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DIRECTORS GUILD OF CANADA
GUILDE CANADIENNE DES RÉALISATEURS

Submission to the Legislative Review Panel

January 11, 2019

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The Directors Guild of Canada

The Directors Guild of Canada (DGC) is a national labour organization that represents key creative and logistical professionals in the film, television and digital media industries. It was created in 1962 as an association of Canada's film and television directors. Today, it has approximately 5,000 members drawn from 47 different craft and occupational categories, covering all areas of direction, design, production and editing.

1. Executive Summary

The Directors Guild of Canada supports the argument that the legislative review should find the right balance between economic and cultural aims for the revision of the Broadcasting Act. The Canadian film and television industry is undergoing a major digital transformation as it migrates from traditional distribution platforms to an increasing online system coupled with omnipresent global platforms that have reshaped the traditional audiovisual value chain. As we shift to a platform and data-driven economy it is important to serve the public interest and protect Canadian creators, stories and jobs by reinforcing the objectives within the Broadcasting Act and provide new policy tools to the CRTC. The big question is how to regulate to ensure sustainability in the system over the long term, enhance fairness and protect national sovereignty. The DGC is in favour of a balanced approach and smart regulation that will encourage audiovisual industry development and foster innovation. To achieve this, it will in our view be necessary to update both the Telecommunications and Broadcasting Acts. But in the interim, there is a pressing need for the CRTC to act to ensure equitable contributions from foreign online programming services operating in Canada.

The principle of net neutrality should be extended to terminal devices

The government has endorsed the principle of net neutrality set out in the Telecommunications Act. However, existing provisions only apply to Canadian-owned carriers, leaving free rein for foreign devices and terminal equipment such as Roku, Chromecast and Apple TV boxes, which provide and govern access to content. The DGC recommends that the CRTC examine this issue and develop ways to ensure non-discriminatory access to Canadian content and services on Internet connected devices. In our view, while this issue has potential Broadcasting Act implications, the Commission has the power under the Telecommunications Act to offer such consumer protection.

Re-invigorating the concept of Broadcasting in a digital era

The core concept of broadcasting in a digital era has not changed: a small number of platforms distribute audiovisual content to a large number of viewers. But lines have been blurred and definitions have become more complex with content consumption shifting to the Internet. This review is called upon to opine on what types of distribution and programming services should be deemed as Broadcasting, and also whether contribution obligations should be extended to

distribution providers which may not be broadcasting undertakings. In our view, all audiovisual content being packaged for the public and delivered over the Internet should continue to be deemed as broadcasting. Internet service providers and wireless service providers providing packaged content via a subscription should be recognized to be integral to the system and be required to contribute. This is why a new approach is needed to address exceptions and grey areas within the Act. As an important symbol of this, the DGC recommends that the Broadcasting Act be renamed the **Audiovisual Media (Services) Act**, consistent with terminology used by media regulators across the world. The new Act should include all existing and future online players that participate in the system and respond appropriately to the challenges created by the digital transformation of the sector.

The Broadcasting Act objectives

The current objectives of the Act listed in Article 3 remain valid and continue to be relevant for the digital age. The DGC is in favour of a balanced approach and smart regulation that will promote sustainable development and preserve the current economic benefits of a healthy audiovisual sector, by encouraging Canadian content creation. The increasing challenge for broadcasting policy is to build the Canadian cultural fabric and produce content that reflects Canadians while offering an adequate response to an unregulated and global, competitive environment. For decades, the guiding aim of the Act, justified by the country's size and geographical position next to the world's largest content exporter, has primarily been cultural. This has made possible the creation, production and distribution of Canadian content created and owned by Canadians. Consistent with the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, we recommend that the current objectives in Article 3 be expanded by recognizing cultural diversity as a human right and the recognition of voices of Canadian creators, not just content owners.

A refined approach

The refined approach we advocate will create a virtuous circle – providing diversity of choice for Canadians on all platforms and screens and renewed support for the film and television industry. The DGC supports equitable contributions and the smart use of exemption orders requiring tangible contributions adaptable to a variety of platforms. We recommend maintaining spending obligations, financial contributions and exhibition requirements on traditional broadcasting players, and extending such measures through new conditions on exemption orders applicable to Internet-based services, which would be subject to oversight and regulatory fees for operating their services in Canada. The new framework would continue to have a set of policies to support the exhibition, licensing and creation of independently produced television programs and feature films.

Participation of online players in the Canadian system

The June 2018 CRTC report "Harnessing Change" painted the picture of a Canadian broadcasting sector in decline and called for a change in the Canadian programming

contribution system. Increasingly, online data consumption points to video content. Internet service providers (ISPs) and wireless service providers (WSPs) would be the natural contributors to the current BDU system to restore funding levels for audiovisual content. The DGC is proposing a comprehensive and fair contribution model, to provide a stable new source of funding and ensure that minimum funding levels are guaranteed for Canadian content creation, production and distribution.

How to improve access to Canadian content

Once a closed system, the Canadian broadcasting sector has been disrupted by digital platforms, many of them foreign. Financing and accessing Canadian content has never faced a greater challenge. This challenge can be resolved by strong support, renewed sustainability, promotion and enhanced discoverability. We believe that access in a global media economy can be safeguarded by stable and predictable funding for Canadian content. Secondly, access can be enabled by setting criteria for content curation and discovery mechanisms favoring local and national audiovisual content, and third, by regulating connected devices and terminals to guarantee that Canadian content remains visible and available.

CRTC governance and administration

Access to data and its exploitation constitute the crux of the digital economy, notably in the audiovisual sector. By its nature, data raises questions related to both protection of personal information and the economic power given to actors mastering it. It is thus necessary to adapt the capacities and mandates of existing regulatory bodies to operate and drive policy decisions in a data-driven economy.

The CRTC should oversee over all broadcasting entities and content distributors operating in Canada. The Commission should also be given express powers to impose spending obligations, financial contributions and exhibition requirements, regardless of the means of regulation.

In addition, the Commission should operate on principles of transparency and accountability and collect the following data from foreign online services and platforms: consumer viewing data, revenue data, subscribers and download data (in the case of transactional video on demand (TVOD)). This data collection process will inform the CRTC of the industry context and evolution, and assist the CRTC in making informed policy decisions. The growing OTT economy is based on data and the CRTC should have all the tools necessary to regulate this economy appropriately.

Overall, CRTC powers should be reinforced to adapt to the fast-changing media ecosystem that requires agility and the capacity to deal with a diversity of players quickly. The DGC supports the creation and implementation of the following new administrative powers for the Commission:

- Introduction of an express power to impose contribution requirements on ISPs and WSPs;

- Introduction of Administrative Monetary Penalties (AMPs) in the Broadcasting Act. These would be a more practical remedy for infringement than current criminal provisions or risk of license revocation;

- The Commission should have broader powers of data collection and inquiry. The Commission's current specific powers only apply to licensees. Going forward, the Act should develop new powers of inquiry specific to all undertakings that the Commission has reasonable grounds to believe may be broadcasting, whether it is domestic or foreign undertakings;

- The Commission should be given express powers to impose spending obligations, financial contributions, and exhibition requirements, regardless of the means of regulation (licensing, regulation and exemption orders);

In addition, the Commission should continue to have the ability to interpret any potential undue preference in the "transmission of programs" under the Telecommunications Act (s.28(1)), with reference to the objectives of the Broadcasting Act.

2. Introduction

The present submission joins those of other cultural industry stakeholders, media, official language, indigenous and minority communities in responding to the call for comments issued by the Review Panel.

The Directors Guild of Canada provides reflections, analysis, data and recommendations to the Review Panel, focusing our attention on the screen-based industries and how to rethink the Broadcasting Act in a digital era. We would like to underline a recurring theme in this submission: how to improve the access to Canadian content and safeguard its diversity.

In this submission we prefer not to return to a review of the challenges and trends affecting the screen-based industries in Canada (a situation addressed by the CRTC report Harnessing Change published in June 2018) but rather to provide specific recommendations on how to update the Telecommunications and Broadcasting Acts and continue protecting Canadian identity and national sovereignty.

Following the thread of questions as set out in the Terms of reference, we provide answers to each of the questions related to Broadcasting Act. In addition, we examine and comment on some of the questions related to the Telecommunications Act that are indirectly related to the Canadian broadcasting system, such as content accessibility. As the new platform economy is

more integrated in the Canadian broadcasting world, the lines are blurring between the telecommunications and the broadcasting sector, sharing the same technology: the Internet. In our view, changes have to be made in both Acts to achieve a comprehensive broadcasting framework.

2.1 A reshaping of the traditional value chain

Major transformations are affecting screen-based industries. Audiovisual programs are increasingly being accessed online. The digitization of signals, decreases in data transmission costs, increased efficiency in compression and content distribution have facilitated the development and usage of new platforms. A data revolution has changed the content spectator to a prescriptor. Algorithms are helping viewers to make decisions and the same algorithms are collecting personal viewing data, with the power to create the reputation of a platform.

The uniqueness of our current geopolitical situation is key to understanding what is at stake and guiding the review of the Telecommunications and Broadcasting Acts. The blurring and erosion of national borders as a result of the digital transformation means that national players are competing directly with global media players, who benefit from strong leverage for content production and distribution.

Web giants are creating a new economic model. Canadian consumers and advertisers are spending more money on platforms and devices controlled by FAANG[1]. Foreign platforms have become a central point of entry for culture and content in Canada and elsewhere in the world. These platforms dominate the online broadcasting experience. Whether through paying for subscriptions, including Internet subscriptions or by buying hardware, research has shown that modern consumers are already paying a hefty price to access content: in 2016, Canadian households paid on average $222.83 per month on telecommunications services[2]. Canadian viewers are captive to this system that favours paying for technology and distribution over content – content made by creators, including directors, screenwriters, and composers.

What is the nature and role of the Internet today? The Internet as a public medium is now over thirty years old, and the broadband Internet more than a decade old.[3] =To preserve its richness and relevance web inventor Tim Berners-Lee, has recently called for a new Internet “Magna Carta”. Clearly, the role of Internet has shifted over time but there continues to be conflicting views on how (or even whether it should be) regulated. “Internet Freedom fighters” view any form of Internet content regulation as an anathema – using Berners-Lee net neutrality definition of an “open platform that allows anyone to share information, access opportunities and

[1] FAANG: acronym for Facebook, Amazon, Apple, Netflix and Google
[2] Including television, internet, mobile and landline. CRTC Monitoring report 2018: https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2018/cmr1.htm
[3] For many Canadians, the arrival of Netflix in 2010 marked the practical beginning of the broadband internet.

collaborate across geographical boundaries". Meanwhile, the definition has been effectively challenged by increasingly powerful digital gatekeepers whose algorithms are used to achieve global audience success often to the detriment of local productions.

The original audiovisual value chain was built around interconnected but distinct functions such as production, distribution and content exhibition. The relative balance between each part of the chain is changing. The audiovisual and broadcasting landscape appears to be evolving from segmented domestic programmers and distributors to a new ecosystem dominated by a handful of major global platforms. Traditional players are being dispossessed of their exclusive position as intermediaries in distributing content.

2.2 Platform regulation: they are not mere intermediaries

Today's Internet is made of platforms. Platforms are not just distributors. As recent Facebook scandals, or as the lack of Canadian content on Netflix clearly demonstrate, platforms are not neutral and transparent channels whose purpose is to share unfiltered content or unbiased opinions. In a world of ubiquitous content and choice, there will always be a need for gatekeepers to curate, select which stories get made and effectively market them to reach domestic and international audiences. Platforms moderate, recommend and curate.

Contrary to views held by some advocates of a free and unregulated Internet, it is actually not complex to ensure that foreign providers comply with local regulation and taxes. It merely requires political will. The international policy and regulatory context, including recent moves by the European Union, has demonstrated that a rebalancing back towards cultural sovereignty is achievable. Canada shares the same values and should follow suit.

We commend the Canadian Government for reiterating the importance of cultural exemption in the new Canada-United States-Mexico Agreement (CUSMA; ratified in November 2018), affirming that the import and export of cultural goods should not be treated like any other industry.

Internet platforms are broadcasting undertakings. Today, Netflix is the No.1 downstream application worldwide, and consumes 15% of all Internet bandwidth. Canadian Internet service providers (ISPs) and wireless service providers (WSPs) are direct instruments of the rapid growth of the new television broadcasting sector on the Internet and should contribute in a fair and equitable manner to the creation of Canadian stories and content.

2.3 What is Broadcasting today?

The principles of the Broadcasting Act remain sound, but what is television broadcasting today? The concept of broadcasting can be examined under several key parameters: nationality of the

platform, type of service offered (content distribution versus content programming) and the type of content (genre) these platforms or services offer.

While the Internet is the common technological shift that underlies the review of the Telecommunications and Broadcasting Acts, the two Acts have different objectives – on one side related to infrastructure, and on the other, cultural content – that should remain separate. Our view is that the Broadcasting Act should be based on a set of existing and new objectives striking the right balance between public and private, linguistic communities, local and foreign, and at the same time safeguarding, enriching and strengthening the cultural, political, social and economic fabric of Canada. This set of objectives should, again, be readily adaptable to scientific and technological change.

This submission is also a call to action against cultural homogeneity created by recommendation algorithms and the domination of a small number of global Internet platforms with similar content libraries. GAFA[4] and other FAANG benefit from fiscal advantages – including minimal Canadian physical presence, employment, and contribution – and an absence of regulation.

3. Telecommunications Act and Radiocommunication Act

3.1 Competition, Innovation, and Affordability

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

ISPs, WSPs and BDUs are integrated into large media conglomerates in Canada. The vast majority of telecommunications and broadcasting undertakings are therefore under the control of a small number of media companies.

We endorse the Terms of Reference observation that:

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

Canadian ownership of broadcasting undertakings creates both tangible and intangible value: broadcasting companies located in Canada are more likely to be attuned to Canadian values

[4] GAFA: Google, Apple, Facebook and Amazon.

and interests, employ more Canadians, invest more in Canada, and return their profits to Canada.

This privileged status for Canadian broadcasters justifies a different approach from foreign undertakings – equitable, but not identical.

3.2 Net Neutrality

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

Net Neutrality is defined by the CRTC as the general principle that "all traffic on the Internet should be given equal treatment by" Internet service providers (ISPs)[5]. The Commission's net neutrality policy rests on sections 27(2) and 36 of the *Telecommunications Act*:

> 27(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.
>
> 36 Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

In April 2017, the CRTC established a new framework[6] regarding differential pricing practices. This policy direction strengthens the CRTC's commitment to net neutrality by declaring that Internet service providers adopt an agnostic approach to the treatment of data, regardless of its source or nature. The Commission's aim is to ensure that consumer choice and access to content are fostered.

In response to a Parliamentary Report[7], the Government of Canada also recently communicated its support for net neutrality principles in Canadian telecommunications policy. In May 2018, the Canadian Parliament voted unanimously in favour of an 'open Internet free from unjust discrimination and interference[8]':

> "Requiring that net neutrality be a guiding principle in the review and update of these acts signals a clear commitment to placing consumers and content providers first,"

The DGC believes that the necessary provisions are already in place in the current Telecommunications Act to guarantee net neutrality with all Canadian ISPs. However, Internet

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[5] See para 10, https://crtc.gc.ca/eng/archive/2017/2017-104.htm
[6] Ibid.
[7] House of Commons, The protection of net neutrality in Canada**,** Report of the Standing Committee on Access to Information, Privacy and Ethics, May 2018.
[8] MP John Oliver speaking about the motion to support an open internet free from unjust discrimination and interference.

connected foreign devices and terminals used in Canada by Canadian consumers are not currently being regulated under the Telecommunications Act. In order to ensure that all cultural content and specifically, audiovisual content is moving freely in Canada, we recommend that section 24.1 of the Act be applied to provide oversight over new consumer access technologies (such as Smart TVs, terminals, software programs, connected and intelligent devices). The combination of modem and computer is no longer the preferred way to access audiovisual content. This issue is further discussed in section 3.3.1, below.

3.3 Consumer Protection, Rights and Accessibility

3.3.1 Are further improvements pertaining to consumer protection, rights, and accessibility required in legislation?

Access to Canadian content is intended to be ensured on all platforms by the net neutrality principle. ISPs and WSPs cannot give preference to Canadian over foreign content. However, technological devices and terminal equipment (such as Roku, Chromecast and Apple TV) are not neutral intermediaries similar to ISPs and WSPs. These terminals and connected devices offer specific options and channels which don't represent the full spectrum of internet broadcasting services available. We see three categories of devices and terminals in relation to accessing Canadian content with Internet:

- Connected television terminals: set-top-boxes, smart TVs, connected TV devices (Apple TV) are terminals exclusively used for television content;
- Mobile connected devices: smartphones, laptop computers (where we can sometimes find preinstalled software);
- Home connected devices: smart devices, virtual assistants, home automation (ex: Amazon Alexa).

With the proliferation of OTT platforms and services distributed by ISP networks to be finally viewed via a terminal, terminal regulation should be applied to ensure complete access to Canadian data and content.

Moreover, these terminals are almost always foreign owned and might serve to block or advantage a channel (via pre-download mechanisms for instance) or give a preference to a certain type of content.

Foreign jurisdictions are taking steps to examine the regulation of terminals and devices. The French Authority for the regulation of electronic communications[9] (ARCEP) suggests a horizontal regulation[10] of these terminals and devices, in the spirit of the net neutrality principles, which safeguards open networks of telecommunications and free transmission of data. In

[9] L'Autorité de régulation des communications électroniques et des postes : https://www.arcep.fr
[10] Horizontal regulation, as described by ARCEP is not fragmented (by manufacturer) and covers all terminals used within the border of a country.

February 2018, ARCEP published a report[11] listing concrete actions to mitigate terminals/devices control of content entry points.

Section 24.1 of the Telecommunications Act should be used to regulate foreign apparatus and devices being used in Canada. The DGC recommends that connected terminals and devices be subject to the Telecommunications Act, and their nature as *de facto* gate-keepers be recognized. The manufacturers making these devices and software programs have responsibilities in terms of consumer protection, affordability and access.

If net neutrality rules exist to safeguard neutral or common carriage of ISPs signals and a diversity of content choice for Canadian consumers, then the same should apply to terminals and devices that are currently passing under the radar.

4. Broadcasting Act

4.1 Broadcasting Definitions

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

In a global media economy disrupted by Internet and dominated by a few international players, the concept of broadcasting as we know it has shifted. The current Act has been challenged by those that believe it should not apply to any internet-based broadcasting activity and falls short of providing a comprehensive broadcasting framework that corresponds to the current state of the communications landscape. To remain relevant, broadcasting regulation must expressly be extended to all audiovisual internet-based programming services and platforms.

The concept of broadcasting was once limited to television and radio, using airwaves and via the control of a limited spectrum. Television broadcasting today has become content packaging and distribution undertaken by various media companies, many of which are not Canadian-owned, in a wide range of formats. Today's broadcasting reality is platform-based and increasingly less dependent on cable. Canadians are now accessing content via smart TVs, set-top-boxes, and mobile phones, that for the most part are, again, not Canadian owned, putting Canadian made content at a disadvantage.

This is not the first time that the Canadian broadcasting system has been under threat and needs to undergo a transformation. Throughout the twentieth century, broadcasting policy had to reinvent itself and always maintained a clear focus on the importance of supporting the creation of Canadian content. We believe that the situation remains the same today and the

[11] Arcep, Les terminaux, maillon faible de l'ouverture d'Internet : https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018.pdf

concept of broadcasting should be reinvigorated to ensure support for the creation and distribution of stories made by Canadians.

Along with substantive amendments, we recommend renaming the Broadcasting Act as the "**The Audiovisual Media Act**" to better reflect the current ecosystem and industry context. The Audiovisual Media Act would continue to cover traditional broadcasting but would be wider in scope, and include new tools. A Canadian Audiovisual Media Act would also align with European broadcasting regulations enacted after the Audiovisual Media Services Directive of 2010[12], such as the Slovakian Law on Audiovisual Media Services from 2011, the Greek Decree on Audiovisual Media Services of 2010 and the Austrian Audiovisual Media Services Act of 2015.

Despite profound shifts in the nature of broadcasting, television content being distributed by platforms such as Netflix and Crave TV remains largely the same. The system may be shifting from one means of delivery to another, and from a large number of domestic broadcasters (in countries around the world) to a small number of international players, but the "product" is still audiovisual content distributed to a large number of viewers. This leads to questions of ownership and control, where to draw a line between content programming and content distribution, (when the two are often weaved together), and how the CRTC should proceed to classify and regulate such internet-based services.

An open communications landscape means that foreign players are occupying the online space alongside Canadian online streaming services and competing with the once closed broadcasting system. What are the platforms to be included in broadcasting? What are the platforms that should not be included?

From a consumer perspective, broadcasting has gone beyond traditional cable and over-the-air television to now include over-the-top services (OTT), Internet service providers (ISPs) and wireless service providers (WSPs). Social media platforms such as Facebook and Instagram have become broadcasting outlets, as well as content distribution platforms such as iTunes and Google Play and major video platforms such as YouTube (Google). Once recognized as broadcasting (pursuant to the Commission's criteria in the Digital Media Exemption Order), the primary differentiating factor between those that should be required to contribute, and not, should be as between professional content and user generated content (UGC). As with film and television today, professional content can be readily distinguished as content typically produced through a production company with diversified financing sources[13].

The challenges of rethinking broadcasting within an open and shifting communications landscape directly lead us back to the *New Media Exemption Order* first introduced by the CRTC in 1999 and updated to include reporting and undue preference provisions in 2009.[14] In

[12] Directive 2010/13/Eu Of the European Parliament and of the Council: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF
[13] Effectively, content either produced by a broadcaster or otherwise eligible for production tax credits.
[14] See Appendix A to Public Notice CRTC 1999-197 and Appendix to Broadcasting Order CRTC 2009-660

1999, the Commission concluded that the Canadian broadcasting system would not be affected by the decision to exempt online platforms from the system. Whether that was true in 2009 is debatable. But now, another ten years later, it is clear that the growing presence of online players has radically changed the economics of the screen-based industry. The Digital Media Exemption Order[15] (DMEO, as it is now called), which does not require online platforms such as foreign OTT to contribute to the Canadian broadcasting system, is unsustainable and has already greatly impacted the Canadian industry.

Conventional television lost $430 million or 21% of its annual revenues from 2012 to 2017, and BDU revenues have declined by $392 million (4.4%) from their 2014 peak to 2016.[16] Declines are expected to continue and expand across the traditional TV ecosystem. This is leading to both a reduction in television funding and variety in financing sources, and exacerbating the challenges the Canadian system already faces in struggling to compete with international offerings. The consequences for Canadian creators are numerous: declining budgets, lower quality, and the deterioration of working conditions.

In 2012, The Supreme Court of Canada confirmed the Canadian Federal Court of Appeal ruling that ISPs are not broadcasting undertakings and they do transmit programs:

> "In providing access to 'broadcasting,' ISPs do not transmit programs," wrote Justice Marc Noël on behalf of justices Marc Nadon and Eleanor Dawson.

This decision was taken in the early days of online streaming. Since then, the audiovisual context and ecosystem has evolved significantly. According to Cisco's annual Visual Network Index (VNI) forecast, video will account for the overwhelming share of total data online over the next five years[17] and by 2019, 80% of global Internet consumption will be video content. Global mobile data traffic is also booming to the point that it is expected to overtake desktop traffic by 2021, with mobile video views in Canada now accounting for 51% of video views on top online platforms.[18]

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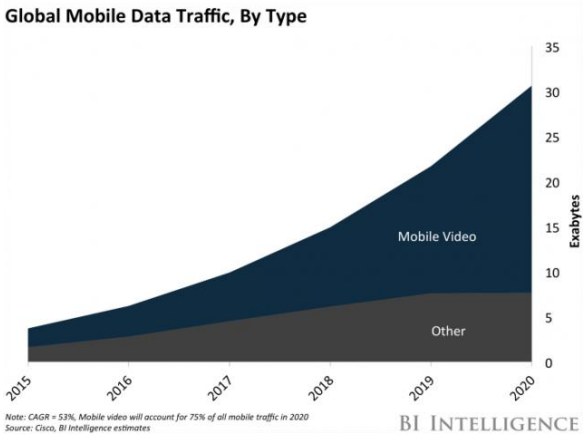
[15] Now Broadcasting Order CRTC 2012-409

[16] CRTC Financial summaries. BDU revenues declined from $8,930 million in 2014 to $8,538 million in 2017. BDU subscribers have been declined even more - from a peak of 11,528,860 in 2012 to 10,702,550 in 2017, a loss of 824,310 subscribers or 7.2%.

[17] https://www.businessinsider.com/heres-how-much-ip-traffic-will-be-video-by-2021-2017-6

[18] https://www.cwta.ca/blog/2018/03/15/comscore-report-shows-continued-growth-in-data-consumption-among-canadian-mobile-users/



While cultural groups and industry associations have been criticized since the beginning of the debate for recommending that ISPs and WSPs be included within the broadcasting system, evidence and common sense suggest that this is now truer than ever.

Traditional broadcasting historically involved both the means of transmission and the content. On the Internet however, these are provided by distinct services. Today, when accessing online services, it is the consumer, through their residential internet or wireless accounts, who is paying for the cost of transmission. Unlike the traditional model, none of the proceeds flow back to support the creation of content. This has to change.

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

The Telecommunications Act ensures a universal access and deployment of Internet to all Canadians (which is becoming a major point of access for content) while the Broadcasting Act has the role to regulate Canadian content (“CanCon”) and promote Canadian voices.

Facilitating and promoting access to Canadian voices online should not rest solely on the shoulders of CBC/Radio-Canada and private broadcasters (through programming requirements such as Canadian Programming Expenditures (CPE) and Programs of National Interest (PNI)). We believe that foreign OTT platforms operating in Canada who reach a certain minimum revenue threshold should be required to make available a significant amount of Canadian content reflecting a diversity of voices. The underlying principle should be that every television platform or service operating in Canada be subject to Canadian content requirements, regardless of its point of origin.

We see “access” as a technical term that either refers to internet access or describes the user interface of the online platforms in question. (In respect of broader issues of “access”, we tend

to use terms like *visibility, discoverability and presence*.) Preserving principles of net neutrality lays a strong foundation for ensuring equitable access to content for all Canadians.

Effective access to Canadian voices online can, however, only be ensured through stable funding mechanisms for Canadian content. To ensure stable and predictable funding, resources should come from where the growth is: Canadian Internet service providers (ISPs) and wireless service providers (WSPs).

Not surprisingly, it is difficult to discover, access and experience Canadian voices through web-based content in the new digital media ecosystem. This is why a second way to promote access to a diversity of Canadian voices online is to put a greater emphasis on content discoverability in search (Google) and accessibility on platforms (content curation and algorithms).

While access to Canadian content was largely controlled by Canadian broadcasters in the past, access is now increasingly under the control of a few global Internet giants. More and more Canadians access television programming via sources other than public and private Canadian broadcasters and depend on a wide array of connected devices, smart TVs, set top boxes and increasingly mobile devices to do so. The Broadcasting Act can no longer just regulate access to content on traditional broadcasters, but must evolve to make sure that Canadian stories, in both official languages are visible on all prominent platforms.

4.2 Broadcasting Policy Objectives

4.2.1 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?

Since the 1930s, our broadcasting system has been Canadian-owned, has adapted to new technologies and successfully ensured a Canadian presence in a landscape largely dominated by stories, entertainment and culture from elsewhere. The introduction of new internet platforms is moving the goal posts once again, but now against larger and more aggressive foreign competitors.

The current objectives of the Broadcasting Act, laid out in Article 3, already strike a good balance between cultural, social objectives, consumers and commercial interests. In our view, this balanced approach ought to be enhanced in a new Broadcasting Act aimed at smart regulation, rather than deregulation of the system.

By smart regulation, we mean an effective framework supporting public policy objectives while fostering sustainable development and an economic climate conducive to innovation and investment. The system should remain in the hands of Canadians, but ensure that global players are subject to Canadian content requirements.

We note that in the speech[19] given on November 1, 2018, the Chair of the CRTC Ian Scott appeared to question the current objective-based approach to the Broadcasting and Telecommunications Acts, stating:

> It should be the objective of legislative drafters in Parliament to clearly state the purpose of each piece of legislation. Rather than providing the regulator with a long list of attributes that get weighed one against another, the drafters of these new laws should provide us with a simple, clear statement of purpose that will allow the Commission to pursue its objective. Greater clarity on purpose and roles will allow us to be more effective in our work.

While we agree in principle that greater clarity, transparency and predictability are desirable, we are unable to see how a singular Broadcasting Act purpose is achievable. As structured, the Broadcasting Act gives the Commission a specific mandate to regulate a particular activity – broadcasting, and, in so doing, wide latitude to fulfill a broad range of objectives. Different forms of broadcasting achieve different objectives to differing degrees, and thus serve different purposes.

Moreover, it is settled law, that while the Broadcasting Act "has a primarily cultural aim", "this does not mean that promoting Canadian content is its sole objective":

> "there are numerous disparate objectives set out in the Broadcasting Act and Parliament intended that the CRTC decide how best to balance competing policy objectives related to broadcasting in Canada." [20]

The CRTC often points out that its role is to serve the public interest. Those words are not in the Broadcasting Act, perhaps because they appear self-evident. We believe that serving the public interest in its primary cultural aim, while balancing disparate objectives, remains the best way for the Commission to safeguard the existing ecosystem, preserve the audiovisual sector, our creators and our capacity to tell Canadian stories on our screens.

Canadian content created and made available to Canadians is the foundation of this entire exercise. The Canadian market is modest and does not have the capacity to thrive without public intervention. In other words, the objectives of the new Broadcasting Act should explicitly prioritize the creation, production and distribution of content created by Canadians. In the new legislation, exhibition and programming requirements for Canadian content should be preserved.

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[19] Ian Scott to the annual 2018 Conference of the Canadian Chapter of the International Institute of Communication: 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

[20] Federal Court of Appeal Decisions, Bell Canada v. Canada, 2017: https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/303948/index.do?r=AAAAAQARQmVsbCBzaW11bHRhbmVvdXMB, para 22.

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

The role of the current Broadcasting Act is to support the development of Canadian expression which includes a wide range of programming showcasing Canadian talent, building a Canadian perspective, as well as promoting the bilingual and multicultural nature of our country.

As we consider the way forward in a new digital paradigm, the primary challenge of creating distinct cultural spaces has not changed. The current public/private partnership system works, and there is now the opportunity to include foreign platforms and online services.

Fundamentally, private broadcasters – be they traditional Canadian media groups or new global OTT providers – have commercial interests that are not necessarily consistent with the national interests espoused in the Broadcasting Act. Allowing foreign platforms, national internet and wireless service providers to operate without rules would render Broadcasting Act goals unachievable.

The review of the Broadcasting Act is an opportunity to place the public interest at the forefront. Canada has a unique geographical position, separated by a porous digital border beside the world's largest content exporter, which justifies the need to adapt the system to enhance support Canadian content and creators.

The public interest should be a guiding priority in maintaining the present framework: there is a belief cultivated by some within the broadcasting sector that there should be significantly less regulatory oversight. This flawed argument is based on the assumption that with the increasing globalization of market, the marketplace will self-regulate. In our view, an unregulated globalized system will not favour the visibility of Canadian content and ultimately risks diminishing the diversity of choice available to Canadian viewers. Therefore, to serve public interest, it is important to create a production and exhibition system where all of the key players contribute to the Canadian system.

The new Broadcasting Act objectives should not only continue to prioritize Canadian expression but also reaffirm a predominant use of Canadian creative and other resources in the creation and presentation of programming; including a significant contribution from the Canadian independent production sector.

We have three suggested areas of improvement in the Act's objectives:

1. First, we note that within the current Act, the Canadian broadcasting system is to be "owned" by Canadians. While it is important that intellectual property be retained and exploited by Canadians, we believe that **the most fundamental goal is to recognize the voices of the *creators*** not just the production companies or other entities that might own the production rights. The realization of this objective is in line with the Creative

Canada Policy framework released in 2017 which clearly vowed to place the creator at the centre of the system.

With the review of the Canadian Copyright Act in progress, the DGC recalls that in this context the Ministers of Heritage and Innovation, Science and Economic Development noted in 2017 that "*a well-functioning framework… should ensure creators receive fair and transparent remuneration*". The DGC and the Writers Guild of Canada (WGC) consider the writer and the director to be the principal creative contributors to the filmmaking process and should be properly compensated for their work. Broadcasting policy should also recognize this essential creative force.

The DGC believes this could be advanced by amending the objectives of the Broadcasting Act through one of two means. One approach would be to amend section 3(1)(d) as follows:

(d) the Canadian broadcasting system should

> (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying and engaging Canadian creative talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, [emphasis added]

Alternatively, a new subclause 3(1)(i)(vi) could be added:

(i) the programming provided by the Canadian broadcasting system should

> (vi) include a significant contribution from Canadian writers and the directors as principal contributors to the creative process

2. As a second suggested improvement to the Act's objectives, and consistent with our views on Canadian voices, **plurality and cultural diversity are a strength and competitive advantage that should be more explicitly written into the Act.** This would also reflect the principles of the UNESCO Cultural Diversity Convention that Canada signed in 2005.[21] The Convention recognizes the distinct nature of cultural goods and services as vehicles of values and cultural identity.

   A sub clause, such as the following, should therefore be included in the Act:

   (d) the Canadian broadcasting system should

[21] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of October 2005, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

(v) Respect human rights and fundamental freedoms, and advance the protection and promotion of the diversity of cultural expression through both the Canadian and international programming it provides.

3. Finally, we believe that the **notion of "equitable" contribution** should be entrenched in the objectives by slightly amending section 3(1)(e):

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

In summary, we believe that equitably serving the public interest, placing content creators at the centre of the system and protecting cultural diversity are objectives that should be prioritized within the new Act to have long-lasting benefits to Canadian culture, identity and cultural sovereignty.

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

Given our limited population and resources, Canada has never been able compete on scale or budget with the world's largest content producers and distributors. Going forward, with an increasingly open broadcasting system, this challenge will only become more acute.

As a consequence, we believe that the requirements for Canadian and foreign platforms should be reconciled under the same key objective: supporting the creation and distribution of Canadian-told and owned stories. We recommend developing an approach that would continue to foster the creation and distribution of Canadian stories, a virtuous circle that provides diversity of choice to Canadians, on all platforms and screens.

As suggested in the June 2018 CRTC *Harnessing Change* report, the new broadcasting system should apply appropriate Canadian content requirements and contributions to all online platforms, whether Canadian or foreign platforms:

> To ensure a vibrant domestic market and be equitable to all players, it will be essential to develop better regulatory approaches that engage all audio and video services and for each to participate in the most appropriate ways in creating and promoting content by and for Canadians.[22]

While obtaining identical obligations from all players is not practical, we favour imposing robust contributions to Canadian programming from all Canadian and foreign platforms and services based on the previous year revenue. We favour such an approach over basing contributions on the number of subscribers. Over-The-Top (OTT) services are increasingly popular with at least

[22] CRTC Harnessing Change Report, May 2015

25 online services[23] operating in Canada in 2018 and dozens more announced for 2019. OTT services in general already reach half of the Canadian population[24], and projections suggest that by 2020, there will be more Canadian households subscribing to OTT services such as Netflix and CraveTV than there will be households subscribed to BDU services (which are estimated to decline by an average 2.5% per year from 2018 to 2020)[25]. OTT is estimated to have garnered $1.11 billion dollars in subscription revenue in 2018 and by 2020, that total is expected to rise to $1.58 billion.[26]

Given that dramatic shift in the broadcasting landscape, we fully support an immediate move towards an "equitable contribution" model, by reviewing the Digital Media Exemption Order and imposing appropriate Canadian programming obligations on online services. Explicit contributions would become a condition in a new set of exemption orders that would apply to different types or classes on online service. As a priority, Internet-based SVOD services, larger than a set threshold of revenues and/or subscribers would, at minimum have a new Canadian programming expenditure requirement.

In determining what would be an "equitable" contribution, the Commission would look at the full scope of obligations and benefits enjoyed by traditional and OTT broadcasters, including:

- The virtual cost-free access to Canadians enjoyed by OTT services by virtue of Internet infrastructure being made available on a non-discriminatory basis, as enforced through net neutrality rules;
- The relative lack of investment in Canadian employment and infrastructure by foreign OTT;
- The international footprint of most foreign OTT players, allowing them to acquire and amortize global rights to Canadian content; as opposed to most Canadian players who only acquire and can only amortize across the Canadian market;
- Benefits enjoyed by traditional Canadian players, like access to simulcast and Canadian program access to tax credits and the Canada Media Fund;
- Obligations on traditional Canadian players, like local service and local news obligations, license fee and compliance costs;

We note the Commission's *Harnessing Change* recommendation in favour of a new "Service Agreement" Model. We are unclear of the benefits of such a model – especially because it seems to suggest the need for a "negotiation" rather than a public proceeding, followed by a CRTC decision.

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[23] https://trends.cmf-fmc.ca/out-to-conquer-canadian-tv-viewers-online-television-vs-conventional-television/
[24] Canada Streaming Video 2018, eMarketer**,** https://www.emarketer.com/content/canada-streaming-video-2018
[25] The Battle for the North American (US/Canada) Couch Potato: OTT, TV, Online, April 2018, The Convergence Research Group, Ltd.
[26] Ibid.

The DGC recommends that with some minor changes, the CRTC's current tools of licensing, regulation and conditional exemption orders can provide the scope and flexibility the CRTC requires. We therefore propose:

1. **Maintaining licensing for larger traditional Canadian owned and controlled broadcast entities.** This would recognize the value of Canadian ownership, and ensure that the highest benefits and most scrutiny accrue to licensed entities. Avoiding licensing of Canadian and foreign online entities would ensure that no "pre-authorization" obligation exists for online services, in accordance with the internet's open permission-less ethos.
2. **Smart use of exemption orders.** The current Act permits the Commission to exempt classes of broadcasting undertakings "on such terms and conditions as it deems appropriate". This allows the Commission to require tangible contributions – as is, for example, already the case with exempt BDUs. Exemption orders are a perfectly adequate vehicle to impose obligations on online services.
3. **Expanded use of regulations.** Currently regulations are only used with licensed entities. There is no reason why regulations of general application could not be used for classes of online players.

We see three potential areas of legislative change that would provide the Commission with greater clarity, flexibility and scope to embrace online players through exemption orders and regulations, and ensuring equitable contribution:

- First, powers to impose spending obligations, financial contributions, and exhibition requirements should be expressly identified, and expressly available regardless of which of the three tools (licensing, regulation and exemption orders) is utilized;
- Second, the power of exemption should made unconditionally available for internet services[27], and be able to be used, like licensing, for individual undertakings not just classes of undertaking; and
- Third, exempt players should be subject to administrative regulatory fees. Currently only licensees pay "license fees". Larger online payers should also be required to contribute.

In addition to the above-listed obligations, we recommend that the following existing and new measures be put in place for all broadcasting undertakings:

- **Exhibition requirements** regarding Canadian programs for all conventional, discretionary and online television services;
- **Expenditure obligations,** including Programs of National Interest ("PNI");
- **Support for the exhibition, licensing and creation** of independently produced television programs and feature films;

[27] That is, there should be no test to the effect that "compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)".

4.3 Support for Canadian Content and Creative Industries

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

All online players should play a significant, appropriate and equitable role in the creation, production and distribution of Canadian content.

For the purposes of provision of film and television content, online players can be divided among three categories: Canadian-owned online screen-based content distribution players, foreign-based online film and television distribution players (such as OTT streaming services and video distribution platforms with licensed content) and Canadian-owned Internet service providers (ISPs) and wireless service providers (WSPs).

The 2012 Supreme Court Reference[28] confirmed that, as telecommunications entities (transport), ISPs cannot be considered to be broadcasting services. It is now a widely known fact that ISPs and WSPs carry large amounts of data representing video content, and in the context of an open internet and open systems of communications, from a multiplicity of points of origin. Regardless of how content is being transported and its point of origin, the determining jurisdictional factor is whether the content being "delivered" to a subscriber and the point of destination. This suggests that every entity delivering audiovisual content to Canadians in Canada should play a significant role in the creation, production and distribution of Canadian content.

As explained in the previous section, the new broadcasting framework should establish minimum contribution and exhibition requirements for online domestic and foreign content distribution players:

- Canadian-owned OTT platforms should be subject to tailored requirements and be eligible to public funding;
- Foreign players should operate under Exemption Orders, with the only difference that foreign entities would not be eligible for Canadian content funding. Foreign services should not be considered to be part of the Canadian-owned broadcasting/media system, thus making them ineligible to public funds. Public funding available in Canada should remain in the hands of Canadians creators, producers, broadcasters and content distributors.

Because Canadian-owned broadcasters would remain fully eligible for public funds, tax credits and other support mechanisms, they could still be subject to a different and stricter regimen than foreign-owned OTT platforms.

[28] Reference re Broadcasting Act, 2012 SCC 4, [2012] 1 SCR 142

A contribution framework for ISPs and WSPs

The DGC supports the introduction of a new regulatory framework that will enable sustainable funding for Canadian programming, akin to that proposed in the June 2018 CRTC report, Harnessing Change[29]. We believe that such a framework is justified and feasible while remaining affordable to Canadians, consistent with the Panel's Terms of Reference. The CRTC stated in the report that:

> "the Internet plays a central role in the emerging digital media environment. Although traditional services will continue to evolve and play an important role, that role will become smaller in the coming years. Canadians will rely more and more on the Internet to discover and consume music, entertainment, news and other information.
> 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.

The CRTC also highlighted the following point in its report:

> "Recognize that there are social and cultural responsibilities associated with operating in Canada and ensure that all players benefitting from Canada and Canadians participate in appropriate and equitable—though not necessarily identical—ways to benefit Canadians and Canada."

The DGC agrees with the Commission that Canadian-owned ISPs and WSPs should be required to contribute a percentage of their revenue to be allocated to funds such as the Canada Media Fund, Telefilm Canada and independent production funds. In the current digital media ecology and with respect to television content, ISPs and WSPs fulfill a role analogous to traditional broadcast distributers (BDUs). As explained in Section 4.1.1, Internet usage and online data consumption across the world and in Canada points to video content, and in particular, film and television linear content as a primary driver of the Internet.

Broadcasting, by definition, is the marriage of transmission (e.g. cable) and content. Television in a digital era has moved to become online programming fuelled by internet transmission (made possible by ISPs and WSPs). It is then natural to view ISPs and WSPs as a key component of the new system. Given market trends, we believe in a model where BDUs, residential internet subscriptions and the wireless sector would all contribute to provide support of Canadian film, television and digital media programming.

To provide a context and explore models, the Directors Guild of Canada along with the Canada Media Producers Association (CMPA), the Association québécoise de la production médiatique (AQPM), and the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)

[29] *Harnessing Change: The Future of Programming Distribution in Canada,* on May 31, 2018.

commissioned an independent study *PricewaterhouseCoopers (PwC)* to propose a new broadcasting system contribution framework. The findings and models described in this study help delineate a methodology for an approach to ISP/WSPs contribution. The study is based on principles of comprehensiveness and fairness which target the right segments for revenues from ISPs and WSPs, while taking into account industry dynamics. The study results are available in an attachment to this submission.

The Canadian communications sector is dominated by a small number of large, vertically and horizontally integrated companies. "The Big 5[30]" accounted for 83% of the communications sector revenue in 2016. The telecommunications industry provides a wide range of services, but it is possible to isolate media content distribution segments that are predominantly engaged in distributing media content to consumers: retail internet and wireless data, excluding revenues derived from roaming and other wireless services. The study explores model options or schemes for possible contribution models, based on the existing contribution framework and future industry dynamics and trends.

The models consider the importance of protecting the viability of small and medium sized enterprises by requiring adapted contributions. In addition, the study demonstrates that the impact on consumers for any scheme would be determined by the companies operating in each segment. Current trends and a number of reasons show that it is not likely that imposing contributions will result in significantly increases prices in the market.

The study was conducted using 7 guiding principles:

1. Comprehensiveness
2. Minimum funding level
3. Dynamism
4. Fairness
5. Minimum growth impediment
6. Pro-SME (small and medium enterprises)
7. Minimum consumer impact

This study proposes six possible "schemes" to develop a new sustainable contribution funding regime to support Canadian television programming.

While revenue from BDUs is expected to continue its decline, video consumption on fixed broadband is expected to increase by 21% between 2017 and 2022. The DGC recommends a dynamic model that will fill the current funding gap and reach a minimum funding level that matches historical peak levels.

[30] Bell Media, Shaw, Rogers, Telus, Quebecor. 2017 CRTC Communications Monitoring Report.

The financial contribution from BDUs is expected to progressively decline, while ISPs/WSPs financial contribution should increase over time. The contribution percentage (from previous year revenue) from each sector should remain stable over time:

- BDUs: 5%
- ISPs: 1%
- WSPs: 1%

As demand for wireless data increases faster than residential internet, we expect that the wireless sector (funding segment) will provide the largest share of contribution, with 2/3rd of the total contributions by 2020.

Accountability and transparency

To have an effective and functioning framework, all licensed Canadian traditional and online players should comply with the guiding principles of the new framework. Central to this should be accountability and transparency, meaning disclosing information and data about revenue and subscribers – especially Canadian online services, given that there is no universal cross-media and cross-platform measurement system in place. In the meantime, foreign online services would operate under exemption orders, but with the same requirement of revenue and subscriber data transparency while complying with contribution and exhibition requirements.

Adapted measures for CPE and PNI for foreign online services

It is essential that the new licensing and exemption order system place a special emphasis on supporting scripted content as it is the most effective way to support the Canadian development of Canadian voices. Hence, we advocate maintaining current Canadian Programming Expenditure (CPE) and Programs of National Interest (PNI) as mechanisms for Canadian-owned broadcasters and their extension to broadcaster online services (OTT). Secondly, adapted measures should be applied to foreign services and OTT platforms such as Netflix and Amazon Prime Video.

From financial contribution to shelf space requirements

To be actively supporting the creation, production and distribution of Canadian content, financial contributions should be required of all online broadcast platforms (such as OTT). There could be distinctions between Canadian-owned online platforms and foreign-based online services. This could be done by applying shelf space requirements for Canadian content for each Canadian-owned online platform and a contribution calculated based on the percentage of the previous year revenue and number of subscribers. Lower requirements for certain platforms could be considered depending on a subscribers' threshold or the type of service offered.

Foreign online services and platforms could be subject to different rules in terms of financial contributions and exhibition requirements. Although translating existing Canadian programming exhibition requirements and spending percentages into equitable obligations on foreign platforms would be the priority, there is also an opportunity to increase the promotion and visibility of Canadian content on these platforms by enforcing transparency of algorithms and request content curation requirements. Foreign online platforms such as Netflix have the financial capacity to stockpile large content libraries, making it relatively easy to accumulate a large quantity of Canadian made shows and content. However, these foreign online platforms (OTT) have built interfaces showcasing priority content. This is where algorithm transparency, loyalty and content curation measures will help Canadian content to emerge and remain discoverable to Canadian audiences.

The DGC recommends an appropriate financial contribution to the creation, production and distribution of Canadian content, and adapted exhibition requirements represented by shelf-space and algorithm transparency.

The definition of Canadian Content or "CanCon"

The CAVCO points system, derived from the Article 3 of 1991 Broadcasting Act should be maintained. This point system is a touchstone for the industry and encourages the production of Canadian content made by Canadians. CAVCO is a simple way to decide who and what is Canadian.

The current CAVCO point system is consistent with the Article 3 and furthers the objectives of the Act. The DGC is in favor of maintaining CAVCO obligations, as well as Canadian ownership for domestic online platforms. Foreign OTT services should not be eligible to access the Canada Media Fund and other independent production funds. They have global platforms and financing not commensurate with Canadian broadcasters and therefore do not warrant direct access to Canadian content funds, however this would not preclude partnerships between foreign OTT providers, and Canadian broadcasters, but would maintain the requirement that first run exhibition be reserved for Canadian owned platforms.

4.3.2 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?

The CRTC should revisit the Digital Media Exemption Order currently responsible for the regulation gap as market conditions have changed. Under the new Broadcasting Act (or Audiovisual Media Services Act), the CRTC should have full oversight over all broadcasting entities and content distributors operating in Canada.

To avoid uncertainty, the Commission should be given express powers to impose spending obligations, financial contributions and visibility requirements, regardless of the means of regulation (licensing, regulation and exemption orders).

In addition, the Commission should operate on principles of transparency and accountability and collect the following data from foreign online services and platforms: consumer viewing data, revenue data, subscribers and downloads data. This data collection will inform the CRTC of industry context and evolution, in a way that will enable it to make better decisions.

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

The new global media system provides consumer access to more content than ever before. Ensuring a diversity of media sources for Canadian content should be a key broadcasting priority. We see three different themes or factors that can favour the availability of Canadian content on Canadian-owned and foreign platforms: providing cultural variety, offering consumers choice in selecting broadcast options and sectoral diversity.

Cultural variety and equality of access can be achieved by supporting Canadian cultural expression, supporting bilingualism and multiculturalism in the broadcast system, and creating a space for indigenous cultural expressions.

Consumer choice was discussed extensively during the Let's Talk TV's[31] proceedings and focused on facilitating consumer choice in selecting broadcast options and ensuring the system provides adequate genre and program diversity.

Sectoral diversity relates primarily to private-sector ownership diversity. Horizontal and vertical consolidation has increased significantly in the last twenty years in Canada and reached a culminating point in 2016 when the four largest vertically integrated broadcast groups (Bell, Shaw/Corus, Rogers, Quebecor,) accounted for 70 percent of all television revenue.[32] This high sectorial concentration is a challenge to the diversity of Canadian voices. In addition, this consolidation has led to a reduction of decision makers related to financing opportunities for independent producers playing a key role ensuring a diversity of voices.

Discoverability, artificial intelligence and algorithms

Content distributors and services make a large number of programming decisions to display and make content accessible, which includes user interfaces and algorithms. Because distribution platforms are in the hands of a small number of major key players, we believe it essential to

[31] https://crtc.gc.ca/eng/talktv-parlonstele.htm
[32] This includes all revenues – advertising, subscription and CBC's parliamentary appropriation. CRTC 2017 Monitoring Report.

develop a system of content curation measures to be applied to these distribution services and platforms.

Algorithmic recommendation is set to have a significant impact in the cultural field. When we refer to algorithms, we usually think about algorithms on social media platforms or cultural platforms that exploit users' big data. Algorithms rank, select information and create a profile that is then exploited commercially. While we often refer to algorithms, they are part of the artificial intelligence umbrella, which is a set of concepts and technologies that imitate or replace humans by mimicking human cognitive functions.

In the questions set out in the terms of reference, we see the recurrence of the term "access" and "accessing content". While questions of access and accessibility belong to the realm of the Telecommunications Act, questions of accessing (or "viewing") content are also central to the Broadcasting Act. In particular, legislative tools can be reinforced in the Broadcasting Act to ensure the availability of Canadian content on the different types of platforms, but also on devices and terminal equipment, under the Telecommunications Act, as suggested previously in sections 3.2.1 and 3.3.1.

Points of access

Foreign devices and terminals used by Canadians viewers are becoming a key point of access for content. Canadian programming services have no guarantees that their OTT content be made available on these devices, in particular if a restrictive editorial policy is applied by terminal manufacturers. In addition, terminals and devices manufacturers are often vertically integrated with audiovisual services in direct competition with Canadian television channels (Google Home, Google Play, etc.).

As such, foreign players will become the main intermediaries in the coming years and the first point of contact for Canadian seeking content. This will increasingly become a matter of public policy concern.

To ensure content is available on all platforms and devices, the CRTC should, at minimum, require non-discriminatory access to devices that Canadians use to access content, pursuant to Section 24.1 of the Telecommunications Act (as recommended in sections 3.2.1 and 3.3.1 of this document).

Consideration should also be given to amending the Broadcasting Act to provide the Commission with a similar but broader power to require that such devices not only provide access to Canadian content and services, but make it discoverable. (We discuss content discoverability at question 4.7.5.)

4.4 Democracy, News and Citizenship

DGC members, like many Canadians, are concerned about the plight of Canadian traditional news platforms, and issues of unreliable or “fake” news. As we have neither the mandate or expertise to represent our members on these matters, however, we will not answer these questions.

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

4.5 Cultural Diversity

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

Over a decade ago, Canada ratified the UNESCO’s *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Under a modernized legislative context, the principles of cultural diversity should prevail over market forces. As stated in the UNESCO Convention, cultural diversity is a human right that should be protected, recognizing the importance of intellectual property rights of creators. The principle of cultural diversity should be expressly implemented in the Act by modifying Article 3, going beyond existing objectives such as “providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values, and artistic creativity.”, and reflecting “the linguistic duality and multicultural and multiracial nature of Canadian society”.

Please refer to our written suggestion of amendment to Article 3 on question 4.2.2 of this document.

4.6 National Public Broadcaster

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

As CBC/Radio-Canada faces global forces and the presence of an abundance of content, the public broadcaster should focus on distinctly Canadian content and building an effective digital strategy. An example of this is the TOU.tv and the recently created GEM platforms. Moreover, in order to compete with digital streaming giants, the CBC should reconnect with younger audiences as well as engaging with audiences on multiple platforms.

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

The DGC sees two important mechanisms to enhance the independence and stability of the public broadcaster: first secure permanent funding and protect CBC from the government action, and second: consider it as a fundamental public good.

There are two specific clauses in the Act related to CBC's independence.

Section 46(5) of the Broadcasting Act sets out the CBC's mandate for journalistic independence:

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

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

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

Thus, while the Government ultimately determines its parliamentary appropriation, and CBC must conform its corporate plan to that overall funding, government is statutorily precluded from limiting any specific journalistic or creative endeavours.

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

Viewing trends and consumption habits remain the best measures for understanding if a platform is a leader in its field. When looking for news content, Canadians are looking for immediacy, accuracy and integrity. When it comes to showcasing cultural content, CBC/Radio Canada should give priority to high impact programming such as scripted drama, that are distinctly Canadian. It is these distinctly Canadian shows that are the hardest to finance and most at risk in a foreign dominated digital landscape.

Moreover, while news may benefit from a "digital first" strategy, to maximize audiences, distinctly Canadian cultural programming should remain "TV first" for the time being.

In addition to broadcasting CBC/Radio-Canada content, the francophone online TV platform Tou.tv is collecting rights from non-CBC/Radio-Canada produced shows and making them available on its platform. We believe this may be an interesting model for increasing the visibility of English language content.

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

The CBC/Radio-Canada can promote Canadian culture and voices by building a robust digital strategy in order to be present and occupy the digital space. For audiovisual content, we support the steps the CBC has taken recently with Gem, the new online platform that comes to complement the French online counterpart, TOU.tv.

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

A foundational role of the public broadcaster is to reflect Canadian stories. Clearly, this should include the investment in the creation and promotion of stories by Indigenous creators. Moreover, CBC/Radio Canada through its various services has an extensive footprint -as its services on multiple platforms are widely available. The public broadcaster is well positioned to reach Canadians where they live, across the country. We see the existing structure of the public Broadcaster as unique opportunity that should be leveraged.

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

CBC/Radio-Canada provides a diverse range of programming on its platforms. The recent launch of the GEM streaming platform and the diversification of the French platform TOU.tv will be instrumental to protect the vitality of Canada’s official languages.

4.7 Governance and Effective Administration

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

The government should continue to have the power to provide policy direction to the CRTC. However, the CRTC needs to maintain regulatory independence to remain effective, and be prepared to assert its jurisdiction under the Act with or without any formal or informal direction.

There are three classes of express powers of direction in the Act, which provide the government considerable discretion to formally guide the Commission on broadcasting policy:

1. General policy direction “of general application on broad policy matters” – s. 7
2. Request that the Commission hold hearings or make a report – s. 15
3. Specific directions respecting channels and classes of applicants – s.26

The Commission will also understandably “take notice” of government thinking – whether in speeches, emails or tweets, in private or public. While nothing can prevent the Commission from choosing to reflect on such informal pronouncements, given the increasing politicization of CRTC decision making, providing the CRTC with greater independence would seem advisable. Accordingly, we recommend that a provision, such as the following, be added at Section 8 of the Act:

> (6) An order, comment or statement issued or made by the Minister or another member of the privy council in any other form is not a policy direction and shall not be binding on, or be given any consideration by, the Commission”

4.7.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?

The CRTC should remain an independent entity at arm’s length from the government. The fast-changing media ecosystem requires agility but also the capacity to deal with a diversity of players in a limited time. The political process and government interventions slow down CRTC decision making. The CRTC should have the capacity to act and deliver policy decisions, revoke licenses and adapt the policy tools while defending the Act’s objectives. The DGC supports the balanced current approach.

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

A modernized Broadcasting Act will have to deal with the challenge of regulating a wide array of platforms, including foreign platforms. The CRTC should consider its process with a view to streamlining decisions and gain in efficiency to response to a fast-changing media environment.

As discussed in section 4.3.1, the DGC is in favour of maintaining the current licensing system for Canadian traditional cable broadcasters, applying exemption orders to Canadian-owned online services and platforms, and subjecting foreign online services and platforms to exemption orders that will be adapted to the ever-changing nature of these entities.

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

While the DGC believes that, generally speaking, the Commission has adequate tools over the short to medium term – in particular to ensure equitable contributions as between OTT providers and traditional broadcasters – over the medium term, there is no doubt that some new tools would be useful. Priorities include the following:

First, we support the introduction of an express power to impose a contribution requirement on ISPs and WSPs, the former now clearly necessary given the Supreme Court of Canada's decision in the ISP reference.[33]

Second, as does the Commission, we support the introduction of Administrative Monetary Penalties (AMPs) in the Broadcasting Act. These would be a more practical remedy for infringement than current criminal provisions or license revocation. Moreover, they become a higher priority as more and more broadcasting activity occurs under unlicensed entities that do not have the same incentives to comply.

Third, we believe that the Commission should have broader powers of data collection and inquiry. The Commission's current specific powers only apply to licensees. Going forward, the Act should identify subpoena and other powers of inquiry specific to all undertakings that the Commission has reasonable grounds to believe may be broadcasting.

Fourth, as outlined in response to section 4.3.2, to avoid any uncertainty and inflexibility, the Commission should be given express powers to impose spending obligations, financial contributions, and exhibition requirements, regardless of the means of regulation (licensing, regulation and exemption orders).

Fifth, and final, the ability of the Commission to interpret any potential undue preference in the "transmission of programs" under the Telecommunications Act (s.28(1)), with reference to the objectives of the Broadcasting Act, should be maintained. Among other things, this would preserve the future ability of the Commission to allow carriers/ISPs to maintain "walled gardens" of BDU service on the Internet, and/or require "priority" for Canadian programming.

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

Typically, a logical mechanism for accountability and access to digital cultural content on online platforms would be the implementation of quotas. However, at a time when online platforms

[33] Reference re Broadcasting Act, 2012 SCC 4, [2012] 1 SCR 142

have an abundance of content in their libraries available to viewer on demand, a quota is not longer the most effective mechanism.

Content discoverability can be enabled by facilitating access to the platforms (by aggregating online platforms), but also by ensuring spaces for cultural content online that could be described as content curation requirements or “digital shelf space”. Each platform or service has its own proprietary user interface that can be changed quickly, depending on their strategy. Measures such as number of titles displayed on a page, recurrence of titles, time on screen should be explored to enhance discoverability.

Thirdly, artificial intelligence and algorithms play an increasingly important role in content discoverability, and in particular with regard to domestic cultural content as much as local news visible. The actual percentage of local content presented to viewers online by foreign platform is often ruled by algorithms, or by a mix of human curation and algorithms. Foreign platforms, similar to domestic online platforms, currently do not disclose information about how their platforms present content for competitive reasons. Nonetheless, the CRTC should have access to the underlying principles of these algorithms.

We believe it is crucial that the Commission examine the role and use of algorithms. The objective should be to establish requirements on online platforms and set the conditions for algorithm transparency, with a first step that the main underlying principles are disclosed. Foreign companies should update the Commission when algorithms are modified. In the meantime, the same platforms operating in Canada should be transparent with regard to their content curation process, disclosing how decisions lead to content and ensuring viewer choice.

When algorithms are not ruling the content displayed on screen, smart TV software programs and devices represent a second layer or obstacle to offering a diversity of choice to Canadian viewers, including Canadian content. As noted at question 4.3.3, enabling Broadcasting Act oversight over these television software programs and devices such as Apple TV, PlayStation and Roku would permit the Commission to set up mechanisms to offer Canadian content and services, if deemed necessary. The Broadcasting Act already recognizes such devices such as "broadcasting receiving apparatus”, but unlike powers in the Telecommunications Act, the Commission has no current broadcasting-based ability to regulate them separately from the undertaking(s) they form part of.

While it may be difficult to legislate discoverability through algorithms, the Commission should develop a process for implementing tangible commitments from online players in this area. For example, an OTT player that is prepared to make specific commitments to making Canadian programming available on their platform and providing priority in display of Canadian programming might request a specific exemption order and relief from more general requirements.

Finally, the discoverability and consumption of Canadian content online largely takes place on a small number of platforms and devices, which represent only a handful of big players. It is therefore reasonable to provide flexibility with tailored commitments to each platform.

5. Conclusion

The DGC urges the Commission to not wait for new legislation but act now to introduce **interim measures** that will impose adequate financial contributions on foreign online OTT services (SVOD, TVOD and AVOD) for the creation of Canadian Content.

We support the introduction of an **express power** to require ISPs and WSPs to contribute to Canadian Content, whether in the Telecommunications Act or the Broadcasting/Audiovisual Media Act.

The DGC believes that Communications legislation is best served by the Telecommunications and Broadcasting Acts continuing to be separated. The objectives of broadcasting and telecommunications legislation remain fundamentally different, and while a service or undertaking can only be subject to one Act, the company providing the service can fall under both Acts.

The scope of regulation for the new **Audiovisual Media Act** should not only cover content programming but also content distribution undertakings, precisely packaged content being distributed online.

The new legislative framework will have to face the test of time in a quickly changing environment. The new framework must be readily adaptable to technological changes and market shifts.

5.1 Summary of DGC's recommendations

Interim measures

- In its Interim Report to be issued in spring 2019, the Review Panel should emphasize to the government and CRTC of the CRTC's ability to introduce appropriate and equitable contributions on online players without legislative change.

Net neutrality and access

- Regulation should be applied to internet connected foreign devices and terminals used in Canada. To protect net neutrality and ensure that all audiovisual content is moving freely in Canada, section 24.1 of the Telecommunications Act should be used to provide oversight over new consumer access technologies.
- Foreign devices and technologies used in Canada for accessing content should be subject to the same requirements as their Canadian counterparts.

Refining the Concept of Broadcasting

- The CRTC should proceed to classify and regulate the wide array of internet-based services considered as broadcasting and establish categories between content programming and content distribution.
- The Digital Media Exemption Order (DMEO) is unsustainable and should be rescinded and a new exemption-based contribution regime introduced
- The underlying principle under broadcasting is that every television platform or service operating in Canada should be subject to Canadian content requirements such as CPE and PNI, regardless of its point of origin.
- According to the **destination principle**: audiovisual programming services and manufacturers of devices operating or being used in Canada should be required to contribute to the creation of Canadian Content, regardless of their point of origin.

Creation of an Audiovisual Media Services Act

- The Broadcasting Act should be renamed the **Audiovisual Media Services Act compatible for the Internet era.** Technological innovation does not change the fact that it is still audiovisual content distributed to a large number of viewers, but this name change will reflect the expansion of the scope of regulation to cover all existing and future formats of audiovisual content programming;

Broadcasting Act Objectives

- The **current objectives** of the Broadcasting Act laid out in Article 3 already strike a good balance between cultural, societal objectives, consumers and industrial interests;
- **Smart regulation**, not deregulation. By smart regulation, we mean an effective framework supporting public policy objectives while fostering sustainable development and an economic climate that is conducive to innovation and investment.
- Serving the **public interest** is the primary goal, while balancing disparate objectives, remains the best way for the Commission to safeguard the existing ecosystem, preserve the audiovisual sector, our creators and our capacity to tell Canadian stories on our screens;
- Canadian content should continue to be **created** and **owned** by Canadians. And in order to recognize the voice of creators in the Act, the Act should include a significant contribution from Canadian creators such as the screenwriter and director;
- We suggest to add a sub-clause to the Act to advance the protection and promotion of the **diversity of cultural expression** through both the Canadian and international programming it provides;
- The notion of **equitable contributions** should be defined in the Act: each element of the Canadian broadcasting system shall contribute in an appropriate and equitable manner to the creation and presentation of Canadian programming.

A new contribution framework

The CRTC should continue to employ its licensing system for larger traditional Canadian owned and controlled broadcast entities;

The CRTC should widen its scope to embrace online players through exemption orders and regulations, and ensuring equitable contribution:

- First, powers to impose spending obligations, financial contributions, and exhibition requirements should be expressly identified, and expressly available regardless of which of the three tools (licensing, regulation and exemption orders) is utilized;
- Second, the power of exemption should made unconditionally available for internet services, and be able to be used, like licensing, for individual undertakes not just classed of undertakings; and
- Third, exempt players should be subject to administrative regulatory fees. Currently only licensees pay “license fees”. Larger online payers should also be required to contribute.

In addition, the DGC recommends that the existing and new measures should be put in place for all broadcasting undertakings:

- Exhibition requirements regarding Canadian programs for all conventional, discretionary and online television services;
- Expenditure obligations regarding Programs of National Interest (“PNI”);
- Support for the exhibition, licensing and creation of independently produced television programs and feature films.

ISPs and WSPs financial contributions – The DGC supports a comprehensive and fair model that would be affordable to Canadians. ISPs and WSPs should be required to contribute a percentage of their revenue to be allocated to government funds. The contribution percentage from each sector should remain stable over time:

- BDUs: 5%
- ISPs: 1%
- WSPs: 1%

CRTC Powers - The DGC supports and recommends:

- The current balanced approach to be maintained for the CRTC. The government should be setting policy direction while maintaining the CRTC independence and regulatory powers;
- The introduction of an express power to impose a contribution requirement on ISPs and WSPs;
- The introduction of Administrative Monetary Penalties (AMPs) in the Broadcasting Act similarly to the ones in place in the Telecommunications Act. This would be a more practical remedy for infringement than current criminal provisions or license revocation;
- Giving the Commission broader powers of data collection and inquiry. The Commission’s current specific powers only apply to licensees. Going forward, the Act should identify

subpoena and other powers of inquiry specific to all undertakings that the Commission has reasonable grounds to believe may be broadcasting;

- The Commission be given express powers to impose spending obligations, financial contributions, and exhibition requirements, regardless of the means of regulation (licensing, regulation and exemption orders);
- The ability of the Commission to interpret any potential undue preference in the "transmission of programs" under the Telecommunications Act (s.28(1)), with reference to the objectives of the Broadcasting Act, should be maintained

Enabling accountability and transparency in the availability of Canadian content:

- Examine the regulation of terminals and devices assuming that the point of destination is what matters;
- Ensure choice and diversity for Canadian viewers;
- Require foreign companies operating in Canada to provide a discoverability strategy rather than sharing the algorithm itself;
- Tailor discoverability and content visibility commitment to each platform (domestic or foreign);
- Setting up a regulatory framework (such as establishing a common metadata system for tracking content) for its economy is necessary to ensure equitable and loyal conditions of access.

We thank you for the opportunity to contribute to this important process.

All of which is respectfully submitted.

Directors Guild of Canada

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