amendment to provide for commercial and operational certainty.

(iii) *Authority to Collect and Regulate Data Collection and Use*

83. IBG/GDI fully supports the Commission's objectives in this area. As noted above, IBG/GDI believes that data that is associated with programming and its use should be recognized as an integral element of the function of broadcasting. Data that is specific to programming and its use should not be confused with the type of alphanumeric text and information that is currently explicitly excluded from the notion of broadcasting.

84. In order to make provide the Commission with clear authority in this area, IBG/GDI believes that the Commission should be provided with specific authority to make regulations prescribing:

- the types of data that are to be considered as associated with programming and its use;
- the conditions for the collection and use of such data; and
- the conditions on which such data shall be provided to the services to which such data relates.

IBG/GDI recognizes that the collection and use of data may involve privacy issues. Therefore, the Act should also provide for the explicit recognition of the rights of privacy of individuals in their own personal information.

(iv) ***Service Agreements***

85. The Commission's proposal to use service agreements in order to regulate enterprises at the highest level of operations could result in a much more responsive and flexible regulatory environment. IBG/GDI therefore supports this approach to regulation.

86. At the same time, there is some concern that this manner of regulation could result in terms and conditions for large enterprises that are more favourable – or more flexible – than terms and conditions that are available to smaller enterprises. For example, the Commission's move to group licensing for the largest broadcast groups resulted in those large groups gaining considerable flexibility in the manner in which they met their regulatory obligations (such as Canadian programming expenditure obligations). Smaller broadcasters had no means to take advantage of the increased flexibility enjoyed by the large groups and were thus placed at some competitive disadvantage. This outcome was an unintended consequence of the regulatory initiative of group licensing.

87. IBG/GDI's concern, therefore, is that any approach to regulating at an enterprise level be framed to take into account the relative size of the various enterprises. In general, small and medium sized enterprises should not be placed in a disadvantageous regulatory position in relation to larger enterprises that are able to "negotiate" a better deal with the regulator due to their size or market power.

(v) ***A healthy and dynamic domestic marketplace***

88. Many stakeholders recognize the central role that Canada's domestic market must play in the creation and distribution of Canadian programming that reflects and is relevant in our own country. As large and enticing as the global market for content may appear, this market will not drive the creation of the type of diverse content that is now readily available in the broadcasting system. This includes local, regional and national news and information programming, programming in Indigenous languages, educational programming and programming that reflects the diversity of cultures and languages present in Canada – from Canadian perspectives. No one else will produce content that is directed to Canada in the same way that Canadians will.

89. For this reason, policymakers have emphasized the continuing need for a healthy and dynamic *domestic* market. For example, the Department of Canadian Heritage noted the following in its *Creative Canada Policy Framework*:

> As the federal regulator for broadcasting and telecommunications, the CRTC has a key role to play in this transition. The Government sent a letter to the incoming Chairperson of the CRTC, welcoming him to his new post and informing him of the Government's vision and priorities for Canada's broadcasting and telecommunications system during his term. <u>These include recognizing that the digital shift has led to an environment of seemingly infinite choice, where global success for Canadian content requires a diverse and strong domestic market that acts as a launchpad for homegrown talent</u>; that the broadcasting system plays a

> crucial role in providing trusted, accurate and quality information; and that recognizing and supporting the perspectives of creators in CRTC deliberations, as well as the key role they play, will be important to the success of the Canadian broadcasting system.[27]

The CRTC's own *Harnessing Change* report highlights the need for a vibrant domestic market, and emphasizes that new approaches are required to respond to the digital shift in the future:

> In this new environment, fostering a spirit of innovation and helping to build a vibrant domestic market in the future—including the new industries and jobs that the Canadian economy will rely on—will require action and investment by governments and all other stakeholders.[28]

Finally, the Terms of Reference provided to the Panel makes explicit the connection between a healthy domestic market and the viability of Canadian expression:

> Without a viable and healthy broadcasting sector, the continued success of Canadian creators, independent producers, and the content they produce is at risk.[29]

90. IBG/GDI fully supports this perspective. A healthy and dynamic domestic market is essential to both the *domestic* success of Canadian expression – which should be perhaps the central goal for policy makers – as well as to its potential *international* success. IBG/GDI has iterated on many occasions that a healthy domestic market will enhance Canadian expression and help to drive innovation in the digital economy.[30]

91. One of the hallmarks of a healthy domestic market in the cultural content sector is a diversity of players in that market – as reflected by diversity in ownership. The Canadian market does not score well in terms of the diversity of ownership. In fact, as noted above, Canada's communications market – including the broadcasting market (and especially television market) – is characterized by exceedingly high levels of concentration of ownership and vertical integration. This is one of the <u>defining features</u> of the Canadian broadcasting sector.

92. It is not apparent that the conscious strategy that some large players and the regulator have pursued – of creating large, and vertically integrated media conglomerates as champions to counterbalance the influence of non-Canadian OTT players – has succeeded. The opposite may well be true. As the CMCRP states:

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[27] Department of Canadian Heritage, *Creative Canada Policy Framework*, page 26 (emphasis added).
[28] CRTC, *Harnessing Change*, Conclusions and Potential Options.
[29] *Broadcasting and Telecommunications Legislative Review, Terms of Reference*, page 10.
[30] See, for example, IBG/GDI's submission dated November 25, 2016 in response to the Department of Canadian Heritage's *Canadian Content in a Digital World* consultation.

> [T]he above analysis suggests that building a cultural policy and TV industry around a few giant vertically-integrated companies has been a failure even on its own terms, with Bell, Shaw (Corus) and Rogers quick to shutter the doors and dispose of services when challenges to their bottom lines mount—despite making profits that are the envy of almost any other industry.[31]

93. We acknowledge that in some instances, the Commission has recognized the discrepancy between the promises made at the time when transactions involving substantial consolidation and vertical integration were approved, and the reality on the ground. For example, in its recent policy regarding local and community television, the Commission noted that large vertically integrated entities were allowed to establish themselves purportedly to create a critical mass to ensure the continued production and distribution of Canadian programming, including news programming.[32] For that reason, the Commission did not permit these companies to access additional funding to support local news programming.

94. Instead, the Commission directed funding to local independent television stations – and this policy has been a resounding success. The Commission recognized that these stations were often the only source for televised news in their local markets.[33] The Commission's policy recognized the operational differences between independent and non-independent services – as well as the specific role of independent TV stations as a source of diversity. This is precisely the type of analysis that the Commission must make under the *Broadcasting Act* to ensure a vibrant and healthy domestic market.

95. IBG/GDI has suggested that broadcasting policy objectives make specific reference to the diversity of ownership as a key objective to guide policy makers.[34] In addition, the regulatory policy set out in the Act should refer specifically to ownership diversity.

96. Currently, section 5 of the Act recites numerous regulatory objectives, but makes no mention of diversity, whether in terms of programming content, ownership, reflection or in any other manner. This is a glaring omission. IBG/GDI believes that focusing on ownership diversity in the regulation of the broadcasting market, even as the market evolves with the entry of new digital players, will help to ensure the presence of a healthy domestic market that supports and encourages programming diversity and innovation at all levels.

97. We recommend, therefore that section 5 be amended to include a specific reference to ensuring ownership diversity:

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[31] CMCRP, *Media and Internet Concentration in Canada, 1984-2017*. [http://www.cmcrp.org/media-and-internet-concentration-in-canada-1984-2017/], page 56.
[32] *Broadcasting Regulatory Policy CRTC 2016-224*, paragraph 19.
[33] Ibid. at 77 and 78.
[34] See above at paragraphs 58 to 72.

> 5.(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that
>
> *h) encourages diversity of ownership, including independent ownership*

98. In addition to this specific change to the legislative framework, it should be noted that IBG/GDI fully supports principles of "net neutrality" in relation to open networks, such as the Internet. Moreover, as we have argued elsewhere, these principles are no less important in relation to the "closed networks" operated by BDUs. Access to closed networks has, however, been viewed more as an issue of ensuring "fair access" to networks, rather than open and "neutral" access.[35]

99. Going forward, IBG/GDI believes that the difference between "open" Internet networks and "closed" BDU networks will continue to blur. In this environment, when a few of the same companies dominate both the "open" Internet access market and the "closed" BDU market, access issues will become even more important to ensure a healthy and vibrant domestic market.

100. If, as IBG/GDI has proposed, the longer term outlook for broadcasting services is to view them as "platforms" rather than programming services or distribution undertakings, then many of the principles of fair access that apply to BDUs are also relevant to certain types of broadcasting service platforms.

101. Looking at section 3(1)(t) of the *Broadcasting Act*, which sets out the key policy objectives that relate to distribution undertakings, many if not all of these principles could be applied equally to a service "platform" offering access to content whether through an open or closed network:

> (t) distribution undertakings
>
> (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
>
> (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
>
> (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

[35] See IBG/GDI submission to the CRTC dated December 1, 2017 in response to *Broadcasting Notice of Consultation CRTC 2017-359*.

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

102. For example, a service offering access to content "apps" on its platform, when operating in Canada, could reasonably be expected to ensure that Canadian "apps" are given priority (or event mandated), are carried on fair terms and are given prominence on the platform. Similarly, a platform that operates a BDU-like service in a "virtual" environment (i.e. through the Internet without operating its own transmission facilities), could reasonably be expected to provide access to the programming offered by other services in Canada (whether on a linear or on-demand basis), and to generally abide by distribution rules that would generally apply to a facilities-based BDU.

103. IBG/GDI believes that it is likely that programming and distribution functions will continue to blur in the future. This is especially true in Canada where the largest distributors are also the largest owners of programming services. In this environment, the *Broadcasting Act* should take a holistic approach to services that are engaged in "broadcasting" (i.e. delivery of programming to the public), and have the full ability to ensure fair and open access to all platforms delivering content to the public as it considers appropriate. Ensuring access to the market – and letting the consumer make the ultimate choice as to whether a service succeeds or not – is and should be a fundamental element of a healthy and vibrant domestic market.

104. The effectiveness of the Commission's existing tools to regulate in the future distribution environment is the subject of the next section of this submission.

F. 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?

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

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

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

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

105. In this section, we will focus specifically on Question 14.4, whether the Commission has the tools at its disposal to regulate appropriately in the emerging digital environment.

106. IBG/GDI wishes to note, however, that the *Broadcasting Act* does strike a balance between an independent regulator and the role of the elected government of the day in setting policy and overseeing individual decisions. While the government of the day has the authority to issue directions on policy matters, to direct research and consultations, and to quash or refer certain decisions back to the CRTC, the CRTC remains independent within its area of jurisdiction. It has proven itself to be fully independent over time. Equally important, CRTC decisions are subject to appeal to the Federal Court of Appeal. In general, this framework strikes an appropriate balance.

107. Some of the particulars could require review and updating as the legislation itself undergoes review. For example, if the Commission were empowered to establish or enter into enterprise-level service agreements, then presumably these agreements should be subject to section 28 of the *Broadcasting Act* in the same manner as a licensing decision. Similarly, as the Commission continues to rely on exemption orders to enable broadcasting services to operate, these orders might themselves be suitable for Cabinet review. Generally, however, such changes would be consequential to other amendments made to the structure of the Act. IBG/GDI believes that the overall interaction between the CRTC, governments of the day and the courts are appropriate in the broadcasting context.

(i) *Authority to regulate commercial relationships should be made explicit*

108. The Commission has explicitly recognized that a healthy wholesale market between BDUs and programming undertakings helps to achieve broadcasting policy objectives. Among other things, it promotes consumer choice and serves to promote the creation of a diverse range of programming made by Canadians, including programing provided by independent services.[36] A healthy wholesale market is also, in IBG/GDI's view, one of the indicators of the healthy and vibrant domestic market.

109. The Commission has developed a number of tools under its existing powers that are intended to support a healthy wholesale market. These include the Commission's *Wholesale Code*[37], and its dispute resolution mechanisms including a "standstill rule", applicable to BDUs and programming services under applicable regulations,[38] staff-assisted mediation, and expedited dispute resolution procedures. In IBG/GDI's view, all of these mechanisms fall with the Commission's existing regulatory powers and will continue to be highly relevant in the future distribution environment.

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[36] See the discussion in *Broadcasting Regulatory Policy CRTC 2015-96*, paragraphs 61 to 103.
[37] *Broadcasting Regulatory Policy CRTC 2015-438*.
[38] *Broadcasting Distribution Regulations*, sections 12 to 15.01; *Discretionary Service Regulations*, sections 14 and 15.

110. Notwithstanding IBG/GDI's view, the Commission's authority to implement the *Wholesale Code* and, in fact, to regulate and supervise commercial relationships between BDUs and programming services has been questioned. Recently, in a Federal Court of Appeal decision, the Court left intact the Commission's overall authority to implement the *Wholesale Code*, but determined that the tool used by the Commission in that instance for its implementation (section 9(1)(h) of the *Broadcasting Act*) was invalid.[39] Accordingly, the *Wholesale Code* and the Commission's dispute resolution mechanisms are now operative by virtue of conditions of licence applicable to BDUs and programming services, and through the dispute resolution provisions set out in the various regulations.

111. IBG/GDI agrees with the suggestions made by the Canadian Communications Systems Alliance ("CCSA") that the Commission should be provided with the express and incontrovertible authority to regulate and supervise the economic relationships between broadcasting undertakings. We agree, therefore, with the recommendation made by CCSA that the Commission's regulatory powers in section 10 of the *Broadcasting Act* be amended to enable the Commission to establish, or to provide mechanisms to establish, the terms and conditions of contractual relationships between broadcasting undertakings.

112. This authority must extend, without question or limitation, to online services and platforms.

(ii) ***Dispute resolution should extend to disputes between all undertakings***

113. In addition, IBG/GDI notes that the Commission's authority to regulate disputes between broadcasting undertakings should be expanded so that it applies, unambiguously, to any type of undertaking, and not just disputes between BDUs and programming services.[40] In addition, the scope of disputes to be resolved should probably be expanded to include disputes of any character relating to the operations of those undertakings and not simply the "carriage of programming".

114. It has been questioned, for example, whether dispute resolution procedures could apply to a dispute between a programming service, on the one hand, and a video-on-demand

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[39] *Bell Canada* v. *7265921 Canada Ltd.*, 2018 FCA 174 (CanLII).

[40] Section 10(1)(h) of the Act give the Commission the authority to make regulations "for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;" It has been questioned, for example, whether dispute resolution procedures could apply to a dispute between a programming service, on the one hand, and a video-on-demand undertaking operated by a BDU on the other. Unquestionably, dispute resolution should apply in these circumstances for the same reason that dispute resolution is appropriate between programming services and BDUs: it involves access to a platform for delivery to the public. As undertakings move to a universal "platform" environment, the programming service and distribution functions will become increasingly blurred, meaning that bright line distinctions such as those currently set out in the regulations between BDUs and programming services will be difficult to interpret and enforce.

undertaking operated by a BDU on the other.[41] Unquestionably, dispute resolution should apply in these circumstances for the same reason that dispute resolution is appropriate between programming services and BDUs: it involves access to a platform for delivery to the public.

115. As undertakings move to a "platform" environment, the programming service and distribution functions will become increasingly blurred, meaning that bright line distinctions such as those currently set out in the regulations between BDUs and programming services will be difficult to interpret and enforce. In addition, while the carriage and terms of carriage of programming are likely to remain the key issues in most disputes between undertakings, there is increasing likelihood that other issues, such as the use and sharing of data collected by one undertaking concerning another undertaking, may also become the subject of active disputes. A broader, rather than a narrower approach is warranted.

(iii) ***Authority to make Interim Orders and Decisions and to Review Orders and Decisions***

116. IBG/GDI similarly agrees with CCSA that the Commission's authority under the *Broadcasting Act* should be expanded to enable the Commission to make interim decisions and orders, and to reconsider its decisions and orders. The Commission already has similar powers under sections 60 and 62 of the *Telecommunications Act*. Broadcasting matters would benefit from this additional level of flexibility and responsiveness.

(iv) ***Illegal and Infringing Content***

117. IBG/GDI has carefully followed the application brought by the Fairplay Coalition regarding the proliferation of illegal and infringing content distributed over the Internet. It is abundantly clear that the power of the Internet has brought both incredible benefits for the wide communication of content to the public, as well as glaring risks.

118. In *Telecom Decision CRTC 2018-384*, the Commission determined that it did not have jurisdiction under the *Telecommunications Act* to require Internet service providers to disable access to web-based services engaged in the blatant and flagrant infringement of copyright. This review of the communications legislative framework presents an opportunity to remedy this gap in way that respects the interests of copyright users, while providing effective remedies for copyright owners and licensees.

119. IBG/GDI supports initiatives that would provide effective means to inhibit the proliferation of illegal and infringing content. This proliferation is currently causing direct harm to programming producers and broadcasters – especially at this time to third-language producers and broadcasters – and this harm will intensify without a meaningful way for the protection of copyright online.

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[41] *Broadcasting Notice of Consultation CRTC 2017-280*.

G. Conclusion

120. IBG/GDI appreciates this opportunity to make this submission to the Panel. Independent broadcasting companies include some of Canada's leading cultural entrepreneurs, who are making new and exciting content for Canadians to experience, and actively exploring opportunities in global markets. Independent broadcasting companies also reflect Canada's full diversity, meeting the mandate for diversity as set out in the *Broadcasting Act*.

121. Canada benefits from and needs a strong independent broadcasting sector.

122. We look forward to working with the Panel and other stakeholders to create a legislative framework that recognizes the essential and vital role of independent broadcasters in Canada's communications system and ensures an ongoing and vibrant communications sector.

123. We would be pleased to meet with the Panel to review this submission or any matters touching upon the independent broadcasting sector.

Yours truly,

[Submitted Electronically]

Joel R. Fortune
Legal Counsel