

January 11, 2019

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

Dear Panel Chair and Panel Members:

**Re: Review of the Canadian Communications Legislative Framework
Placing Indigenous Peoples at the Centre**

1. These are the joint comments of **Aboriginal Multi-Media Society of Alberta, Aboriginal Peoples Television Network Incorporated, Missinipi Broadcasting Corporation, Native Communications Inc., Native Communications Society, Northern Native Broadcasting (Terrace), Northern Native Broadcasting Yukon, OKâlaKatiget Society, and Taqramiut Nipingat Inc.** ("we" or "us"). We are responding to the Panel's call for comments on its review of Canada's communications legislative framework.

Executive Summary

2. The Panel should take explicit notice of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* and incorporate those Principles into its recommendations to the Government regarding Canada's communications legislative framework. It is concerning to us that the Principles were not identified to the Panel in the Terms of Reference provided to it for its important work.
3. One of the Principles recognized by the Government is the "distinctions-based approach" needed to ensure that the unique rights and circumstances of different Indigenous Peoples, whether First Nations, Inuit or Métis are recognized. We recognize that approach and do not purport to speak for all Indigenous Peoples in these comments. The Panel will, no doubt, carefully consider the comments of all Indigenous representatives, groups and individuals that participate in this process, who have unique expertise and experiences to offer.
4. The Panel should seek to ensure that Indigenous Peoples are placed at the centre of the communications legislative framework with respect to all matters touching upon the provision of fundamental communications services to Indigenous communities, and the expression of Indigenous cultures.
5. We recommend the following measures:
 - (1) The telecommunications policy for Canada set out in the *Telecommunications Act* should refer specifically to the objective of ensuring the provision, operation and

use of high quality telecommunications services by Indigenous Peoples and including for the purposes of self-determination and economic development;

- (2) The *Telecommunications Act* should include provisions to establish a specific authority, which must include direct Indigenous representation, to investigate, oversee and report on specific initiatives to fulfill the objective set out above – including with designated funding;
 - (3) The *Broadcasting Act* should be amended to provide specifically that Indigenous Peoples have the right to establish their own media and to access non-Indigenous media without discrimination;
 - (4) The objective in the *Broadcasting Act* should provide that programming created by and for Indigenous Peoples shall be provided in the broadcasting system and be readily accessible; the objective should be prescriptive and ensure adequate funding for Indigenous participation in the broadcasting system;
 - (5) The *Broadcasting Act* should make specific reference to Indigenous languages as constituent languages in Canada and within the broadcasting system and requiring specific support for their preservation and advancement;
 - (6) Provisions that currently support Indigenous broadcasting services, such as the power of the Commission to direct the distribution of Indigenous programming by distribution undertakings, should be brought forward into any new legislation and applied to new distribution platforms;
 - (7) The *Broadcasting Act* or the *Radiocommunication Act* should refer specifically to the reservation of radio frequencies in markets where frequencies are scarce for the purpose of providing Indigenous programming;
 - (8) Indigenous programming and funding for that programming should be controlled, primarily, by Indigenous Peoples. For CBC/SRC, this should mean coordinating with Indigenous broadcasters in the production and broadcast of Indigenous content – including, through "no cost" licensing of Indigenous content and other arrangements.
 - (9) We do not support the inclusion of Reconciliation as a specific objective for the Canadian Broadcasting Corporation/Société Radio Canada (CBC/SRC) in the Act. Instead, Reconciliation should be reflected in concrete terms: the objectives for CBC/SRC should include reflecting Indigenous cultural diversity primarily through programming created by and for Indigenous Peoples and in conjunction with Indigenous controlled-media. The CBC/SRC board of directors should include at least two representatives for Indigenous Peoples. CBC/SRC should have a subcommittee of its board for Indigenous programming, a majority of the members of which must be representatives of Indigenous Peoples.
6. We look forward to reviewing the comments that will be made by Indigenous representatives, groups and individuals in this process and we are hopeful that our

recommendations, together with such other recommendations as may be made to the Panel, will be translated into concrete proposals for the Government's action.

Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

7. From the perspective of Indigenous Peoples, this review is not happening in isolation from the complex and sometimes fraught relationship of Indigenous Peoples with the Government of Canada and the Crown.
8. The Government of Canada has on numerous occasions stated its intention to adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples*. The Declaration is a fundamental element of international law as it relates to the rights of Indigenous Peoples around the world.
9. The Government of Canada has made an unequivocal commitment to adopt the Declaration, in a manner that is consistent with Canada's Constitution and the "full box of rights for Indigenous Peoples in Canada"¹ set out in section 35 the Constitution. As a part of this commitment, the Government, through the Department of Justice, issued an overriding statement of Principles that it states is a "necessary starting point for the Crown to engage in partnership, and significant move away from the status quo to a fundamental change in the relationship with Indigenous Peoples." The Principles include the following definitive statement of intent on the part of the Government, as the representative of the Crown:

The implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) requires transformative change in the Government's relationship with Indigenous peoples. The UN Declaration is a statement of the collective and individual rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world, and the Government must take an active role in enabling these rights to be exercised. The Government will fulfil its commitment to implementing the UN Declaration through the review of laws and policies, as well as other collaborative initiatives and actions. This approach aligns with the UN Declaration itself, which contemplates that it may be implemented by States through various measures.²

10. The Principles state that implementing the UN Declaration will require transformative change. It further states that this change will be made through (in part) a review of laws and policies that will be guided by the Principles. The Principles themselves, the Government states, "are rooted in section 35 [of the Constitution], guided by the UN Declaration, and informed by the Report of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC)'s Calls to Action."³

¹ Hon. Carolyn Bennett to the United Nations General Assembly on May 10, 2016.

² *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

³ *Ibid.*

11. Section 35 of the Constitution, the UN Declaration, the Royal Commission on Aboriginal Peoples and the Calls to Action of the Truth and Reconciliation Commission all touch upon matters of self-government, culture and reconciliation that are directly relevant to the legislative framework for broadcasting and telecommunications.
12. We were distressed, therefore, when the Terms of Reference for the Panel did not make specific reference to the Principles, to the need for transformative change in the Government's relationship with Indigenous Peoples, or to any of the fundamental principles, recommendations and calls to action set out in the Constitution, the UN Declaration, the Royal Commission on Aboriginal Peoples or the Truth and Reconciliation Commission. This oversight is concerning.
13. However, we urge the Panel to take into account the Principles set out by the Government of Canada through the Department of Justice as a representative of the Crown. This review of Canada's communications legislative framework is precisely the opportunity envisioned in the Principles for Canada to begin to transform its relationship with Indigenous Peoples in its ongoing review of its laws and policies. We have attached a copy of the Principles to this submission for reference.
14. Without meaning to exclude any of the important Principles recognized by the Government, we believe that the following are the most relevant to this review.

Principle 1:

All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government

Principle 3:

The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

Principle 4:

Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

Principle 8:

Reconciliation and self-government require renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.

It is also likely that Treaty relationships will be implicated in this review. In addition, the Principles make specific reference to the Royal Commission on Aboriginal Peoples and to the Calls for Action of the Truth and Reconciliation Commission. There are important

findings and recommendations made by these bodies that should be adopted and reflected in the Panel's important work.

15. It is critical, we believe, for the Panel to take explicit notice of the Principles and the important rights and findings on which the Principles are based. We have attempted to reflect the Principles in our comments, although we do not believe that our comments should be viewed as exhaustive in any way of the transformative change that is required in Canadian law and policy in the process of reconciliation. The Principles themselves speak of the need to take a "distinctions-based approach" in adopting laws and policies and we recognize that this approach is entirely appropriate in this case.
16. We believe that there are certain fundamental aims that the Panel should take into account in reviewing communications legislation from the perspective of the Principles.
17. First, there is a continuing and profound need for economic development and support for many Indigenous communities. The statistics and need are well documented and often repeated. Indeed, there are currently numerous, admirable, government-supported programs and initiatives that are targeted towards the economic development of Indigenous Peoples and communities, including specifically in the communications sector. However, the need and underlying justice of these initiatives is not explicitly recognized in our communications legislation.
18. The Royal Commission on Aboriginal Peoples stated succinctly the importance of economic development for Indigenous Peoples:

Self-government without a significant economic base would be an exercise in illusion and futility. How to achieve a more self-reliant economic base is thus one of the most important questions to be resolved. What measures need to be taken to rebuild Aboriginal economies that have been severely disrupted over time, marginalized, and largely stripped of their land and natural resource base? The question is urgent, and not only because progress toward self-government would be severely constrained in the absence of effective measures to rebuild Aboriginal economies. For Aboriginal individuals and families, whether they live in urban or rural areas, employment levels and income continue to lag far behind Canadian standards.

Furthermore, the rapid increase of the Aboriginal population means that thousands of additional young people will be entering the labour market over the next two decades. Indeed, our estimate is that more than 300,000 jobs will need to be created for Aboriginal people in the period 1991 to 2016 to accommodate growth in the Aboriginal working-age population and to bring employment levels among Aboriginal people up to the Canadian standard.⁴

19. Ironically, these words were written just over two decades ago and the young people entering the labour market then are that much older. Many initiatives have been

⁴ *Report of the Royal Commission on Aboriginal Peoples, Volume 2, page 750.*

undertaken, and some have achieved great success, but it is doubtful whether the overall need for economic development in many Indigenous communities has changed materially. This is a multi-generational task that we should not shy away from, even if it is challenging. Communications law and policy has a direct role to play in economic development.

20. The second fundamental aim, in addition to economic development, is that Indigenous Peoples should be in clear control of our own cultural expression and media. This principle is stated explicitly in the UN Declaration as follows:

Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

The UN Declaration also sees a role for State media (such as CBC/SRC and the various provincial educational services in Canada) and private media, but this role is one of reflection, not control:

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.⁵

Our communications legislation is currently weak in recognizing the right of Indigenous Peoples to access and control their own media, and to be reflected in State and private media.

21. The third fundamental aim, we believe, is that Canada's communications legislation should explicitly recognize the importance preserving and supporting Indigenous languages. The UN Declaration sets out the following clear principle in respect to languages:

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

22. The benefits of advanced communications are profound. But the negative effects can be equally profound. The memorable words of Rosemarie Kuptana, the President of the Inuit Broadcasting Corporation, before the CRTC in 1982, on the impact of television in the North come to mind:

⁵ UN Declaration, Article 16.

We might liken the onslaught of southern television and the absence of native television to the neutron bomb. This is a bomb that kills people, but leaves the buildings standing. Neutron bomb television is the kind of television that destroys the soul of a people, but leaves the shell of a people walking around. This is television in which the traditions, the skills, the culture, the language, count for nothing.⁶

It was the recognition of both the potential positive influence and the actual negative effects of modern media that propelled the creation and support of Native Communications Societies, Native radio stations, Television Northern Canada and Aboriginal Peoples Television Network, among other things. These initiatives were all critically important in their time and reflect the effort and good will of Indigenous and non-Indigenous Peoples alike. However, our communications legislation does not properly recognize the fundamental importance of Indigenous languages and culture and the role of our communications environment in its preservation and support. It should.

23. The Principles set out by the Government of Canada, and the specific aims that we have described above, inform our comments on suggested changes to Canadian communications legislative framework.

Telecommunications Act

24. As organizations, we are primarily engaged in the cultural industries. We are, as well, users of telecommunications services and have direct experience with the availability of services in Indigenous communities. There are numerous Indigenous organizations that are engaged more deeply in telecommunications policy and the delivery of telecommunications services. We look forward to these organizations taking the leadership role in considering how to reflect the important need for advanced telecommunications services, including broadband services, in all Indigenous communities.
25. From our perspective, however, it is clear that the ability of Indigenous Peoples and communities to engage in economic development will hinge on their ability to participate fully in advances in communications technologies. The requirements and opportunities in these communities are necessarily far different than the needs in rural areas generally. The provision of telecommunications infrastructure and services has direct implications for self-government in these communities. Also, many Indigenous communities are in the most remote areas and are currently reliant on satellite technology for their telecommunications needs, which places those communities in a unique position compared to many rural communities.
26. The CRTC and other Government agencies have listened and responded to the concerns of Indigenous representatives in framing telecommunications policies. For example, the Commission's recent policies regarding the establishment, funding and management of a

⁶ Quoted in M. Marybell *From Talking Chiefs to a Native Corporate Elite: The Birth of Class and Nationalism among Canadian Inuit* (McGill-Queen's University Press, 1996) page 415.

Broadband Fund⁷, clearly reflect and benefited from the input of Indigenous organizations and governments. At the same time, what is *missing* from those policies is a direct focus on the particular and specific needs of Indigenous communities in Canada, an evaluation of how those communities are served in relation to non-Indigenous communities and a policy directed specifically to address those communities' requirements.

27. For example, in its policy setting out the management structure and criteria to be employed by the Broadband Fund the Commission considered specifically the type of applicants that would be eligible for funding. It recognized that many proponents suggested that non-profit or community organizations should be prioritized, or that funding should be directed through public-private partnerships or other mechanisms.⁸ However, in framing its policies the Commission decided that "the Broadband Fund should be competitively neutral and not prioritize any particular applicants."⁹
28. Nor are the particular needs and circumstances of Indigenous communities given explicit recognition. At the same time, the Commission has indicated that it *may* give "special consideration to proposed projects that would serve Indigenous communities". It made this comment while also indicating that it may also give special consideration to proposals that would assist English and French linguistic minority communities. It is not clear to us that the circumstances that may face English and French linguistic minority communities are at all comparable to the circumstances facing Indigenous communities. The linkage in the Commission's policy is troubling. Further, the Commission did not accept the specific recommendations that Indigenous communities be consulted as part of the funding process, or that Indigenous communities should be a priority under the Broadband Fund.¹⁰ In calling for comments on the structure and management of the Broadband Fund, the Commission acknowledged that it "did not raise the question of whether it should take any social considerations into account when selecting projects for funding."¹¹
29. We find it concerning that the Commission's key policy to support the provision of modern and necessary telecommunications services across the country does not take into account the particular circumstances of Indigenous communities. While we believe that the Commission will exercise its oversight of the funding program in good faith and in recognition of these circumstances, the fact is that the policy itself is not framed in these terms and lacks concrete details regarding the allocation of funding to support Indigenous initiatives, or how the Commission will give these initiatives special consideration. The fact that the *possibility* of directing funding to Indigenous communities as a priority was not raised explicitly in the Commission's policy consultation document is also concerning.

⁷ *Telecom Regulatory Policy CRTC 2016-496 and Telecom Regulatory Policy CRTC 2018-377.*

⁸ See *Telecom Regulatory Policy CRTC 2018-377*, paragraphs 111 to 114.

⁹ *Ibid.* at paragraph 115 (emphasis added).

¹⁰ *Ibid.* at paragraphs 275 to 279.

¹¹ *Ibid.* at paragraph 274.

30. We do not question, at all, the Commission's willingness to work with Indigenous communities in telecommunications matters. We are concerned, however, that the *Telecommunications Act* does not itself provide the Commission with the proper focus on Indigenous telecommunications requirements as a legislative and policy priority. For this reason, the telecommunications policy for Canada set out in the *Telecommunications Act* should refer specifically to the objective of ensuring the provision, operation and use of high quality telecommunications services by Indigenous Peoples and including for the purposes of self-determination and economic development.

Recommendation: Amend Telecommunications Policy Objectives

31. The following provision would be added to section 7 of the Act after existing paragraph (b) (which refers to urban and rural areas):

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

(c) to ensure the provision, operation and use of high quality telecommunications services by Indigenous Peoples and including for the purposes of self-determination and economic development;

32. We are also mindful that telecommunications funding is not the sole prerogative of the CRTC. Different levels of government are engaged in funding activities, many of which assist Indigenous communities. When the Commission established the Broadband Fund, it noted the following regarding these different funding activities:

The Commission expects that governments will continue to fund, and will create new funding programs to support, broadband infrastructure projects in underserved areas. In addition, the private sector will continue to invest in expanding and upgrading its broadband networks, including in underserved areas, to meet the needs of Canadians. As such, the Commission's broadband funding mechanism will be aligned with existing and future broadband investments and funding initiatives; it will complement and not replace them.¹²

33. There is, however, no specific mechanism in the *Telecommunications Act*, or in other legislative that we are aware of, that provides for a mechanism to track and advise on different funding approaches. There is no co-ordination mechanism. While no one entity may assume direct control over all funding activities, creating an administrator with the responsibility to track and advise on different funding activities could co-ordinate funding tools, and advise on whether these tools as a whole are helping to meeting telecommunications policy objectives. If the Commission, as it currently stands, reports only on its own funding activities, then the opportunity to take a broader view with a broader impact would be lost.

¹² *Telecom Regulatory Policy CRTC 2016-496*, paragraph 135.

34. Clearly, we believe that the objective of providing high quality telecommunications services to Indigenous communities should be at the centre of the mandate of such an administrative function. The administrator should include representation from Indigenous communities.

Recommendation: Provide for an Administrator to Oversee and Report on Funding

The *Telecommunications Act* should include provisions to establish a specific authority, which must include direct Indigenous representation, to investigate, oversee and report on specific initiatives to fulfill telecommunications policy objectives, including the objective to provide Indigenous communities with high quality telecommunications.

Broadcasting Act

Broadcasting Policy Objectives

35. Indigenous Peoples appear twice in the broadcasting policy objectives set out in section 3(1) of the *Broadcasting Act*.
36. First, section 3(1)(d) says that the broadcasting system should reflect the needs, interests, aspirations and circumstances of Canadian men women and children, "including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society." Second, section 3(1)(o) states that "programming that reflects the Aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose." In our view, these references, while progressive at the time the *Broadcasting Act* was updated in 1991, are now problematic.
37. The reference to the "special place" of Indigenous Peoples in section 3(1)(d) is wholly inadequate. It does not capture the particular rights and interests of Indigenous Peoples in their own media, and the need for reflection in other media. The Government through its adoption of the UN Declaration has now explicitly recognized these rights and interests. The Principles confirm that the Government intends that all laws and policies that touch upon Indigenous Peoples should be based on these rights.

Recommendation: Recognize Indigenous Media Rights in the Broadcasting Act

38. Accordingly, Canada's broadcasting policy objectives should include explicit recognition of the rights of Indigenous Peoples in Canada that are now recognized in Article 16 of the UN Declaration which provides as follows:

Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

In our view, this statement could be included as a broadcasting policy objective, or more appropriately, set out in section 2 of the Act as an overriding principle of its interpretation and enforcement (in the same way in which the freedom of expression is recognized).

39. Indigenous Peoples are also reflected in existing section 3(1)(o) of the *Broadcasting Act* which states that:

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

This provision has already been soundly criticized as discriminatory with respect to Indigenous Peoples. In 2003, the Standing Committee on Canadian Heritage released a detailed and extensive report on the state of Canadian broadcasting and made recommendations for the path forward.¹³ The Committee made the following, unequivocal, observation:

The Committee strongly believes that the present wording of section 3.(1)(o) of the Broadcasting Act, stating "programming that reflects the Aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;" is discriminatory. The use of the qualifying phrase "as resources become available for the purpose" leaves the impression that broadcasting that reflects the Aboriginal cultures of Canada is of diminished importance. This detracts from the declared policy statement in section 3.(1)(d)(iii) of the Broadcasting Act that "the Canadian broadcasting system should reflect the special place of Aboriginal peoples within Canadian society."¹⁴

Fifteen years after this Report was issued, no remedial steps have been taken to address this discriminatory provision. It is time to do so.

40. The *Broadcasting Act* should also specify that Indigenous Peoples will be in control of the production and distribution of their own content. Resources that support Indigenous content should be directed to Indigenous Peoples. This is what happened with creation and operation of Aboriginal Peoples Television Network and the effect on the participation of Indigenous Peoples in the broadcasting system has been profound.

Recommendation: The Broadcasting policy objective for Indigenous programming should be unconditional

The *Broadcasting Act* should state without condition that the broadcasting system will provide programming that is created by and for Indigenous Peoples, and that Indigenous Peoples will have access to this programming. The policy objective should also reflect

¹³ *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*.

<http://www.ourcommons.ca/DocumentViewer/en/37-2/HERI/report-2>

¹⁴ *Ibid.* page 380.

the role that Indigenous Peoples themselves should play in creating that programming. The following policy objective would meet these requirements:

programming created by and for Indigenous Peoples shall be provided in the broadcasting system and be readily accessible

41. The objective should be stated in prescriptive terms. It is essential that adequate funding be provided to support Indigenous participation in the broadcasting system and Indigenous voices. Currently, for example, funding provided to Indigenous broadcasting – and especially to Indigenous radio broadcasting – is inadequate. Long-established Indigenous communications societies with radio services, which have been in continuous operation for decades, are facing declining funding even as the need for Indigenous language programming is increasing. Radio broadcasting remains extremely popular in many Indigenous communities as the primary means of providing local information and local cultural programming. However, funding mechanisms have not been consistently maintained for these services. Funding needs to be restored and even expanded to meet the needs of these communities.
42. Another area of key concern for Indigenous Peoples is the lack of recognition in the *Broadcasting Act* for Indigenous languages. In fact, in many ways the current language of the Act actively marginalizes and undermines Indigenous languages.
43. For example, section 3(1)(b) of the Act states that the broadcasting system operates "primarily in English and French languages". Section 3(1)(c) of the Act recognizes that French and English broadcasting "operate under different conditions and may have different requirements". 3(1)(k) states that a range of broadcasting services should be made available "in English and in French". 3(1)(q) states that alternative television programming services should be offered "in English and in French". The broadcasting regulatory policy set out in section 5(2) similarly refers to the need to take into account "the different characteristics of English and French language broadcasting".
44. There is no reference at all in the *Broadcasting Act* to Indigenous (or Aboriginal) languages. While English and French broadcasting may indeed be the "primary" languages of broadcasting in the system today, from the perspective of Indigenous Peoples whose languages have been lost or are suffering today from assimilation and, indeed, cultural genocide,¹⁵ the recognition of the fact of primacy of English and French

¹⁵*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission for Canada.* "Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. In its dealing with Aboriginal people, Canada did all these things."

is laden with negative implications. It is in part because of the primacy of these languages in media that Indigenous languages have been lost and continue to suffer today.

Recommendation: Fully recognize Indigenous languages as languages in Canada

45. It is appropriate that the *Broadcasting Act* continue to recognize the presence and differences in English and French language broadcasting. At the same time, the *Broadcasting Act* should explicitly recognize Indigenous languages as constituent languages in Canada and within the broadcasting system.

The Broadcasting Act should explicitly recognize Indigenous languages as constituent languages in Canada and within the broadcasting system and requiring specific support for their preservation and advancement.

All references to the roles of English and French and to their specific circumstances and regulatory treatment should be framed to including Indigenous languages as well.

Broadcasting Definitions and Commission's Authority

46. We have reviewed the recommendations of the CRTC in its *Harnessing Change* report and agree with the conclusion that new forms of "over-the-top" digital distribution should be included within the broadcasting system. As the Commission stated:

A vibrant domestic market is not possible unless it engages all players in the system and ensures that each participates in the most appropriate and equitable ways. The current regulatory approach to audio and video content establishes benefits for traditional players, as well as related obligations. Neither these benefits nor these obligations are applied to the many online international services also operating in Canada and playing increasingly important roles in the broadcasting system. These services draw significant revenues from Canada and Canadians and, in some cases, also make important contributions, but neither their roles and responsibilities nor their contributions are currently recognized—and are certainly not guaranteed. These services are not identical and so should not make identical contributions. Instead, their contributions should be appropriate to their circumstances, while providing the greatest benefit to Canadians. These contributions, however, should be equitable to ensure that all players can compete fairly and effectively, which also benefits Canadians.¹⁶

47. One of the key tools that the Commission has used to support Indigenous broadcasting in Canada is section 9(1)(h) of the *Broadcasting Act*. This section empowers the Commission to require distribution undertakings to distribute programming services on terms and conditions deemed appropriate by the Commission.
48. Section 9(1)(h) has enabled APTN to become a world-leading Indigenous broadcaster. The type of programming created and broadcast by APTN did not exist before APTN

¹⁶ CRTC, *Harnessing Change: The Future of Programming Distribution in Canada, Conclusions and Potential Options*. (emphasis added)

launched – with the full support and visionary action of the CRTC, Indigenous leadership, Indigenous producers, and many others. This programming depends, without a doubt, on obtaining fair access to distribution to Canadians together with monetary compensation through a regulated wholesale fee.

49. We do not know how, exactly, distribution infrastructure will evolve. It is likely, as others have argued, that programming and distribution functions will continue to blur at that programming platforms will increasingly dominate our system. It is critical, we believe, that the regulator retain the ability to require that platforms operating in Canada provide priority access to certain types of programming or programming services, and also be empowered to determine the terms and conditions of such access.

Recommendation: The power to require distributors or "platforms" to offer programming or programming services on terms and conditions must be maintained

50. Section 9(1)(h) of the *Broadcasting Act* must be updated together with other provisions of the *Broadcasting Act* so that it applies to new forms of broadcasting and broadcasting distribution. While the exact language to be used will depend on the structure and precise language used in other parts of the Act and its definitions, the following provision captures the essence of our recommendation:

The Commission may, in furtherance of its objects

(h) require any person that operates a programming service or platform to distribute or provide access to programming or programming services on such terms and conditions as the Commission deems appropriate.

The intent is to create a technologically neutral approach to the requirement to offer programming through the facilities of programming services or distribution platforms, regardless of the terminology used. This approach has been critical to the reflection of Indigenous Peoples in the broadcasting system in the past, and will continue to be fundamentally important going forward.

51. Section 9(1)(h) of the *Broadcasting Act* relates to the distribution of programming on platforms that are operated by other entities. There is no similar provision in the *Broadcasting Act*, or the *Radiocommunication Act*, that empowers the CRTC to reserve or allocate radiocommunication frequencies for specific purposes. Rather, section 26(1) of the *Broadcasting Act* provides the Governor-in-Council with the authority to issue directions to the Commission "respecting the reservation of channels or frequencies for the use of the Corporation or for any special purpose designated in the order". This provision makes specific reference to CBC/SRC, but does not recognize any other specific use (using generic language).
52. There is, no comparable provision in the *Radiocommunication Act*. In addition, while the *Radiocommunication Act* provides that the Ministerial authorities in section 5(1) of that Act (including in relation to the issuance of licences and allocation of spectrum to certain uses) may be exercised with reference to telecommunications policies set out in the *Telecommunications Act*, there is no similar reference either to the *Broadcasting Act* or

broadcasting policies, or to any reservation of frequencies ordered by the Governor-in-Council under the *Broadcasting Act*.

53. We believe that so-called "traditional" broadcasting – using radio frequencies on a broadcast basis – will continue to be relevant and important for Canadians and Indigenous Peoples into the future. Advances and the digitization of broadcasting technology are making over-the-air broadcasting more diverse and adaptable. Communications technologies are combining broadcasting functions and two-way communications.
54. In this environment, it is important that the regulator have the ability to ensure that radio frequencies are properly allocated to enable Indigenous Peoples to operate media using these frequencies. This is an especially compelling issue currently in markets where over-the-air radio frequencies are becoming increasingly scarce, and are even being repurposed for other telecommunications purposes.
55. We support the explicit allocation of radio frequencies for the use of Indigenous Peoples for the creation and broadcast of Indigenous programming. In our view, frequencies should be reserved in all major urban markets in Canada to ensure that radio frequencies are available to support the launch of services where none now exist. Ensuring that this authority is present in the *Broadcasting Act* and *Radiocommunication Act* would serve a function for over-the-air broadcasting that is comparable to the authority granted to the Commission currently under section 9(1)(h) of the Act. The authority to issue radiocommunication licences or authorizations under the *Radiocommunication Act* should be subject to any reservation of frequencies made under the *Broadcasting Act*.

Recommendation: The Broadcasting Act and Radiocommunication Act should contemplate the reservation and use of radio frequencies by and for Indigenous media

56. We support the addition of provisions in the *Broadcasting Act* that would enable and require the Commission to reserve radio frequencies for use by Indigenous media. An amendment would be required to the *Radiocommunication Act* to reflect this authority.

The Commission shall reserve frequencies for the use of Indigenous media to ensure that programming created by and for Indigenous Peoples is provided in the broadcasting system and is readily accessible

While this provision does not require the Commission to allocate a specific frequency in any particular market, the requirement to ensure that Indigenous programming is readily accessible using radio frequencies will require an examination of the availability of frequencies and their reservation in markets where such frequencies are becoming scarce.

Role of the CBC/SRC with respect to Reconciliation and Indigenous Programming

57. The terms of reference for the Panel raise the following question:

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

58. To answer this question, it is important to refer to the principles set out in the UN Declaration. The UN Declaration envisions a specific role for "state" media. While CBC/SRC operates independently from government, it is nonetheless "owned" by government, is responsible to Parliament, and is an agent of the Crown.¹⁷ It is, in our view, state media within the meaning of the UN Declaration.

59. The UN Declaration provides as follows with respect to state media:

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.¹⁸

This principle is to be read in conjunction with (and it appears *after*) the right of Indigenous Peoples to establish their own media in their own languages.

60. It is our view that CBC/SRC, as state-owned media, has a role to play in the reflection of Indigenous cultural diversity in the programming it offers. This should include Indigenous language programming.

61. However, one of the key elements of Indigenous content can, and should be, the control of that content by Indigenous Peoples themselves. This is why, we believe, the Terms of Reference ask the Panel to consider how CBC/SRC can encourage "the telling of Indigenous stories by Indigenous Peoples". In our view, in order for Indigenous Peoples to tell their own stories, they must be in full control of the telling: from conception to broadcast. In addition, Indigenous controlled-media have been and should continue to be the primary vehicle for the creation and presentation of Indigenous content.

62. The CBC/SRC's role in Indigenous broadcasting should be a role of reflection, not control. It should facilitate and support the role of Indigenous media in creating content, which could then also be broadcast by CBC/SRC under agreed terms. More specifically:

- (1) resources that support Indigenous content should be directed to Indigenous Peoples; and
- (2) where CBC/SRC produces, commissions or obtains Indigenous programming it should licence that programming for the use of Indigenous broadcasters on a "no cost" basis.

¹⁷ See sections 40, 46(3) and 47(1) of the *Broadcasting Act*.

¹⁸ UN Declaration, Article 16.

63. APTN provides a clear indication of the benefit of providing meaningful resources to Indigenous Peoples so that they are in control of all aspects of their own media and programming. It makes no sense for Canada's public broadcaster to operate in a competitive position to Indigenous broadcasters. Yet, this can easily happen through the CBC/SRC using its comparatively vast resources to produce and acquire Indigenous content, which it then broadcasts on an exclusive basis – to the exclusion of and in competition with Indigenous broadcasters. This practice is counterproductive to Indigenous control of our own media and voices and to the longer-term viability of Indigenous services.
64. CBC/SRC's role with respect to Indigenous programming and Indigenous participation should be based on the principle that Indigenous Peoples will have primary responsibility for their own content and stories and be the primary beneficiary of them. The objectives, corporate structure and powers of CBC/SRC should reflect this approach.

Recommendation: CBC/SRC should play a role to reflect Indigenous cultural diversity under meaningful control of Indigenous Peoples

65. We do not support the inclusion of Reconciliation as a specific objective for CBC/SRC. Reconciliation should, instead, be reflected in more concrete, structural terms. CBC/SRC should have as one of its objects the reflection of Indigenous cultural diversity, including in programming created by and for Indigenous Peoples. Section 3(1)(m) of the Act, which currently includes no reference to Indigenous Peoples in CBC/SRC's mandate, should include the following provision:

[T]he programming provided by the Corporation should

- (ix) in conjunction with Indigenous controlled-media, reflect Indigenous cultural diversity primarily through programming created by and for Indigenous Peoples***

It is critical, for the reasons discussed above, that CBC/SRC work in conjunction with Indigenous controlled-media.

66. CBC/SRC's board of directors should include at least three Indigenous representatives (to reflect First Nations, Inuit and Métis voices). This could involve increasing the board size from the current twelve directors to fifteen:

36(2) There shall be a Board of Directors of the Corporation consisting of fifteen directors, at least three of whom shall be Indigenous Peoples.

67. In addition, to ensure that the objective of Indigenous reflection through Indigenous-controlled content is brought into practice, CBC/SRC's board structure should include an Indigenous programming subcommittee similar to the subcommittees that currently exist for English and French broadcasting, as contemplated in section 45 of the *Broadcasting Act*:

45.(1.1) The board shall establish a standing committee of directors of programming for Indigenous cultural diversity, consisting of the Chairperson, the President and at least three directors of the Corporation that are Indigenous Peoples.

The size and composition of the sub-committee should ensure that Indigenous Peoples represent a majority of that committee.

Conclusion

68. It is time to update our communications legislation to reflect not just the "special place" of Indigenous Peoples in Canadian society, but to make it clear that it means that Indigenous Peoples have a right establish our own media and to participate fully in the communications ecosystem.
69. It should also reflect that Indigenous Canadians have been here since time immemorial and, as such, should be placed on an equal footing with the English and French communities so well entrenched in the existing legislation. The Government's commitment to enact an *Aboriginal Languages Act* clearly shows that the recognition of the importance of our presence and relationship with the country must be endorsed within all legislative acts of this country.
70. As a final point, we would like to acknowledge that the CRTC, the Department of Canadian Heritage, Canada Media Fund, and many others too numerous to mention, have all championed Indigenous Peoples' participation in the broadcasting system. These institutions and a great many individuals have supported the creation and launch of the Northern Native Broadcast Program, Television Northern Canada, APTN, First Peoples Radio, the Indigenous Screen Office, and many other individual projects and content creators. These are all notable and worthy achievements.
71. It is time, though, to make it clear that Indigenous Peoples are and must be at the centre of our own cultural content and have all necessary tools to take full advantage of technology and telecommunications services for economic development and self-determination.

72. We appreciate this opportunity to present our recommendations to this important Panel.
We have provided an executive summary of our comments above.

Yours truly,



for

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